BOOK REVIEW

INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: CASES AND MATERIALS. By Gary B. Born with David Westin. Kluwer Law and Taxation Publishers (2d ed. 1992). 928 pp.

Reviewed by CURTIS A. BRADLEY
and JACK L. GOLDSMITH III*

The issues that arise in civil lawsuits involving foreign parties or transactions often differ from those that arise in purely domestic litigation. Practitioners and academics are beginning to assemble and study these issues in a systematic fashion. The result is the burgeoning field of international civil litigation.[1]

---

* Associates, Covington & Burling, Washington, D.C. We used the text under review in a course we taught at the University of Virginia School of Law in the autumn of 1993. We would like to thank Kathryn W. Bradley, Simon Frankel, R. Hewitt Pate, Paul Stephan, and Peter D. Trooboff for helpful comments.

1. In addition to the volume under review, other general works on international civil litigation in United States courts include Restatement (Third) of the Foreign Relations Law of the United States (Am. Law Inst. 1987 & Supp. 1993) [hereinafter Restatement]; David Epstein & Jeffrey Snyder, International Litigation: A Guide to Jurisdiction, Practice, and Strategy (1993); Ved P. Nanda & David K. Pansius, Litigation of International Disputes in U.S. Courts (1986 & Supp. 1993); Lawrence Newman & Michael Burrows, The Practice of International Litigation (1993); Joseph M. Lookofsky, Transnational Litigation and Commercial Arbitration: A Comparative Analysis of American, European, and International Law (1992); Andreas Lowenfeld, International Litigation and Arbitration (1992) [hereinafter Lowenfeld, International Litigation]; Claire M. Germain, Germain's Transnational Law Research: A Guide for Attorneys (1991 & Supp. 1992).

In addition, scores of books have been published addressing specific topics in international litigation. See, e.g., Joseph Dellapenna, Suing Foreign Governments and Their Corporations (1988); Bruno A. Ristau, International Judicial Assistance: Civil and Commercial (rev. ed. 1990). There is also an "already massive and [rapidly] expanding"

International civil litigation subsumes a broad array of cases. It includes actions primarily involving U.S. plaintiffs and foreign defendants (private or governmental);[2] foreign plaintiffs (private or governmental) and U.S. defendants;[3] foreign plaintiffs and foreign defendants;[4] and even U.S. plaintiffs and U.S. defendants.[5] It encompasses a spectrum of controversies, ranging from human rights abuses to commercial disputes, that can involve state law (typically tort or contract), federal law (typically securities or antitrust), or international law, and that can take place in state court or federal court.[6]

---

journal literature on the subject. Jonathan Pratter & Joseph Profaizer, A Practitioner's Research Guide and Bibliography to International Civil Litigation, 28 Tex. Int'l L.J. 633, 639 (1993). Pratter and Profaizer's bibliographical guide provides references to the major primary sources (treaties, statutes, and cases) and secondary sources (books, subject headings for articles, and suggested computer search queries) for all of the significant topics in international civil litigation.

2. See, e.g., Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993) (U.S. states and numerous domestic companies sue British reinsurers for violation of Sherman Act); Saudi Arabia v. Nelson, 113 S. Ct. 1471 (1993) (U.S. citizen sues Saudi Arabia, its instrumentalities, and its U.S. purchasing agent for personal injuries allegedly resulting from unlawful detention, torture, and negligent failure to warn); Société Nationale Industrielle Aérospatiale v. United States Dist. Court, 482 U.S. 522 (1987) (U.S. citizens sue instrumentalities of France for negligence and breach of warranty); Helicopteros Nacionales de Colombia v. Hall, 466 U.S. 408 (1984) (U.S. citizens sue South American companies and U.S. supplier for wrongful death); The Bremen v. Zapata Off-Shore Co., 407 U.S. 1 (1972) (U.S. corporation sues German corporation for negligent towage and breach of contract).

3. See, e.g., Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (executrix of Scottish citizens sues U.S. manufacturers for wrongful death); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (instrumentality of Cuban government sues U.S. citizens for conversion of property); Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958) (Swiss company sues U.S. government under Trading with the Enemy Act); Hilton v. Guyot, 159 U.S. 113 (1895) (French citizen sues U.S. citizen to enforce French judgment).

4. See, e.g., Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992) (Panamanian corporations and Swiss bank sue Argentina and its instrumentality for breach of contract); Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) (Liberian corporations sue Argentina for tort allegedly committed on high seas in violation of law of nations); Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983) (Dutch corporation sues Central Bank of Nigeria for anticipatory breach of irrevocable letter of credit).

5. See, e.g., Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244 (1991) (U.S. citizen sues U.S. corporations for employment discrimination in connection with overseas assignment); W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l, 493 U.S. 400 (1990) (U.S. citizen sues U.S. citizens and a Nigerian citizen for violations of RICO, the Robinson-Patman Act, and state anti-racketeering law); Am. Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (U.S. corporation sues U.S. corporation for violation of Sherman Act).

6. Many cases involving foreign parties and transactions, including cases against foreign sovereigns, are governed by state law and can be adjudicated in state courts. The resulting multiplicity of potential state and federal fora and potentially applicable state laws in this

Unifying this vast assortment of transnational cases, and rendering them worthy of study for both the practitioner and the academic, is the presence (or potential presence) in each of them of a unique set of procedural, jurisdictional, and conflict-of-law issues. *International Civil Litigation in United States Courts: Commentary and Materials*[7] presents these issues in chapters that "track the chronology of lawsuits involving foreign parties in U.S. courts."[8] These chapters are entitled Judicial Jurisdiction,[9] Service of Process Abroad,[10] Forum Selection,[11] Taking Evidence Abroad,[12] Foreign Sovereign Immunity,[13] Subject Matter and Legislative Jurisdiction,[14] the Act of State Doctrine,[15] and Recognition and Enforce-

---

context often perplexes foreign litigants, and raises interesting questions regarding the proper role of the states in addressing issues that might affect U.S. foreign relations. See generally Louis Henkin, Foreign Affairs and the Constitution 227-48 (1972) [hereinafter Henkin, Foreign Affairs]; Richard B. Bilder, The Role of States and Cities in Foreign Relations, 83 Am. J. Int'l L. 821 (1989); John Norton Moore, Federalism and Foreign Relations, 1965 Duke L.J. 248, 272.

7. Gary B. Born with David Westin, International Civil Litigation in United States Courts: Commentary and Materials (2d ed. 1992) [hereinafter ICL].

8. Id. at 2. The first edition of ICL included a chapter on international arbitration. Gary B. Born & David Westin, International Civil Litigation in United States Courts: Commentary and Materials 605-46 (1st ed. 1989). The arbitration chapter has been deleted from the second edition, and forms the basis of a forthcoming companion volume to ICL authored by Gary Born. See International Commercial Arbitration in the United States: Commentary and Materials (forthcoming 1994).

9. This chapter covers *in personam* jurisdiction (general and specific), *in rem* jurisdiction, and *quasi-in-rem* jurisdiction; the national contacts versus state contacts issue; and personal jurisdiction based on multinational corporate and agency relationships.

10. This chapter examines extraterritorial service of process under the Federal Rules of Civil Procedure, the Hague Service Convention, and the Inter-American Convention on Letters Rogatory; the effect of extraterritorial service that violates foreign law; service of process in the United States on foreign defendants; and service on foreign sovereigns under the Foreign Sovereign Immunities Act.

11. This chapter covers the enforcement of transnational forum selection agreements, *forum non conveniens*, and judicial doctrines employed in response to parallel proceedings abroad, such as *lis alibi pendens* and anti-suit injunctions.

12. This chapter explores extraterritorial discovery under both the Federal Rules of Civil Procedure and the Hague Evidence Convention, the conflicts that such discovery generates under foreign law (including foreign blocking and clawback statutes), and methods for resolving these conflicts.

13. This chapter analyzes the congeries of issues that arise under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11, and amendments to §§ 1332, 1391, 1441 (1988 & Supp. IV 1992), with particular emphasis on the exceptions to sovereign immunity, especially the commercial activities exception, 28 U.S.C. § 1605(a)(2), and the non-commercial tort exception, 28 U.S.C. § 1605(a)(5).

14. This chapter covers alienage jurisdiction, federal question jurisdiction, the alien tort statute, a variety of extraterritorial jurisdiction issues (especially extraterritorial antitrust jurisdiction), and the doctrine of foreign sovereign compulsion.

15. This chapter begins with a discussion of the act of state doctrine as articulated in the Supreme Court's decision in Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964).

ment of Foreign Judgments.[16] Throughout these chapters, the ICL authors highlight "five basic themes that frequently recur in international civil litigation": the role of public international law; the effect of foreign public policies and governmental interests; the separation of powers issues raised by judicial involvement in foreign affairs; the tension between policies of federalism and national control over foreign relations; and international comity.[17]

When ICL was first published in 1989, it was the only casebook (and one of the first hornbooks) to present a "comprehensive treatment" of the "emerging field" of international civil litigation.[18] Now in its second edition, ICL is recognized by many as the standard general work in the field.[19] ICL has been used in courses in over a dozen law schools;[20] it is cited by courts and commentators;[21] and (we can attest) it is an invaluable resource frequently

---

The chapter continues with an analysis of the variety of exceptions and qualifications to the doctrine that have arisen in the last thirty years, including the "validity" limitation, the *Bernstein* exception, the commercial activities exception, the public act requirement, the situs requirement, the treaty exception, and the Second Hickenlooper Amendment.

16. This chapter focuses on the public policy and other exceptions to the recognition and enforcement of foreign judgments.

17. ICL, supra note 7, at 3-26. The ICL authors' introductory essay explains how these themes arise in international litigation. The essay is an intelligent overview of the field, but may be too sophisticated for students who, at the outset of the course, are unfamiliar with international law, federal jurisdiction, and conflicts of law. The essay is very useful, however, as a review at the end of a course based on the book.

18. Id. at 2-3. Although ICL was the first casebook devoted solely to international civil litigation, an earlier generation of casebooks addressed most of the subjects now considered central to international civil litigation. See Henry J. Steiner & Detlev Vagts, Transnational Legal Problems: Materials and Text (1st ed. 1968); Milton Katz & Kingman Brewster, Jr., The Law of International Transactions: Cases and Materials (1960); cf. I & II Abram Chayes et al., International Legal Process (1969). However, as one of the authors of ICL has noted, these books did not "attempt[ ] to deal comprehensively with transnational litigation as such, but rather . . . dealt the area glancing blows in the course of looking at a different set of relations and problems." David Westin, Book Review, 83 Am. J. Int'l L. 438, 438 (1989).

19. See Stephen B. Burbank, The World in Our Courts, 89 Mich. L. Rev. 1456, 1457 (1991) (reviewing first edition of ICL and asserting that ICL "should . . . become the standard text for courses in law schools, and it is an essential volume for the libraries of firms involved in international practice"); Anne-Marie Slaughter Burley, International Law and International Relations Theory: A Dual Agenda, 87 Am. J. Int'l L. 205, 230 (1993) [hereinafter Burley, A Dual Agenda] (characterizing ICL as a "leading casebook in the area"); Harold Hongju Koh, Transnational Public Law Litigation, 100 Yale L.J. 2347, 2390 n.217 (1991) [hereinafter Koh, Transnational Public Law] (assessing ICL as "[t]he best current compendium" regarding international civil litigation).

20. Letter from Kluwer Law and Taxation Publishers (Dec. 29, 1993) (on file with the *Virginia Journal of International Law*).

21. The Supreme Court cited ICL in its last two international civil litigation decisions. See Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891, 2909 n.22 (1993); Saudi Arabia v. Nelson, 113 S. Ct. 1471, 1478 (1993).

relied upon by practitioners. Perhaps the best measure of ICL's success is the emergence since its initial publication of a slew of competitors.[22]

Despite ICL's popularity and the blossoming interest among academics and practitioners in international civil litigation, some commentators have questioned whether there is a "discretely identifiable 'law of international civil litigation.' "[23] Jonathan Pratter and Joseph Profaizer maintain that "[t]he phrase 'international litigation' does not describe a unified field but rather a set of discrete topics having an international element," and that it "is better thought of as an 'umbrella term' covering a group of distinct questions."[24] Stephen Burbank argues that international litigation is not "a discrete field today," but rather is

> 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.[25]

Anne-Marie Slaughter Burley concludes that although "this area of law is growing apace, it remains a definition and a category without a theory," resulting in "a seemingly random hodgepodge of doctrines and topics connected as a field only by a common 'international' or 'foreign' element."[26]

Although the ultimate significance of these criticisms is unclear,[27] we believe that they are in any event overstated. As an

---

22. See supra note 1 for a list of these new publications.

23. Burbank, supra note 19, at 1457.

24. Pratter & Profaizer, supra note 1, at 637-38.

25. Burbank, supra note 19, at 1459.

26. Burley, A Dual Agenda, supra note 19, at 230. Professor Burley adds that, although international civil litigation has "common elements," it lacks "an overriding organizing principle or conception that would provide identity and cohesion to this subject area as a *field*." Id. at 230 n.121.

27. The critics never explain in any detail what constitutes a "field," or what criteria determine whether a group of materials raising related issues is a field. Although these interesting questions are beyond the scope of this review, it is worth noting that the critics acknowledge that the doctrines and issues of international civil litigation should be studied together for pragmatic reasons. For example, Professor Burbank states that he does "not mean to question the utility of the course of study offered in [ICL]," and he acknowledges that international litigation is a field of a " 'nominal kind' . . . that 'can . . . be justified by the heuristic needs of the legal profession.' " Burbank, supra note 19, at 1457-58. Similarly, Pratter and Profaizer concede that, "at least for practical reasons[,] the[]

initial matter, many of the topics in international civil litigation generally are not covered in other courses. These important but neglected topics include extraterritorial service and evidence-gathering;[28] personal jurisdiction based upon multinational corporate affiliations or agency relationships;[29] the enforcement of transnational forum selection clauses;[30] alienage jurisdiction;[31] the problem of parallel proceedings in multiple countries (and the attendant doctrines of the anti-suit injunction and *lis alibi pendens*);[32] foreign sovereign compulsion;[33] and the recognition and enforcement of foreign judgments.[34]

In addition, some international civil litigation topics are treated in other fields, but inadequately so. Three examples will suffice: The Supreme Court's transnational personal jurisdiction decisions—*Asahi*,[35] *Helicopteros*,[36] and *Benguet*[37]—are taught in procedure and conflicts-of-law courses, but they are usually considered for the light that they shed on purely domestic personal jurisdiction problems, and only in passing, if at all, for their international elements.[38] The extraterritorial application of federal law has been included in conflicts casebooks only recently (if at all),[39] and is gen-

---

recurring issues [in international civil litigation] deserve to be considered together." Pratter & Profaizer, supra note 1, at 638 n.1. Moreover, Professor Burley's criticisms are a prelude to the argument that a "Liberal theory" of international relations provides unity and coherence to international civil litigation. Burley, A Dual Agenda, supra note 19, at 230-32. For further discussion of this theory, see infra note 46.

28. See ICL, supra note 7, at 153-220, 345-447.

29. See id. at 136-45.

30. See id. at 232-74.

31. See id. at 545-56.

32. See id. at 319-41.

33. See id. at 623-32.

34. See id. at 739-88.

35. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987).

36. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984).

37. Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

38. See, e.g., John J. Cound et al., Civil Procedure: Cases and Materials 127-49 (6th ed. 1993); Robert Cover et al., Procedure 1459-61 (1988); Stephen C. Yeazell et al., Civil Procedure 123-31 (1992). But see David Louisell et al., Cases and Materials on Pleadings and Procedure 384-402 (6th ed. 1989) (treating *Helicopteros* and *Asahi* separately under the rubric of "International Litigation").

39. The most recent editions of two leading conflicts casebooks include, for the first time, a separate chapter devoted to conflicts between United States federal law and foreign law. See Roger Cramton et al., Conflict of Laws 644-718 (1993); Lea Brilmayer & James Martin, Conflict of Laws: Cases and Materials 625-702 (1990); see also Andreas F. Lowenfeld, Conflict of Laws 629-760 (1986). Other casebooks give these issues either cursory attention, see Willis Reese et al., Conflict of Laws 686-95 (9th ed. 1990), or no attention at all, see Gary J. Simson, Issues and Perspectives in Conflict of Laws (1991); David Vernon, Conflict of Laws: Theory and Practice (1982). None of the leading conflicts

erally analyzed in public international law casebooks only as it relates to customary international law limitations on prescriptive jurisdiction.[40] The judicial exercise of federal common law powers in the foreign affairs field—the so-called "federal common law of foreign relations"[41]—is treated by federal courts books as the "enclave" of federal common law that warrants least discussion,[42] and by foreign affairs and public international law books only as support for the federal law status of customary international law.[43] The real growth area for the federal common law of foreign relations, and the place that most clearly reveals the unique separation of powers and federalism problems it presents, is international civil litigation.[44]

Moreover, only by a holistic approach to the doctrines of international civil litigation can one fully appreciate the nature and complexity of certain recurring concepts and themes. The federal common law of foreign relations is one example of this phenomenon. Other examples include the role played by varying notions of international comity, the diverse means by which international law (treaty and customary) affects U.S. procedure, and the ubiquitous

---

hornbooks considers these issues. See Eugene F. Scoles & Peter Hay, Conflict of Laws (2d ed. 1992); Robert Leflar et al., American Conflicts Law (4th ed. 1986); Russell Weintraub, Commentary on the Conflict of Laws (3d ed. 1986).

40. See, e.g., Louis Henkin et al., International Law: Cases and Materials 1046-1125 (3d ed. 1993) [hereinafter Henkin et al., International Law]; Barry Carter & Phillip Trimble, International Law 699-824 (1991); Joseph M. Sweeney et al., The International Legal System 462-513 (3d ed. 1988).

41. The federal common law of foreign relations stems largely from the Supreme Court's decision in *Sabbatino*, where it was used as a justification for the federal law status of the judge-made act of state doctrine. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 423-27 (1964). Based on *Sabbatino*, several scholars have argued for federal judicial lawmaking in many areas of international civil litigation. See, e.g., Henkin, Foreign Affairs, supra note 6, at 223; Moore, supra note 6; cf. Restatement, supra note 1, § 111 reporter's note 3. The Supreme Court has not yet delineated the proper scope of the federal common law of foreign relations, and state courts and lower federal courts are in substantial disagreement on the issue. See infra note 44 and accompanying text.

42. See, e.g., David P. Currie, Federal Courts 359-60 (4th ed. 1990); Martin H. Redish, Federal Courts 515 (2d ed. 1989); Paul M. Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 901-05 (3d ed. 1988).

43. See, e.g., Thomas M. Franck & Michael J. Glennon, Foreign Relations Law and National Security Law: Cases, Materials, and Simulations 112-49 (1993); Henkin et al., International Law, supra note 40, at 167-70.

44. The federal common law of foreign relations arises in a number of different subject areas covered by ICL, including extraterritorial discovery, ICL, supra note 7, at 436-37, the enforcement of forum selection clauses, id. at 240-44, *forum non conveniens*, id. at 303-04, foreign sovereign compulsion, id. at 630-31, foreign sovereign immunity, id. at 524-31, and the enforcement of foreign judgments, id. at 770-72.

erosion of the distinction between public and private international law.

Finally, the charge that international civil litigation lacks unifying principles is exaggerated. Numerous scholars—including Professors Lowenfeld,[45] Burley,[46] Waller,[47] Koh,[48] Paul,[49] and Garvey,[50] among others—have developed or are developing unifying accounts or global critiques of this "field." The proliferation of these comprehensive analyses is attributable at least in part to the

---

45. Lowenfeld, International Litigation, supra note 1; Andreas Lowenfeld, Public Law in the International Arena: Conflict of Laws, International Law, and Some Suggestions for Their Interaction, 163 Recueil des Cours de Droit International de la Hague [R.C.A.D.I.] 311 (1979).

46. Professor Burley has drawn on Liberal international relations theory to develop a sophisticated theoretical framework that, *inter alia*, analyzes the "internal fissures" at the heart of many international civil litigation doctrines as a function of "objectively identifiable differences between liberal and nonliberal states." Burley, A Dual Agenda, supra note 19, at 232. Professor Burley also projects other applications of Liberal international relations theory onto the doctrines of international civil litigation. See id.; see also Anne-Marie Burley, Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine, 92 Colum. L. Rev. 1907 (1992) (applying the theory in a comprehensive manner to the act of state doctrine).

47. Professor Waller has argued that the "separate and sequential" doctrines of international civil litigation involve "repetitive, fragmented, and ad hoc" interest-balancing tests which are "wasteful, inefficient, and unfair." Spencer Weber Waller, A Unified Theory of Transnational Procedure, 26 Cornell Int'l L.J. 101, 114, 117 (1993). In place of this sequential analysis, he proposes that federal courts adopt "a single omnibus determination of the sufficiency of United States interests and whether foreign interests so outweigh conflicting U.S. interests in a particular dispute to warrant deference on comity grounds." Id. at 117.

48. In contrast to Professor Waller, Professor Koh finds virtue in the sequential analyses of the doctrines of international civil litigation. He argues that these doctrines—which he generally groups as "The Federal Rules of Transnational Civil Procedure" and the American "Law of Foreign Sovereignty"—constitute flexible judicial tools for addressing the comity, separation of powers, and competence concerns that inhere in transnational public law litigation. See Koh, Transnational Public Law, supra note 19, at 2382-94; see also Harold Hongju Koh, Civil Remedies for Uncivil Wrongs: Combatting Terrorism Through Transnational Public Law Litigation, 22 Tex. Int'l L.J. 169 (1987). Professor Koh has elaborated upon his views concerning the Transnational Rules of Civil Procedure in his recent Hague lectures. See Harold Hongju Koh, International Business Transactions in U.S. Courts, __ R.C.A.D.I. __ (forthcoming 1994) (lectures delivered at the Hague Academy of International Law, Private International Law Session, July 5-9, 1993).

49. Professor Paul explains that the Supreme Court's invocation of the rhetoric of comity in various international civil litigation contexts does not achieve what he takes to be the goals of comity—the avoidance of judicial interference in foreign relations, predictability, and the reciprocal treatment of foreign courts. Joel R. Paul, Comity in International Law, 32 Harv. Int'l L.J. 1, 54-70 (1991).

50. Professor Garvey argues that the proliferation of judge-made doctrines in international civil litigation constitutes impermissible foreign policy-making by courts. Jack I. Garvey, Judicial Foreign Policy-Making in International Civil Litigation: Ending the Charade of Separation of Powers, 24 Law & Pol'y Int'l Bus. 461 (1993).

ICL authors' collection and publication of international civil litigation materials as a "distinct, cohesive body of law."[51]

Regardless of whether international civil litigation can properly be described as a "field," it is undeniable that there is a large audience for general hornbooks and casebooks in this area.[52] As mentioned earlier, ICL is ambitiously designed to serve as *both* a hornbook for practitioners and a casebook for students and professors.[53] We believe that it succeeds more in the former enterprise than in the latter.

In our view, ICL is the best general hornbook on the subject. It organizes and explains in one volume all of the topics that are likely to be of concern to the practitioner. Instead of tracking down treatises or other materials on specific topics in international litigation each time an issue arises, the practitioner can (and we do) consistently turn to ICL as a reliable starting point, and often an ending point, when presented with an international litigation problem.

The organization of the book, with its chapters arranged in the order that issues are likely to arise in litigation, facilitates its use.[54] Each chapter begins with a helpful background introduction to the topic, and further provides superb practical guidance to the often-obscure rules and doctrines of international litigation. In practice, we have found particularly helpful ICL's explanation of the various mechanisms of extraterritorial service and discovery.[55] In addition, ICL provides excellent organization and analysis of the multitude

---

51. ICL, supra note 7, at 2.

52. See supra note 1 for a list of general works on international civil litigation.

53. See ICL, supra note 7, at 3.

54. ICL contains appendices that reproduce relevant rules, statutes, and treaties, including the long-arm statute for the District of Columbia, various pertinent Federal Rules of Civil Procedure (including the recently revised Rules 4 and 26), the Hague Service and Evidence Conventions (with Declarations), the Model Form for Hague Evidence Convention Letter of Request, the Interamerican Convention on Letters Rogatory and Additional Protocol, and the Foreign Sovereign Immunities Act ("FSIA"). Oddly, the appendices omit the jurisdiction and removal provisions of the FSIA, 28 U.S.C. §§ 1330, 1441(d) (1988). We recommend that these provisions, frequently relied upon by practitioners, be added to the next printing or to a third edition. The authors also might consider adding a reproduction of the United States Constitution.

55. The Federal Rules of Civil Procedure were substantially revised effective December 1, 1993. For an analysis of the significance of these revisions for international litigation in United States courts, see Gary B. Born & Andrew N. Vollmer, The Effect of the Revised Federal Rules of Civil Procedure on Personal Jurisdiction, Service, and Discovery in International Cases, 150 F.R.D. 221 (1993).

of special rules prescribed by the Foreign Sovereign Immunities Act for foreign sovereign litigation.[56]

Perhaps the most useful feature of ICL is the Notes that follow the leading cases. In addition to discussing the implications of these cases, the Notes, numbering in the hundreds, also touch upon a variety of relatively obscure issues of interest to practitioners. A very small sample of these issues includes personal jurisdiction over a foreign subsidiary of a U.S. parent company;[57] the effect of service of process in violation of international law;[58] the enforceability of "one-sided" forum selection agreements;[59] the power of federal courts to order a U.S. subsidiary to produce documents held abroad by a foreign parent;[60] counterclaims as waivers of sovereign immunity;[61] choice of law under the alien tort statute;[62] the waivability of the act of state doctrine;[63] and the enforceability of foreign default judgments.[64] Further, the Notes contain helpful string citations (particularly of lower court decisions) concerning these and other sub-issues.

ICL lacks two features that would add to its success as a reference book. First, it would benefit from a table of cases and a bibliography.[65] Second, because international civil litigation is a rapidly changing field, an official supplement, perhaps in the form of a pocket part, would also be useful. Since the publication of the second edition, the Supreme Court has announced two important decisions in the field, one of which, *Hartford Fire*,[66] mandates radical reconstruction of ICL's treatment of extraterritoriality in Chapter 7. In addition, lower courts are churning out new decisions in this area daily. One of the ICL authors, Mr. Born, is co-editor of an excellent quarterly newsletter with an "organizational and analytical approach . . . modelled on" ICL that provides summaries of

56. See ICL, supra note 7, at 449-540.
57. Id. at 144.
58. Id. at 200.
59. Id. at 265.
60. Id. at 356.
61. Id. at 477.
62. Id. at 571.
63. Id. at 716.
64. Id. at 757.
65. See Burbank, supra note 19, at 1457 n.3.
66. Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993).

important recent decisions in the field.[67] ICL would be strengthened by a regular infusion of the newsletter materials.

ICL is also an effective casebook, but it is in our view less successful in this regard than as a hornbook. This results in part from its attempt to be both. For example, the lengthy Notes and string citations that are so helpful to the practitioner can be distracting to the student unconcerned with such minute detail. In addition, the space required by a comprehensive reference manual,[68] combined with the limiting factor of single-volume treatment, leave the ICL authors inadequate room to explore theoretical issues in satisfactory depth. Perhaps surprisingly, this is truest of the recurrent themes identified by the ICL authors,[69] all of which raise fascinating theoretical issues that are only parsimoniously explored in ICL.

Space limitations also appear to have affected adversely the excerpts of leading cases in ICL. For example, the facts of some of the cases are inadequately summarized for class discussion. Perhaps the best illustration of this point is the severely edited factual background and procedural history of the *Laker Airways* litigation,[70] which makes it difficult for the uninitiated reader to understand the context of the issues discussed in the excerpted opinion. In addition, dissents and concurrences—useful pedagogical tools—are frequently omitted. When they are included, they are often too abbreviated.[71] Finally, some of the leading international civil litigation decisions by the Supreme Court are not excerpted at all.[72]

Another weakness of the second edition of ICL as a casebook is its failure to integrate fully the three relevant Supreme Court decisions issued since the first edition.[73] In the chapter on forum-selec-

---

67. Editor's Introduction, Int'l Litig. Newsl., Feb. 1990, at 1. The newsletter is published by Mr. Born's firm, Wilmer, Cutler & Pickering, and according to the first issue, "distributed . . . free of charge, to lawyers and others interested in U.S. litigation involving foreign parties or transactions." Id.

68. Even with the elimination of the chapter on international arbitration, see supra note 8, the second edition of ICL has grown from 736 to 928 pages.

69. See supra note 17 and accompanying text.

70. ICL, supra note 7, at 328-37.

71. For example, Chapter 8, "Act of State," contains little more than a paragraph of Justice White's famous dissent in *Sabbatino*, which to this day remains one of the best critiques of the majority's position. ICL, supra note 7, at 662.

72. Not included, for example, are two of the most significant international litigation decisions, Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428 (1989) (requiring a suit under the Alien Tort Statute to satisfy the requirements of the FSIA), and Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480 (1983) (upholding constitutionality of FSIA).

73. This may be the result of rushing the second edition into print. Further evidence of this are the distracting typographical errors throughout the book, many of which which did

tion clauses, the authors have retained a 1984 court of appeals decision as one of the few excerpted cases,[74] even though (as the authors seem to recognize) it is of doubtful viability in light of the more recent Supreme Court decision, *Carnival Cruise*,[75] which follows in the text. Similarly, in the chapter on the Foreign Sovereign Immunities Act, the Supreme Court's *Weltover* decision,[76] which substantially clarified the "commercial activities" exception to sovereign immunity, was simply tacked on after two federal circuit decisions (included in the first edition)[77] that *Weltover* rendered partially invalid and otherwise redundant.[78] Finally, the authors have included in the subchapter concerning legislative jurisdiction the Supreme Court's *Aramco* decision,[79] which strongly reaffirmed the presumption against extraterritorial application of U.S. law. This subchapter, however, seems to ignore in its analysis the significance of the Court's decision in *Aramco*, and merely repeats the first edition's lineup of lower court decisions applying U.S. antitrust law extraterritorially.[80] In all three instances, ICL would have benefitted from a more thoroughly integrated revision.[81]

International civil litigation is a fast-growing field worthy of independent study. Born and Westin have made a substantial contribution to this field, and ICL remains the best general hornbook

---

not appear in identical passages in the first edition. Such careless editing is particularly troubling in a book that is so expensive ($85.00 in hardback and $60.00 in paperback).

74. Colonial Leasing Co. of New England v. Pugh Bros. Garage, 735 F.2d 380 (9th Cir. 1984).

75. Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

76. Republic of Argentina v. Weltover, Inc., 112 S. Ct. 2160 (1992).

77. Callejo v. Bancomer, S.A., 764 F.2d 1101 (5th Cir. 1985); Mol, Inc. v. People's Republic of Bangladesh, 736 F.2d 1326 (9th Cir. 1984).

78. See ICL, supra note 7, at 502-08. The FSIA chapter needs to be rewritten in light of *Weltover* and the Supreme Court's most recent FSIA decision in Saudi Arabia v. Nelson, 113 S. Ct. 1471 (1993).

79. Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co. (*Aramco*), 499 U.S. 244 (1991).

80. This is somewhat surprising, considering that just after the publication of the second edition of ICL, Mr. Born published an excellent article surveying the history of the extraterritorial application of United States law and criticizing *Aramco* as inconsistent with the historical trend (exemplified by the antitrust decisions) toward extraterritoriality. See Gary B. Born, A Reappraisal of the Extraterritorial Reach of United States Law, 24 Law & Pol'y Int'l Bus. 1 (1992).

81. We also agree with others who have noted that Chapter 2, "Judicial Jurisdiction," now 124 pages, is too long and duplicative of material covered in the basic Civil Procedure class. See Burbank, supra note 19, at 1467 n.61. In our view, the authors should simply have summarized the basic domestic law regarding personal jurisdiction, and then proceeded immediately into the international litigation cases, such as *Helicopteros* and *Asahi*. Cf. Lowenfeld, International Litigation, supra note 1, at 150-54.

on the subject. As the field has grown, however, so has the need for a traditional casebook. Although ICL has impressively filled this gap since its publication in 1989, it succeeds more as a hornbook than as a casebook. This is due, in part, to its attempt to be both. The field now warrants more than the hybrid hornbook/casebook treatment offered by ICL,[82] and indeed, more traditional casebooks are now appearing.[83]

82. For an argument in favor of ICL's hybrid hornbook/casebook approach, see Jeffrey P. Minear, Book Review, 35 Harv. Int'l L.J. 251, 255-56 (1994).

83. See Lookofsky, supra note 1; Lowenfeld, supra note 1.