[Vanderbilt Journal of Transnational Law](https://scholarship.law.vanderbilt.edu/vjtl)

Volume 17
Issue 1 *Winter 1984*

Article 2

1984

An Introduction to International Civil Practice

Detlev F. Vagts

Follow this and additional works at: https://scholarship.law.vanderbilt.edu/vjtl

Part of the Civil Law Commons

Recommended Citation

Detlev F. Vagts, An Introduction to International Civil Practice, 17 *Vanderbilt Law Review* 1 (2021)
Available at: https://scholarship.law.vanderbilt.edu/vjtl/vol17/iss1/2

This Symposium is brought to you for free and open access by Scholarship@Vanderbilt Law. It has been accepted for inclusion in Vanderbilt Journal of Transnational Law by an authorized editor of Scholarship@Vanderbilt Law. For more information, please contact mark.j.williams@vanderbilt.edu.

Vanderbilt Journal of Transnational Law

VOLUME 17 WINTER 1984 NUMBER 1

AN INTRODUCTION TO INTERNATIONAL CIVIL PRACTICE

*Detlev F. Vagts**

TABLE OF CONTENTS

I. INTRODUCTION 1
II. THE FRAMEWORK 5
A. Preliminary Planning 5
B. Choosing a Forum 6
C. Litigating the Case 7
D. Enforcing the Judgment 8

I. INTRODUCTION

Let me, first of all, express the appreciation of all the speakers for the hospitality shown to us here. As soon as we arrived at the Nashville airport we realized that, whatever has happened to courtesy in the rest of the country, we were now in a different world. Here, "please" and "thank you" are still a part of the ordinary vocabulary.

As the keynote speaker of this symposium, it is my function to provide a general framework within which the other speakers can develop their specific topics with much more extensive and current knowledge than I have.

In a crude way, the importance of the subject matter can be

*Eli Goldston Professor of Law, Harvard Law School. LL.B. *magna cum laude* 1951, Harvard Law School; A.B. *summa cum laude* 1948, Harvard College. Associate Reporter *Foreign Relations Law of the United States*. Co-author, TRANSNATIONAL LEGAL PROBLEMS (1979).

measured by the increase in the number of cases listed under the West key numbers for "Judgments" which purport to collect all of the cases on the enforcement of foreign judgments in United States courts. The *West Modern Federal Practice Digest* uses four pages under this caption to list cases for the years from 1939 to 1970. In contrast, the *Federal Practice Digest 2d* uses seven and three-quarters pages for cases from 1967 to 1977 and the pocket part has another three and one-half pages.[1] Such statistics hide the great disparities in the size and significance of international litigation. At one end of the scale is the mass of litigation triggered by Nigeria's refusal to accept all the cement it had ordered, or the huge uranium contract and antitrust litigation in the United States.[2] At the other end is the case of a New York couple who arranged to send furniture to New York from Vienna and subsequently changed their mind, leaving the antique furniture dealer to resort to the Austrian long-arm rules.[3]

Involvement with foreign litigation tends to fall quite randomly among trial lawyers; although some of them, like our speakers, have substantial sophistication on foreign issues, many do not. A trial lawyer's special skill is a sensitivity to the reactions of the judges and juries they must persuade. This sensitivity can be a very localized aptitude. The great trial lawyers, from Clarence Darrow on, are not seen as cosmopolitan persons.

By the same token, many judges have only a vague understanding of what occurs in foreign courts. Some glimpses of judicial views in other nations' courts often offer pictures not only of the issues, but also of the writers. One view is that of Lord Denning of the United Kingdom Court of Appeal:

> As a moth is drawn to the light, so is a litigant drawn to the United States. If he can only get his case into their courts, he stands to win a fortune. At no cost to himself; and at no risk of having to pay anything to the other side. The lawyers there will conduct the case "on spec" as we say, or on a "contingency fee" as they say. The lawyers will charge the litigant nothing for their ser-

---

1. 33A FED. PRAC. DIG. 235-39 (1970); 51 WEST'S FED. PRAC. DIG. 2D 1156-63 (1977); *id.* at 391-94 (Supp. 1982). The original version took eight pages to cover the years 1754 to 1941. 42 FED. DIG. 939-47 (1941).

2. One of the leading cases in this series is Verlinden B.V. v. Central Bank of Nigeria, 103 S. Ct. 1962 (1983). *See also* Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981).

3. Siedler v. Jacobson, 86 Misc. 2d 1010, 383 N.Y.S.2d 833 (App. Term 1976).

> vices but instead they will take 40 percent of the damages, if they win the case in court, or out of court on a settlement. If they lose, the litigant will have nothing to pay to the other side. The courts in the United States have no such costs deterrent as we have. There is also in the United States a right to trial by jury. These are prone to award fabulous damages. They are notoriously sympathetic and know that the lawyers will take their 40 percent before the plaintiff gets anything. All this means that the defendant can be readily forced into a settlement. The plaintiff holds all the cards.[4]

On the whole, the attitude of United States courts towards British courts is almost deferential. This attitude is occasionally expressed in ways that must seem curious to foreign courts. For example, the Ninth Circuit Court of Appeals stated that "United States courts . . . are hardly in a position to call the Queen's Bench a kangaroo court."[5] My Australian friends find this analogy puzzling. On the other hand, harsh words often have been spoken of less familiar judicial systems. Witness District Judge Mansfield's description of East German courts:

> Such consideration reveals the decisions of the Supreme Court of East Germany to be so completely lacking in any objectivity of approach and so thoroughly saturated with a combination of communist propaganda, diatribes against the "capitalist oriented" decisions of the West German courts, and absence of judicial restraint, that any logical analysis is obfuscated by their obvious political mission . . . .West German court decisions are described in the following terms: inspired and controlled by "monopolistic-capitalistic circles"; "nothing to do with juridical reasoning but amounts to an irresponsible juggling with fictitious notions"; "formalistic bourgeois methods [which] make it impossible to veil such coarse violations of law"; "pretense of strict lawfulness"; "conscious falsification"; and "contradictions between [a] peacefully minded population and a warlike revenge-inspired State, which find their expression chiefly in the clerico-militaristic federation at Bonn."

---

4. Smith Kline & French Laboratories v. Bloch, [1983] 1 W.L.R. 730, 733-34 (C.A. 1982). For a United States response that criticizes domestic lawyers for encouraging such a view of United States law, see Laker Airways, Ltd. v. Pan American World Airways, 559 F. Supp. 1124, 1133 (D.D.C. 1983). For a British rejoinder showing more understanding of national differences in procedure, see British Airways v. Laker Airways, [1983] W.L.R. 545, 575 (C.A.).

5. British Midland Airways, Ltd. v. International Travel, Inc., 497 F.2d 869, 871 (9th Cir. 1974); *see also* Colonial Bank v. Worms, 550 F. Supp. 55, 58 (S.D.N.Y. 1982).

. . . .

> In contrast to those of East Germany, the decisions of the courts of West Germany appear to be restrained, objective, reasonably logical, and dispassionate in their approach.[6]

Another example from an earlier time is the Texas Supreme Court's view of Mexican procedures.

> The proceedings shown in relation to this judgment make it manifest that the trial of the case in the Mexican court was wanting in these essential elements. They reveal that the action was one unquestionably resting in questions of fact, and that Masterson pleaded what would have constituted a good defense, yet that he was denied the right to present it, it not appearing that his offer to support it was unseasonably made. If it be urged that this was warranted by the Mexican procedure, we are unwilling to give conclusiveness to a judgment which such a procedure sanctions. The judgment and the recitals which accompany it are a maze of words; but as we interpret their vague and confused statements, it appears to have been rendered upon no proof whatever. It furthermore appears that Masterson was denied an appeal from the judgment upon what seems to us to have been a frivolous ground, namely, the omission to affix a stamp to the document of appeal. The entire proceeding appears to have been arbitrary in its nature and summary in its execution; and the court, in our opinion, properly declined to give the judgment effect.[7]

In collecting such views, one is mindful of the warning contained in Justice Harlan's concurring opinion in *Zschernig*.[8] He noted that making judgments about procedures in foreign courts, as required under the Uniform Enforcement of Foreign Money Judgments Act, might pose as many difficulties as those produced when state courts must first determine if foreign laws allow heirs to enjoy United States inheritances before granting an alien the right to inherit. Litigating lawyers also must make judgments about the qualities of unfamiliar foreign courts.

---

6. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 293 F. Supp. 892, 907-08 (S.D.N.Y. 1968), *aff'd as modified*, 433 F.2d 686 (2d Cir. 1970).

7. Banco Minero v. Ross, 106 Tex. 522, 537, 172 S.W. 711, 715 (1915). *But see* Hilton v. Guyot, 159 U.S. 113, 202-05 (1895) (approving French procedures although different from the United States model).

8. Zschernig v. Miller, 389 U.S. 429, 461-62 (1968).

II. The Framework

A. Preliminary Planning

An international lawsuit can be broken down into stages, each representing a branch in the tree of successive decisionmaking. The emergence of a sense of grievance in the plaintiff's mind starts the first stage. He has been hurt and wants to sue somebody. That attitude leads to a consultation with a lawyer, presumably in the plaintiff's vicinage. The lawyer should recognize any foreign element in the case which could mean that the lawsuit should be tried before a foreign court. Taking the case to a foreign court would involve the transport of United States input—legal rules, testimony, documents—abroad. Conversely, the case might well be better tried in the United States, at least from the plaintiff's point of view. This location for the case would require the introduction of foreign elements in the United States.

Making this forum decision necessitates the understanding of some elements of foreign law, both substantive and procedural. To acquire this knowledge, United States attorneys must consult foreign counsel because it would be foolish to try to make decisions in these fields without training or practice. Finding the desired type of foreign counsel is not easy. Most lawyers in the United States do not have a network of acquaintances extending beyond this country. The labels that describe foreign lawyers add to the confusion; one encounters the terms *avoués*, *avocats*, and *notaires* which are each equivalent to "lawyer."[9] Their functions, however, differ from United States categories. For example, in Great Britain, as well as in other countries, the trial bar is separate from the counseling bar. This division raises an initial question: Can a British barrister be consulted directly, or must a British solicitor be the intermediary?[10] Firms with regular connections abroad have a definite edge in selecting and making contact with foreign lawyers.

Once a foreign lawyer is chosen, communications seem to fall

9. *See* 1-2 Transnational Legal Practice (D. Campbell ed. 1982) (collects a vast quantity of information about lawyers in foreign countries).

10. Costello, *England and Wales* in 1 *id.* at 95: ("a barrister is permitted only to give advice to a foreign lawyer directly without the intervention of a solicitor in the case of noncontentious matters in which no litigation (or arbitration) in England is contemplated or in progress"); *see also In re* T. (A Barrister), [1981] 3 W.L.R. 653, 658 (Visitors to Lincoln's Inn).

within the United States-version of the attorney-client privilege, even with an interpreter.[11] A recent case[12] from the Court of Justice of the European Communities, however, indicates that only those engaged as independent practitioners within the Community are entitled to the privilege.

At some early stage, the question of fees raises its disturbing head. Counsel outside the United States are, like Lord Denning,[13] apt to see United States litigation costs as extraordinary. Although legal costs are likely to be lower abroad, they can be surprising. Thus, the application of foreign courts' rules that award a percentage of the amount in controversy (the German *Streitwert*) can produce strange results when a foreign lawyer plays a very small role in a very large case.[14]

B. Choosing a Forum

Counsel must recommend whether to bring a suit and where it should be brought. The latter decision can be a complex one. First, the question of in personam jurisdiction must be considered. The bases for jurisdiction in the United States (from doing business, to mere presence, to long-arm statutes) vary from those recognized in Europe.[15] Each system has some type of jurisdictional claim that others regard as "exorbitant." France allows suit by virtue of a plaintiff's nationality. Germany sustains a suit if some of the defendant's property is present; in one case, a skier's underwear provided the necessary property. Other nations may find it strange that jurisdiction can arise under United States law merely because the sheriff was able to catch the defendant in transit within United States borders.[16] Later in the litigation, it is important to determine whether the jurisdictional basis of the judgment will be recognized and enforced in foreign courts. Choice of law rules are supposed to minimize forum shopping, but

---

11. 8 J. WIGMORE, EVIDENCE §§ 2300, 2317 (McNaughton rev. ed. 1961).

12. A. M. & S. Europe, Ltd. v. Commission of the Eur. Community, [1982] E. Comm. Ct. J. Rep. 1575 (case 155/79).

13. *See Smith Kline & French Laboratories,* [1983] 1 W.L.R. at 733-34.

14. *See generally* R. SCHLESINGER, COMPARATIVE LAW 342-52 (4th ed. 1980).

15. Materials on different nations' views on the appropriate jurisdictional basis appear in H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS, ch. 7, at 729-58 (2d ed. 1976).

16. Some American judges would agree. *E.g.,* Fisher v. Fielding, 67 Conn. 91, 34 A. 714 (1895).

instead, they leave many differences between fora. Thus, no conflicts of law principles affect the likelihood that a New York jury will award more liberal damages than a London judge.[17] In regulatory areas such as antitrust, courts will decide *whether* their own state's statute applies under the rubric of legislative or regulatory jurisdiction, and not *which* antitrust law should be applied according to choice of law rules.

The choice of forum decision may be complicated by the more or less simultaneous selection of a different forum by the other party. Injunctions, restraining orders, and harsh words between judges as well as parties may ensue.[18] The selection of forum may have been predetermined by a choice of forum clause or, more likely, by an arbitration clause. Even so, a struggle may remain if it can be asserted that the matter is not arbitrable because of the involved state's public policy. Whether or not to make a challenge or to take a delaying or disruptive stance in the arbitration depends on many factual elements. If the potential foreign defendant is a sovereign state or an instrumentality of a state, a different set of rules and constraints become relevant.

C. Litigating the Case

Once a forum is chosen, proceedings must be initiated for the plaintiff in the optimum way. The complaint or its foreign equivalent must meet local standards. The generalized "notice" pleading, accepted in the United States, will cause problems in foreign jurisdictions that expect a much more detailed description of the plaintiff's theories and supporting facts.[19] Service should be effected upon defendants in a manner that not only will satisfy the forum's requirements, but also will facilitate the recognition of the resulting judgment in other jurisdictions. This may involve complying with the Hague Convention on Service of Process.[20]

---

17. *Cf. Smith Kline & French Laboratories*, [1983] 1 W.L.R. at 733-34.

18. Baade, *An Overview of Transnational Parallel Litigation: Recommended Strategies*, 1 REV. LITIG. 191 (1981).

19. For a comparison of German and United States pleading practices, see Kaplan, von Mehren & Schaefer, *Phases of German Civil Procedure I*, 71 HARV. L. REV. 1193, 1212-21 (1958).

20. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163. For commentary on the treaty, see RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 (Tent. Draft No. 5 1984).

The next stage is discovery. Despite the progress that has been made in improving cooperation between courts, notably in the adherence of many states to the Hague Convention on Evidence, discovery problems do remain.[21] For example, even our British cousins look askance upon the United States style of "fishing expeditions."[22] This nonacceptance makes the task of discovery harder for plaintiffs who need to make their case from defendants' files. In other jurisdictions, no sharp division exists between discovery and the trial itself. The judge or judges retain control over both parts of the process.

The trial itself will, of course, be very different. The randomly chosen, ad hoc United States jury in civil litigation has disappeared from almost every other jurisdiction. Lay persons may appear, but only in the guise of co-judges who often sit for long stretches and frequently are selected for their business expertise. Styles of argument must be tempered to the nature of the judicial approach in the foreign jurisdiction; quarrels about hearsay and other exclusionary rules of evidence do not have a role when no jury is to be protected from prejudice. European judges feel much more responsible for dragging out the facts of the case than do United States judges who rely on counsel to do the job via discovery.[23] Trials can be long and dilatory; indeed, they may be interrupted while the court personnel turn to other cases or while additional evidence is sought. One must recognize, however, that this delay is much less a factor in many jurisdictions abroad than in the more crowded districts of the United States.

D. Enforcing the Judgment

Finally, a judgment is rendered that may, of course, be appealed by stubborn litigants. As Lord Denning noted, foreign judgments appear to be more modest in amount than United

---

21. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444. For commentary on the treaty, see RESTATEMENT, *supra* note 20, § 483.

22. Rio Tinto Zinc Corp. v. Westinghouse Elec. Corp., [1978] A.C. 547 (H.L.). For a defense of United States practices, see Laker Airways, Ltd. v. Pan American World Airways, 559 F. Supp. at 1132-33.

23. For comparisons of European and American civil procedure, see Kaplan, *Civil Procedure—Reflections on the Comparison of Systems*, 9 BUFFALO REV. 409 (1960); Kaplan, von Mehren & Schaefer, *supra* note 19, at 1193.

States judgments.[24] If the judgment can be satisfied out of local assets or by the acquiescence of the defendant, well and good. If not, one may have to seek enforcement of the judgment abroad. United States judgments are particularly dependent upon the comity or generosity of foreign legal systems because the United States is not a party to any treaties dealing with the enforcement of judgments abroad.[25] A United States judgment has a good chance of being denied recognition upon grounds of public policy or failure to prove reciprocity. Reciprocity is sometimes a difficult matter because we are a fifty state jurisdiction.[26] There is even a risk that a United States antitrust judgment will not only be refused enforcement, but also will be "clawed back," meaning a foreign defendant will be able to recover the penal portion of the United States award.[27] Enforcement of a foreign judgment in the United States is also a somewhat venturesome proposition. Although enforcement is the usual result in routine cases, the parameters of the penal and public policy exceptions are still in doubt. The presence of the Uniform Recognition of Foreign Money Judgments Act in some states narrows the range of possible disputes, but does not eliminate them.

---

24. *See Smith Kline & French Laboratories*, [1983] 1 W.L.R. at 733-34.

25. RESTATEMENT, *supra* note 20, §§ 491-98 (Tent. Draft No. 4, 1983) (notes the failure to achieve agreement with Great Britain). The United States defendant should be aware that, under a 1968 convention, judgments of one court in the European Community can be enforced elsewhere in the Community. *Id.* at 115-16.

26. *Cf.* RESTATEMENT, *supra* note 20, § 491, at 110-11, 115 (Tent. Draft No. 4, 1983).

27. *Compare* Lowe, *Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Act, 1980*, 75 AM. J. INT'L. L. 257 (1981), *with* Lowenfeld, *Sovereignty, Jurisdiction and Reasonableness: A Reply to A. V. Lowe*, *id.* at 629.