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# Transnational Adjudication: A View From the Bench

## I. Introduction

A phenomenon has developed in recent years known as "transnational litigation." This activity is becoming increasingly commonplace. Its roots are in traditional civil, administrative and criminal litigation, but all of these forms of litigation take on a new dimension when conducted on a transnational level. Thus even those private and government litigators who are well-versed in customary forms of judicial combat must take time to acquaint themselves with the substantive legal issues and the litigation procedures peculiar to transnational litigation.

Many seminars and institutes have been sponsored by bar associations and others to consider the ramifications of transnational litigation. At these proceedings numerous experts—U.S. and foreign practitioners, scholars, and government officials—have thoroughly and insightfully discussed the specific substantive and procedural issues that transnational litigators are likely to encounter. However, these commentators usually approach the complexities of transnational litigation as litigators. To the best of my knowledge few judges have addressed this crucial topic. My perspective is somewhat unique: that of the transnational *adjudicator*. Since the adjudicator is the decision maker in the litigation process, the efforts of the transnational litigators are—or should be—focused on guiding the judge's deliberations. So, perhaps I am in a position to give an inside view of how

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advocates can improve the adjudicatory process, and along the way help the court reach a just decision in favor of their clients. Remember, the knowledge of expert counsel has no influence on the decision unless it is clearly communicated to the court.

## II. Conducting Transnational Litigation

Let us take a hypothetical transnational case through the major phases of litigation, illustrating the judge's perspective of how each stage should be conducted. I will draw on examples from my own experience, both on and off the bench, and from recent transnational cases in other circuits. At each step of the process the reader should compare my points with his or her own real-life cases (past or present). Could you have done it better? Should you now be doing it differently? How would you do it differently in the future? If many of these points turn out to be what you are doing anyway, be of good cheer: you have not wasted your time, you have confirmed you are doing things right. You do not need better technique, just more righteous clients!

### A. Educating the Judge

A litigator should have his overarching objective firmly fixed in mind. In a very real and practical sense, the first objective of any litigator must be *to educate the court* about the facts and the law in his case.

A judge is by definition a generalist. He has little control over the subject matter of the cases which reach his court. On any day of oral argument I could be, and have been, required to deal with topics as diverse as the validity of Railroad Noise Emission Standards; the extent of the constitutional double jeopardy bar against a second trial after a mistrial; and the legality of charges levied by a state port commission under the Shipping Act of 1917. Unlike most practitioners, judges cannot limit their practice to any particular specialty. Thus, in all but routine matters an advocate must educate the judge on the legal and factual issues.

The necessity of educating the judge is especially apparent when the litigation is transnational in its substantive and procedural scope. If a plaintiff files in our court a suit by French, Norwegian, British, American and Canadian plaintiffs arising out of a crash, on the high seas, of an American-manufactured, Norwegian owned and operated helicopter,[1] the judge may not be an instant expert in the complex tangled web of issues raised. Most of my experience in international law and transnational adjudication has been gained off the bench, and I am not familiar with judges appointed to the bench in recent years who have had experience similar to my own. Thus,

[1] *See* Pain v. United Technologies Corp., 637 F.2d 775 (D.C. Cir. 1980).

although transnational litigation is increasing, the likelihood remains fairly low that a particular judge will be experienced in this area.[2]

Consequently, the *overriding job of counsel is to educate the judge on the significant legal aspects of the litigation*: the existence and substance of foreign law; the source and scope of international law; the relevance of U.S. law; and the interrelationship of these three branches of law. The litigator must not lose sight of this objective as he moves through the various phases of litigation. One should not assume the court is stupid; with some exceptions, it is merely untutored.

In the transnational proceeding, there is an added dimension to this educational process, which might be termed "*continuing education.*" A transnational case usually involves different national laws, potentially or actually conflicting policy interests, and divergent national administrative and judicial procedures. These may be, and often are, in a state of uncertainty and constant flux during the litigation, even if the facts of the underlying controversy can be frozen at one point in time. Transnational litigation is to the domestic breed as three-dimensional chess is to the garden variety, or as the triphibious warfare of MacArthur is to a land battle of World War I.

The lawyer is a general in this multidimensional legal battle, marshalling and coordinating the legal claims and litigation resources of clients. Because these factors are all so difficult to discover and weigh accurately in the transnational case, much more than in a domestic suit, the judge is forced to rely on thorough and effective representation by counsel.

With the central objective of educating the court in mind, let us look at the four major stages common to all transnational litigation, whether at the trial or appellate level: (1) research and analysis of facts and law, (2) presentation of the case, (3) argument, and (4) postargument conduct.

### B. Organizing the Case—Research and Analysis of Facts and Law

The transnational litigator should gather as many facts as soon as possible, of course, before making the decision to litigate. The more facts one has at one's disposal, the greater the chance the court will be able to dispose of the issue intelligently. If a preliminary injunction is required the court may be asked to act on an incomplete factual record. When the court is asked to act partly on mere allegations, as distinct from proof, the responsibility of

[2]Davis Robinson, the Legal Adviser of the United States Department of State, recently made this precise point when he emphasized the extraordinary importance of the Restatement of the Foreign Relations Law of the United States ("Restatement") in influencing the Courts.[2] *See* D. Robinson, "*Transnational Litigation*" reprinted in American Bar Association Nat'l Inst., 1 Transnational Litigation: Practical Approaches To Conflicts And Accommodations 39, 40 (J. Fedders, J. Harris, R. Olsen & B. Ristau eds. 1984) (outline of remarks given at ABA Nat'l Inst. on Transnational Litigation, 8 March 1984).

counsel to know his case is even higher. For example, in the recent *Laker Airways* case, Laker, a British airline, sought to enjoin Belgian and Dutch airlines from seeking an English injunction against Laker's U.S. suit.[3] Because little discovery in the case had been completed prior to the motion for an injunction, the district court judge was forced to rely more heavily on the oral submissions of counsel.

Once the factual picture emerges, counsel will consider what legal issues are raised by the facts. Here it is especially important to maintain clarity of analysis. Transnational cases raise complex and interrelated issues of public international, private international, constitutional, criminal, commercial, and administrative law. As I have noted, it is unlikely that the judges hearing such cases will be well versed in all of these different substantive fields, and, even less likely, in their interrelationship.

Make sure that the domestic, international, and foreign law issues are distinguished from one another. Some attorneys confuse comparative law, and the issues generated by the intersection of diverse laws of two or more nations, with international law, which is shared in common by many countries.

The necessity of making these distinctions is illustrated by the classic conflict of jurisdiction case, in which a U.S. governmental body asserts jurisdiction to regulate conduct by a private party outside the U.S., usually in the face of a conflicting claim of jurisdiction by a foreign governmental body, often manifested in a blocking statute or a judicial order. In this situation, the *domestic* issues raised would include the questions whether the assertion of jurisdiction was authorized by statute and whether construing the statute to authorize assertion of jurisdiction would be consistent with the U.S. Constitution. The *international* issues raised would include whether the assertion of jurisdiction was based upon territoriality, nationality, or one of the other jurisdictional bases recognized by international law, and whether the type of jurisdiction being exercised was jurisdiction to prescribe, adjudicate, or enforce. The *foreign law* issues raised would include the questions of how a foreign court would interpret and apply the foreign blocking statute or judicial order. To prevent confusion, these different types of issues should be distinguished from the start, and each issue separately briefed, with the relevant sources of law for each issue carefully identified.

The importance of clarity in issue analysis is demonstrated by *Federal Trade Commission v. Compagnie de Saint-Gobain Pont-A-Mousson*,[4] which

[3]Laker Airways Ltd. v. Pan American World Airways, 559 F. Supp. 1124 (D.D.C. 1983), *aff'd*, Laker Airways Ltd. v. Sabena, Belgian World Airlines, slip op. (D.C. Cir. 6 March 1984).

[4]636 F.2d 1300 (1980).

involved the enforcement of an administrative agency's investigative subpoena to a French corporation overseas in light of French blocking legislation. In *St. Gobain*, the main domestic law issue was the extent of the FTC's statutory authority to serve compulsory process abroad, which derived from the FTC Act. The main international law issue was whether exercise of enforcement jurisdiction without prescriptive jurisdiction would violate customary international law, as spelled out in the *Restatement*. The main foreign law issue was how the French blocking statute would be interpreted by a French court. Until the court ordered briefing on the latter two questions, however, the briefing in the case centered only on the domestic law issues, unilluminated by their relationship to the other two issues.

Once the facts and legal issues have been outlined and ascertained, counsel should consider what national and foreign interests are implicated. This is of vital concern to judges at several stages of the litigation. For instance, when considering jurisdiction to adjudicate, a court must determine whether there are reasonable contacts between the defendant and the forum. In assessing prescriptive jurisdiction, the court evaluates the sufficiency of territoriality, nationality, or other jurisdictional links. When deciding the applicability of U.S. law, the court asks whether Congress intended to provide a remedy to protect the U.S. interests implicated. Finally, when confronted with a claim of *forum non conveniens* the court must determine whether the balance of public and private interests suggests that the case should be brought in a different forum or country also having jurisdiction.

Regardless of the specific issue, or particular method of analysis adopted, these inquires all have one point in common: at any of several stages in the litigation the advocate may be required to persuade the judge that the transnational case is—or is not—properly in the judge's court. An evaluation of U.S. and foreign interests will be necessary to that decision, so counsel must begin early to assess them.

### C. Presenting the Facts

After counsel has ascertained the facts and clearly analyzed the legal issues, assessing the potential U.S. and foreign contacts with the litigation, the next step is to present the case to the judge. At this point the task of educating the judge begins in earnest: presentation of facts, explication of legal issues, and advancement of the governing law.

On appeal, the statement of the facts can be one of the most important and persuasive portions of the appellate brief. And of course, the presentation of evidence at the trial level—either at preliminary hearings, or on consideration of the merits—is always crucial. Counsels' first obligation in

presenting the facts is to accurately and fairly lay the facts before the court. The repercussions of transnational litigation may reverberate well beyond the parties. *Advocacy must not obscure accuracy.*

This is well illustrated by *Securities and Exchange Commission v. Banca della Svizzera Italiana.*[5] To exercise jurisdiction over a defendant foreign corporation, the district court had to determine whether the subsidiary of the foreign corporation did business in New York. At a hearing, counsel for the parent corporation answered that the subsidiary did not do business in New York. However, searching the record after the hearing, the court located a letter of the defendant—submitted by the plaintiff SEC—which clearly established that the subsidiary did do business in the state. The court noted in its opinion that counsel's denial of that fact was "erroneous and obviously inadvertent."[6] I suggest that there is no room for these "errors" in transnational cases. Counsel must be sure of the facts. Avoid generalizations, if possible; if not, qualify those generalizations which are absolutely necessary.

Accurate accumulation and presentation of facts is made especially difficult in transnational cases by the distortions of distance and the divergence of legal and social systems. These are factors in every transnational case—from the very largest to the smallest. One of the first transnational cases on which I ever sat involved the issue of whether a foreign mother was entitled to a social security pension upon the death of her American-resident son.[7] She claimed that the son had provided her with a small amount of cash and some parcels, no more than two hundred dollars' worth, but which accounted for more than half of her annual income. The U.S. agency denied her claim without giving it a fair hearing. No one ever bothered to calculate accurately the dollar in Polish zlotys. In reversing, we noted the confusion and frustration which the parties—and consequently the judges—often find in dealing with unfamiliar foreign procedures and processes. By research and through presentation of facts, counsel can help eliminate that frustration and confusion.

What kinds of facts should be presented? Besides those facts directly relating to the merits of the substantive claim, the court must be informed of the *nature* and *status* of pending foreign legal proceedings. Judges are not usually informed on the purposes and operation of foreign law. Attorneys should be prepared to brief these issues. Affidavits of foreign attorneys or expert witnesses should be utilized when necessary. For example, in *St. Gobain*, on remand the trial court relied on affidavits to assess factual significance of foreign proceedings.[8] Even where not critical to the outcome,

[5]92 F.R.D. 111 (S.D.N.Y. 1981).
[6]*Id.* at 112.
[7]Radlinska v. Secretary of H.E.W., 454 F.2d 1043 (D.C. Cir. 1971).
[8]F.T.C. v. Compagnie De Saint-Gobain-Pont-A-Mousson; 493 F. Supp. 286, (1980).

this information would go a long way toward encouraging understanding, respect, and therefore comity, to foreign proceedings.

The *status* of the foreign proceedings may have crucial legal consequences. In *I.J.A., Inc. v. Marine Holdings, Ltd.*,[9] the district court stayed U.S. proceedings upon a representation that a Canadian court was on the verge of resolving all the legal issues. However, when the parties later demonstrated that the foreign court litigation was only in incipient stages, the U.S. court dissolved the stay and allowed simultaneous parallel proceedings. For similar reasons, in *Laker Airways Limited v. Sabena, Belgian World Airlines*[10] our court was vitally concerned with the status of the English proceedings, so we requested supplemental statements to be filed shortly after oral argument, with subsequent updates. Attorneys should keep the court up to date, without urging and prompting by the court.

### D. Presenting the Legal Issues

Once the factual setting of the case is established, counsel must address the legal issues raised by the facts. Make sure that the precise *relationship* between the international, domestic, and foreign law issues is spelled out. Brief all issues, particularly those issues preliminary to the merits. Sometimes, even to point out that *no issue* on a particular point, *e.g.*, sovereign immunity or act of state doctrine, is involved, and why, would be helpful. Similarly, it would be helpful to have the *order* in which the issues should be approached spelled out.

Counsel must also carefully and precisely *define* the legal lynchpins supporting the case. For example, in transnational cases, the term "jurisdiction" tends to be used very loosely. It is important to distinguish between subject matter and personal jurisdiction, agency jurisdiction and jurisdiction of states under international law, and jurisdiction to adjudicate, prescribe, and enforce. This is true for any case involving a conflict of foreign and domestic jurisdictions. It is also crucial to identify the legal consequences that flow from the type of jurisdiction asserted. In the recent *Laker* case, one of the parties asserted—incorrectly, in the view of the court—that one type of jurisdictional base (nationality of party) was paramount over all others.[11]

Perhaps most importantly, counsel should not ignore the difficult issues—especially the ones which could operate against the client's claim. In several major transnational cases the parties have not addressed significant legal

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[9]524 F. Supp. 197 (E.D. Pa. 1981).

[10]Slip op. (D.C. Cir. 6 March 1984).

[11]*Id.* at 46–51. Other recent commentators have also expressed agreement with the position reached by the court. *See, e.g.*, The Laker dispute: a case for international arbitration, Financial Times, 29 March 1984, at 11.

issues. In *St. Gobain*, no one discussed two states' foreign blocking laws. In *Laker*, in which the issue of whether Belgian and Dutch airline-defendants were subject to the United States antitrust laws was hotly contested, both the British plaintiff and the foreign defendants ignored the meaning of the relevant Belgian and Dutch air service treaties. These issues should have been caught by the plaintiffs in most cases. But, even so, the defendants could have raised the issues. If they say nothing, then the court will not have the benefit of their arguments and might more easily rule against them.

Attention to the *mechanics* of presenting the facts and legal issues may be worth its weight in gold. Lawyers should not hesitate to use charts, graphs, tables, maps, or diagrams in both trial and appellate courts. They wili often help clarify and summarize complicated interrelated issues, and help the judge visualize the legal and factual posture of the case. In one case concerning the ownership and occupation of land situated overseas, the parties at oral argument used a diagram of the land by which the court and both sides made important distinctions. In the *Westinghouse Nuclear Reactor Case*,[12] our court was concerned with the location of a proposed foreign nuclear reactor *vis-a-vis* U.S. troop installations and a naval base. A map helped clarify this. Recently at oral argument counsel showed the court an enlargement of three textual pages which we could read from the bench. Counsel then used a long pointer to indicate the asserted relationship of one paragraph to another. These simple steps clarified and advanced the argument.

Charts and diagrams can and should be used to track various legal issues in briefs. The judge may very well ask his law clerk to make these charts or diagrams if the parties do not take the initiative. The attorney who does it for the court may well score an advantage by emphasizing features favorable to the attorney's position while still being fair and accurate.

### E. Presenting the Applicable Law

After the facts and legal issues are well briefed, the next task is to present the law necessary to resolve the factual and legal controversy. The attorney must first *identify* all relevant law: *U.S.*, *foreign*, and *international*. During this process counsel must take the necessary time, be thorough, and use experts and affidavits if necessary.

The second step is to *provide a copy* of all sources which are difficult to locate. The parties should include all important foreign decisions and judicial orders in the appendix. This is vital in a transnational case compared to a domestic one. It makes the court's task much easier, and reduces the chance that the court will overlook an important foreign law.

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[12]Natural Resources Defense Council v. Nuclear Regulatory Comm'n, 647 F.2d 1345 (D.C. Cir. 1981).

Parties should also be prepared to assess and argue the *precedential weight* of the authority cited. In transnational cases, the sources of precedent and doctrine are *more nebulous* than in purely domestic cases, where the advocate can always look to the U.S. Reports or Federal Reporter Second. International law treatises should be relied upon, but the parties should make it clear when they are inaccurate. Even the generally accurate *Restatement* may at times not fully reflect the U.S. practice in international law, and thus can not be accepted blindly.[13]

Almost every transnational case will implicate one or more *treaties* or international agreements. The advocate must make sure the Court is briefed on all relevant international agreements to which the U.S. is a party. In *Pain v. United Technologies Corp.*,[14] determining whether the district judge had correctly decided the *forum non conveniens* motion required an understanding of the Hague Convention on Taking Evidence Abroad,[15] which no party had briefed or discussed at oral argument.

The parties should not fail to consider the extra dimension of legal issues created by the intersection of public and private law: specifically, *the effect of public treaties on private rights*. In some cases this interconnection is well explained. For example, in *Collins v. Weinberger*,[16] which concerned discrimination against American Army employees overseas, the effect of applicable treaties and executive agreements was thoroughly briefed. However, there are many other cases in which the relationship between public treaties and private rights has been ignored.

Finally, the attorney should seriously consider the availability and desirability of *executive guidance* on treaty interpretation or other litigation issues. In *Sumitomo Shoji America v. Avagliano*,[17] the Supreme Court had to determine whether the U.S.-Japan Treaty of Friendship, Commerce and Navigation[18] provided an exemption for wholly owned American subsidiaries of Japanese corporations from Title VII discrimination laws. The Court was greatly aided in reaching its conclusion that the treaty did *not* confer such an exemption by the submissions of interest of the Japanese government (a diplomatic cable) and the U.S. government (an amicus brief), which both suggested that the treaty did not exempt Japanese owned American subsidiaries.[19]

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[13]*See, e.g.*, Laker Airways Ltd. v. Sabena, Belgian World Airways, slip op. 75–85 (6 March 1984 D.C. Cir.); Robinson, *Expropriation in the Restatement (Revised)*, 78 AM. J. INT'L L. 176 (1984).

[14]637 F.2d 775 (D.C. Cir. 1980).

[15]Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, entered into force for the United States 7 Oct. 1972, 23 U.S.T. 2555, T.I.A.S. No. 7444.

[16]707 F.2d 1518 (D.C. Cir. 1983).

[17]102 S. Ct. 2374 (1983).

[18]Entered into force 30 Oct. 1953, 4 U.S.T. 2063; T.I.A.S. No. 2863.

[19]Sumitomo Shoji America v. Avagliano, 102 S. Ct. 2374, 2379 (1983).

Our own court also relies heavily on executive interpretation of treaties. Compare *Sumitomo* with *Mendaro v. World Bank*,[20] in which the District of Columbia Circuit interpreted the treaty establishing the World Bank as *conferring* immunity on the Bank from a Title VII action brought by a former employee working in the United States. The court was guided in this decision by a consistent line of Executive Branch treaty interpretations reaching the same result.

### F. Arguing the Case

Once all of the issues have been thoroughly organized and briefed, the advocate should try to simplify the case at oral argument to *highlight the core issues*. It is even more important here than in the usual case to take special pains to separate the forest from the trees. Very often a judge cannot fully appreciate the importance of a transnational case—even if the judge fully understands the technical legal issues—if the judge does not have a general sense of *why* the case arouses international concern. Counsel must be prepared to identify all important U.S. and foreign interests. It is also crucial to show how these can be accommodated or reconciled under the disposition advocated.

If a transnational case involves a *clash of regulatory philosophies* between two countries, like the *Laker* or *Nylon Spinners*[21] cases, this point should be made clear at oral argument. If there is in fact no real conflict between the regulatory philosophies, and the jurisdictional assertions of two nations can somehow be reconciled, that fact, too, should be brought home. If the private party is charging that the U.S. has been too aggressive in asserting extraterritorial jurisdiction, the point can be illustrated by positing hypothetical cases in which the shoe is on the other foot.

While presenting the case, and during the course of argument, the thorough advocate will not fail to pursue *remedies available in other branches* of government. Counsel may be able to get affirmative assistance from the U.S. executive branch. During my tenure as Assistant Attorney General in the Criminal Division, the Department of Justice was prepared to actively assist requests for extradition to foreign countries, depending upon the wording of the particular bilateral treaty involved. However, if no request was made for this assistance, then the Department of Justice was unaware of the need for it and unable to fulfill its treaty obligations as vigorously as it might otherwise have done.

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[20]717 F.2d 610 (D.C. Cir. 1983).

[21]United States v. Imperial Chemical Industry, Ltd., 105 F. Supp. 215 (S.D.N.Y. 1952); United States v. Imperial Chemical Industries, Ltd., 100 F. Supp. 504 (S.D.N.Y. 1951); British Nylon Spinners, Ltd. v. Imperial Chemical Industries, Ltd. [1955] 1 Ch. 37; British Nylon Spinners, Ltd. v. Imperial Chemical Industry, Ltd., [1953] 1 Ch. 19.

Aside from affirmative assistance in the litigation, the executive branch may aid in reaching an alternative remedy through diplomatic negotiation or settlement. Contrast the following two decisions: In *Securities and Exchange Commission v. Banca della Svizzera Italiana*,[22] the court enforced a discovery request against a foreign party relying heavily (the court emphasized the point in BLOCK LETTERS) on the absence of any governmental suggestion—either U.S. or foreign—that the discovery would violate foreign interests or otherwise be unacceptable. The opposite result was reached in *United States v. County of Arlington, Virginia*.[23] In this case, after the U.S. District Court upheld a state county's suit against the German Democratic Republic for real property taxes on an apartment building owned by the German government for use by embassy staff and personnel, the German and United States governments negotiated and concluded an agreement exempting the property from taxation. The United States then instituted litigation assuring the exemption of the property from the date of the agreement forward, and collaterally attacked the previous adjudication of the tax status of the property prior to the agreement, which was left for retrial. Clearly, by conducting negotiations and concluding an agreement with the executive branch, the foreign defendant was able to obtain significant relief which the court would otherwise have been unlikely to grant.

### G. Postargument Responsibilities

After organizing, presenting, and arguing the transnational case, the lawyer may think his responsibilities concluded. However, the court's job is only now beginning—and the vigilant attorney should never rest until the judgment has been issued and confirmed.

After oral argument, the judge must collect, organize, sift, and analyze the information and evidence submitted to the court; the court must then decide the case and issue an opinion. This process may take only a few days or several months, depending upon the urgency of the case, the complexity of the legal and factual issues, the number of judges assigned to adjudicate the issue, and the extent of agreement or disagreement among those judges. During that period, things change. New facts may be unearthed. New foreign and domestic legislation may be passed. Executive orders may take effect. Administrative agencies may interject themselves into the controversy. Foreign judicial proceedings may be terminated or commenced.

Counsel must advise the court spontaneously, promptly, and thoroughly whenever any significant changes in the status quo occur. In my own recent experience on the bench, I have encountered important postargument

[22]92 F.R.D. 111 (S.D.N.Y. 1982)
[23]669 F.2d 925 (4th Cir. 1982)

developments in each of these areas: the factual basis of the claims, the applicable foreign law, and the status of foreign proceedings. For example, in one case dealing with the act of state doctrine, the facts changed after argument when the foreign government, not a direct party to the litigation, issued an expropriatory decree. The court relied on counsel to bring this changed circumstance to their attention. Similarly, in *St. Gobain*, after the case was submitted, the Federal Trade Commission Improvements Act of 1980[24] modified the FTC Act to make it clear that Congress intended the FTC to be able to serve some types of civil investigative demands overseas, even in the face of contrary international law. Yet the judges' law clerks, not counsel, brought this new Act to the Court's attention.

In other situations changes may occur in the status of pending foreign proceedings. In *Laker*, English judicial and administrative proceedings occurred simultaneously with American judicial proceedings. This required extensive coordination. Counsel did as effective a job as was possible, especially since they were hampered by restrictive executive orders issued by the British Government and injunctions imposed by the English courts. After argument in *Laker*, new developments in the English executive's interpretation of the orders issued under the Protection of Trading Interests Act were brought to the court's attention by counsel. They were relevant to the amount of ongoing English interference with the U.S. litigation and thus to the degree of comity that our courts were able to extend to the foreign proceedings.

Counsel must be diligent in discovering and reporting these changes in the facts, law, and status of other proceedings. Only in this way can the parties be assured of a decision issued on the most current state of information.

## III. Conclusion

I hope these comments have provided an added perspective on the process of transnational litigation. Two final points deserve emphasis.

The first is a general one which all corporate counsel know to follow: keep your client out of court. Anticipate trouble. Look after the details and the major problems will look after themselves. The court cannot help but look more favorably upon a party which has not contributed to its own legal problems, and has made every effort to avoid disruptive litigation. And of course, that party is probably in the stronger legal position. Do not be like the legendary attorney trying a protracted transnational case in a distant forum, who, when the trial was complete, telegraphed the senior partner at

[24]*See* 15 U.S.C. § 57b-1(c)(6)(B) (1982); FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1325 n.140 (D.C. Cir. 1980).

the home office that "justice has triumphed," causing the senior partner to wire back "appeal immediately"!

Second, most of the techniques for conducting transnational litigation advanced here are really nothing more than the same common sense principles which should be followed by good lawyers in any litigation, whether purely domestic or transnational. However, because litigation with a transnational character frequently involves great expense, complex interrelated questions of domestic and international law, and difficult-to-obtain sources of precedent with which most judges do not deal every day, there is a greater risk of error when an advocate litigates the transnational case. Reference to works which contain both primary and secondary domestic and foreign sources[25] will significantly aid counsel in reducing the errors of the courts.

Moreover, transnational litigation often corrals the conflicting competing interests of nations within the walls of a single courtroom; it focuses the attention of the affected nations—and even the world—on the events occurring within the court. By exercising their utmost diligence and skill in representing parties to transnational litigation, lawyers substantially aid an efficient and just disposition. This can only help increase international respect for the role of courts in resolving transnational disputes, and promote the acceptance of judicial processes and the rule of law.

Generally, my experience gained on the bench and as an occasional participant at seminars on transnational litigation confirms my view that the increasing expertise of lawyers in the transnational field augers well for the future of transnational litigation as a device for conflict accommodation and interest reconciliation. Members of the growing transnational bar are generally an extremely talented group of lawyers who already follow most of the suggestions advanced herein. I hope all actors in the process of transnational litigation—courts, counsel, government officials, and others—will listen to and assimilate the insights offered by their fellow participants in this process. By so doing, they will further refine and strengthen the role of adjudication in the settlement of transnational disputes.

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[25]*See, E.g.*, AMERICAN BAR ASS'N NAT'L INST., I-III TRANSNATIONAL LITIGATION: PRACTICAL APPROACHES TO CONFLICTS AND ACCOMMODATIONS (eds. J. Fedders, J. Harris, R. Olsen & B. Ristau 1984).