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Tackling International Law Issues in Appellate Cases

As globalization increases, lawyers in all fields of practice are dealing with legal matters that span across international borders. Appellate law is no exception. This article discusses the kinds of international legal issues that may arise in litigation and provides tips and resources for addressing those issues, particularly in appeals.

Types of International Law Issues That May Arise

Most lawyers need to research international law or the laws of a foreign nation at some point in their careers. The issues may arise in a wide variety of cases. For example, a personal injury lawyer may have a client who was injured in another country, and it must be determined what laws apply. A family lawyer might have a custody battle where the parents are in two different countries; which country can determine the custody issues? Or, a client may need to know the process for adopting a child overseas. Litigation involving parties or witnesses in different countries can also pose procedural challenges when serving parties, conducting discovery, and enforcing judgments. In short, knowledge of international or foreign law is often necessary.

Appellate lawyers deal primarily with three main areas of international law: treaties, conflict of laws, and comity. Treaties, often called “conventions,” are written international agreements between two or more countries that govern many different situations. Litigators commonly consult treaties such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (governing service of process of persons in other countries), or the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (relating to discovery of information in other countries). There are many other treaties covering a broad range of issues, from family law to the international sale of goods. Under the United States Constitution, treaties to which the United States is a party have the same force and effect as federal law. *See* U.S. Const., Art. VI, Cl. 2.

Conflict of laws issues arise in situations where there is a question about which country’s law governs the dispute. In tort cases, this issue may arise where the injury occurred in another country, or where a party is a foreign national. Contract disputes might require determining which law governs interpretation of the contract where the parties are from different countries, or where the contract involves cross-border transactions. Other examples include divorce cases where the marital property is located in a foreign country, or employment issues where a domestic corporation hires foreign employees.

International conflict of laws issues are generally treated the same way as domestic cases where the laws of different states are at issue. California uses the “governmental interest

analysis” test, which requires the court to 1) examine whether the laws of the two nations are materially different; 2) determine what interest each nation has in applying its own law; and 3) select the law of the country whose interests would be more impaired if its law were not applied. *Washington Mutual Bank, F.A. v. Superior Court*, 24 Cal.4th 906, 919-920 (2001). (Note that Civil Code § 1646 addresses choice of law issues in contract cases). The main difference between domestic and international conflicts issues is that researching foreign law can be far more challenging than researching the law of another state.

The final category, comity, is a common law doctrine that goes back more than 100 years in our jurisprudence. See *Hilton v. Guyot*, 159 U.S. 113 (1895). Comity refers to “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws.” *Id.* at 164. Comity arises in three different contexts. The first is where the parties have competing cases pending in different countries (or the ability to proceed with litigation in another country), and the domestic court must consider whether to abstain from deciding the case. See *Diorinou v. Mezitis*, 237 F.3d 133, 139 (2d Cir. 2001). The second situation involves enforcement of a foreign judgment. *Id.* The final situation arises where the court must consider “whether to accept the adjudication of a foreign tribunal on a cause of action on a particular issue.” *Id.*

Tips and Resources

Addressing international legal issues in an appeal can be challenging. The first step is to understand what type of issue is presented: is there a governing treaty, is there a conflict of laws issue, or do the principles of comity apply?

Treaties. There are many resources for locating treaties. The Hague Conference on Private International Law’s website, http://www.hcch.net/index_en.php, provides extensive information about all of the different Hague Conventions, including the text of the treaties, lists of member states, status charts, and reports. The State Department also maintains detailed information about treaties on its website: <http://www.state.gov/s/l/treaty/>. Other resources for locating treaties include portal sites including the Electronic Information System for International Law developed by the American Society of International Law, <http://eisil.org/>; and GlobaLex, a website devoted to international and foreign law research published by NYU School of Law, <http://www.nyulawglobal.org/globalex/>. Treaties are also published in print sources, such as United States Statutes at Large (Stat.), United States Treaties and Other International Agreements (U.S.T.) and Treaties and Other Acts Series (T.I.A.S.).

To determine if the treaty is currently in force and to identify which countries are bound by the treaty, a good resource is Treaties in Force, prepared by the State Department. The electronic edition can be found at <http://www.state.gov/s/l/treaty/treaties/2009/index.htm>.

Treaties in Force provides a list of treaties currently in effect and citations to print sources. Treaties are organized by country and by subject.

Finally, case law and secondary sources are helpful for interpreting treaties or applying their terms to particular situations. There are many reported federal and state decisions addressing particular treaties. Law reviews and other secondary sources may also provide additional insights about a particular treaty. They may also help form policy arguments to support a client's position in an appeal.

Conflicts of Law. When researching foreign law, locating and understanding the foreign law can be challenging. A good resource to start with is the Library of Congress, which has a Guide to Law Online containing links to numerous sources of foreign law: <http://www.loc.gov/law/help/guide.php>. It may be necessary to obtain translation services if the information is not available in English.

Also, consider the type of legal system involved. In civil law countries, for example, prior case law is not considered binding precedent, unlike in our common law system. The primary source of law is legislation, not case law. Other countries follow Islamic law, which is based in part on religious considerations.

Finally, in these situations, counsel should consider advising a client to hire legal counsel in the other country as well. Most domestic lawyers are not experts on foreign law. It is important to make sure the client is aware of these limitations.

Comity. When dealing with a situation involving the doctrine of comity, first determine what type of situation is presented (abstention, enforcement of a judgment, or recognition of a foreign tribunal's adjudication on a cause of action). There are many federal and state cases addressing the doctrine. The Restatement (Third) of Foreign Relations Law is also a great secondary resource on comity issues.

Note that the standard of review on appeal is different depending on which type of comity applies. In the first situation (abstention), the standard of review is generally abuse of discretion, a difficult standard for appellants. *See Diorinou*, 237 F.3d at 139. The standard of review for the other two situations is usually *de novo*, a more favorable standard for appellants. *Id.* at 139-140. The type of comity, therefore, can have a significant effect on an appellant's chances of success.

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