INTERNATIONAL COMMERCIAL LITIGATION

SECOND EDITION

RICHARD FENTIMAN

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For Alicia

FOREWORD TO THE FIRST EDITION

Richard Fentiman has combined scholarly analysis and practicality in a formidable new work on international commercial litigation. Since Lord Mansfield's day, such litigation has been a core area of English legal activity, shaping much of our substantive law of contract. However, as practitioners and clients know, the enforcement of rights and a satisfactory outcome to disputes often depend more on the forum in which they are resolved than on substantive law.

Hence, the remarkable prevalence of jurisdictional disputes in the English Commercial Court, over recent decades. *Ubi jus, ibi remedium* might, for a practitioner, read *ubi remedium, ibi jus*. Disputes often settle without difficulty, once parties know the forum where they will be decided (or - since putting off the evil hour can be a reason for invoking particular jurisdictions - not decided). The European Community's valiant attempt in the Brussels Regulation and Lugano Convention to produce a simple and 'certain' scheme eliminating or resolving all jurisdictional issues has led to a body of jurisprudence sometimes adding to the scope for procedural manoeuvring. Some aspects of the Regulation are happily under review by the European Commission, as the book explains.

The insight guiding Richard Fentiman's excellent book is that parties to international commercial transactions need to know how private international law addresses the legal risks involved in their transactions. They wish to eliminate the risks of uncertainty and of an unfavourable outcome. To do this, they must address both litigational risks (e.g. where litigation will occur) and substantive transactional risks (how far their legitimate expectations may be undermined by unforeseen legal principles or obstacles wherever litigation does occur).

This insight dictates the content and order of the book. After detailing the relevant legal risks, it sets out schematically to discuss the principles governing choice of law, choice of forum and jurisdiction, procedural risks, pre-emptive proceedings, anti-suit injunctions, interim measures, remedies, and enforcement. Throughout, the text contains both a full review of domestic and, where relevant, European Court of Justice authority, with footnote references to a wide range of secondary and academic material, including overseas sources. It is enriched by passages which, after stating the current legal position, invite consideration of the possibility that, on some points, the law may or should change direction in the future.

The book will be of great value - to practitioners and clients seeking to address these risks in advance of entering into transactions, and to those seeking to understand and resolve issues arising out of transactions already concluded. It is a pleasure to read and commend it and to congratulate Richard Fentiman on a very substantial achievement.

Jonathan Mance
Justice of the Supreme Court of the United Kingdom

PREFACE

Nothing since the first edition of this book has diminished the intellectual interest and practical importance of its themes. Economic recession triggered a stream of cross-border cases in the English courts, ensuring the significance and vitality of the law governing such disputes, even if the anticipated deluge of claims never materialized. The revolution in English law's approach to multistate litigation, begun three decades ago, has been further consolidated, as the courts continue in particular to explore the frontiers of transnational injunctive relief and hone their adjudicatory discretion. The courts have further refined these technologies, building on the principles established in the landmark decisions in *Spiliada, Aérospatiale, Airbus, Babanaft, Donohue,* and *Credit Suisse.* So too, the parallel, if starkly contrasting, evolution of European private international law, embodied in the corpus of regulations on jurisdiction, evidence, service, and choice of law, has continued apace, with the reworking of the Brussels jurisdiction regulation at its heart. And, all the while, the tension between the national and EU projects, with their radically different assumptions and contested frontier, has continued as a recurring leitmotif in the cases and commentary. Against this background, international commercial litigation remains a subject uniquely engaging in its combination of intense practicality, concerning the tactics and micro-economics of litigation, and conceptual fascination, involving the most intricate and challenging problems of private international law.

Like its predecessor, this edition is concerned with the high-value, multi-venue disputes which characterize the business of the English Commercial Court (and sometimes the Chancery Division), and with the rules of private international law and international civil procedure applicable in such cases. This second edition is markedly different, however, from the first. It has been possible to expand considerably the discussion of jurisdiction agreements in Chapter 2, and transnational injunctions in Chapters 16 and 17, reflecting the central importance of those topics. Chapter 2 especially has been augmented to consider such matters as the effectiveness of asymmetric jurisdiction agreements, the award of damages for breach of jurisdiction agreements, and the effect of such agreements on third parties. Chapters 16 and 17 now include enhanced consideration of the jurisdictional basis of cross-border injunctive relief, and the moderating effect of comity in such cases. New sections have also been introduced addressing, in Chapters 6 and 19, the important ways in which the award of interest, the currency of judgment, and the assessment of costs, affect the value of recovery, and the economics of cross-border litigation. The modalities of effecting service and obtaining evidence abroad also receive expanded treatment (in Chapters 8 and 19), acknowledging the practical importance of those matters, and the perhaps surprisingly profound issues of principle which they generate.

More significantly, the law has changed much in the lifetime of the first edition, leaving little in the following chapters unaffected. Most obviously, the activation of the recast Brussels Regulation on 10 January 2015 has required much additional discussion. Similarly, the European Commission's proposal to approve the Hague Convention on choice of court agreements (not implemented at the time of writing) has demanded the addition of much new material. The amendments to the Regulation are in places significant, by offering a

solution (although merely partial) to the notorious *Gasser* problem, and by determining finally which law governs the validity of jurisdiction agreements. But such changes are incremental, stopping short of the wholesale abolition of national rules of jurisdiction that was predicted. Nor will the Hague Convention have the practical effect that its promoters might wish, when it comes into force. Engaged only in connection with bilateral, exclusive jurisdiction agreements designating the courts of Contracting States, its immediate importance should not be exaggerated. Nonetheless, the changes effected by the recast Regulation are in some respects highly significant, and may spawn much litigation. Most importantly, perhaps, the operation of the new regime regulating parallel proceedings in EU and third states remains unclear, as does its impact on national law, matters addressed in Chapter 12. It is equally uncertain how the enhanced insulation of arbitration from the Regulation affects the possible restraint of proceedings in EU states in breach of arbitration agreements, a debate considered in Chapter 16. It is possible that national law survives in some cases at least concerning alternative proceedings in non-EU states, and that anti-suit injunctions may again be deployed within the EU in defence of arbitration agreements. As this suggests, the recast regulation has far from quieted old debates surrounding such *causes célèbres* as *Owusu* and *West Tankers*.

The advent of the recast Regulation, and the likelihood that the Hague Convention will enter into force, dictate the organization of much of what follows. The Regulation will apply from 10 January 2015 to all commercial proceedings initiated, and to judgments obtained, after that date. Where appropriate, the primary discussion centres on the recast Regulation, but consideration is also given to those cases which might yet come to court concerning earlier proceedings and judgments. Separate reference is also made to cases subject to the 2007 Lugano Convention, whose provisions track those of the superseded Brussels I Regulation, but differ from those of Brussels I bis. Again, although at the time of writing the 2005 Hague Convention is not in force, the following discussion anticipates its implementation, and describes its operation in detail. Distinct but related questions concern the treatment of the 1980 Rome Convention on the law applicable to contractual obligations, in the light of the subsequent Rome I regulation, and of the Private International (Miscellaneous Provisions) Act 1995, now superseded by the Rome II regulation on the law applicable to non-contractual obligations. Primacy in the following pages is inevitably given to the Rome I regulation, governing contracts concluded after 17 December 2009, and the Rome II regulation, regulating non-contractual damage occurring after 11 January 2009. Although wasting assets, both the 1980 Convention, and the 1995 Act remain of some importance, however, the former because many pre-Rome I, long-term contracts continue to subsist, the latter because of numerous late-blooming, pre-Rome II mis-selling claims arising in the wake of the recession. Both are briefly considered where appropriate.

Numerous judicial decisions since 2010 have also expanded, and sometimes clouded, our understanding of the law, many of them important, some of them intriguing, and a few of them frustrating. They have addressed a range of practically important and conceptually challenging issues. These include (non-exclusively) such matters as the effectiveness of asymmetric jurisdiction agreements, the legitimacy of awarding damages against a counterparty for suing in an EU state in breach of a jurisdiction agreement, the growing issue of third parties in commercial disputes (as co-defendants, as silent parties to jurisdiction agreements, as repositories of a defendant's assets), the regulation of parallel proceedings in the EU, the reflexive effect of the EU jurisdiction regime, the legitimate scope of

transnational injunctive relief, and the proper approach to *forum conveniens* applications. In addition to decisions in the higher courts, many at first instance have added texture to the law, and demonstrate the attitudes and assumptions of the courts. Such decisions at the trial stage are of central importance, insofar as a proper understanding of the law requires not merely a grasp of doctrine, but of the ethnography of judicial practice. The volume of judicial decisions at all levels, driven by the ingenuity of lawyers, and the considerable sums at stake in commercial disputes, means that no account of the subject can remain definitive for long. The current edition seeks to present the law as it appeared on 1 October 2014.

Not all change, however, is unforeseeable, and it is possible to speculate on how the law may evolve even in this edition's lifetime. Three recent developments, in particular, may presage fundamental change in future. Discussion continues surrounding the possibility of a 'Rome 0' regulation, addressing those interstitial aspects of private international law not addressed in the existing Rome instruments, a debate given focus by the European Parliament's 2012 study, *A European Framework for Private International Law*. Controversially, any such development would doubtless involve a harmonized approach to the application of foreign law in EU national courts, an area of considerable practical importance, considered in Chapter 20, where English law's approach remains distinctive in a European context. More significantly, perhaps, in March 2014 the European Parliament's Legal Affairs Committee published its report on the *Possibility and Terms for Applying Brussels I Regulation (Recast) to Extra-EU Disputes*, advocating the extension of the rules of the Brussels jurisdiction regime to defendants domiciled in third states. Such a revival of the scheme to abolish national rules of jurisdiction entirely is a reminder that the decision to abstain from doing so in the recast Brussels Regulation was intended by some as merely a temporary reprieve. Were the traditional English approach abolished, founded on service, and the comfortingly lapidary *Spiliada* principles, the conduct of transnational disputes in the English courts would be transformed, a matter considered in Chapter 1.

Surprisingly, however, recent events suggest that change may come more immediately from a domestic source. In several recent decisions the English courts have disparaged the scale of interlocutory proceedings in international commercial disputes, a position notably endorsed by Lord Neuberger in *VTB v Nutritek*, but evident also in cases concerning the assessment of costs, exemplified by *Vitol v Nasdec* (considered in Chapter 19). They have deployed their enhanced powers to case-manage disputes, and prevent the recovery of excessive costs, as a disincentive to adversarial profligacy. Superficially, the avoidance of disproportionately complex and costly litigation is hardly controversial. But it may have serious consequences, perhaps unintended, for international commercial disputes in the English courts. Such disputes are invariably interlocutory, mainly concerning jurisdiction and injunctive relief, yet are hard-fought, with little expense spared. They proceed on the (correct) assumption that the result in such proceedings will determine the final outcome of the dispute, by prompting settlement or capitulation. Many judges may conclude that the scale and cost of such disputes is justified, given their importance, but others may assume that such complexity and expense is inherently disproportionate, given that such proceedings are interlocutory. Which view will prevail has important consequences for the shape of international commercial litigation in the English courts. It is not impossible that the near future will see a move away from the existing model of substantial interlocutory contests, in disputes which seldom proceed to trial on the merits, to a model, evident already in cases subject to the EU regime, with its emphasis on substantive disputes on issues of liability.

Although much has changed, this edition rests on the same assumptions as the first, and adopts the same perspective. Reflecting the reality of commercial litigation in the English courts, it has at its core the interlocutory disputes which dominate such cases, in particular those concerning jurisdiction, pre-emptive measures, and injunctive relief. Such matters are treated at length in Chapters 4–17. Given that such litigation very often (although not invariably) revolves around the effect of contractual jurisdiction agreements Chapter 2 is devoted to the management of jurisdictional disputes by prior agreement. The focus of international commercial disputes on issues of jurisdiction and injunctive relief does not entail, however, that other elements in the law of international civil procedure and private international law are of no importance. The trigger for any dispute is a contest about liability, and no litigant proceeds without formulating (and assessing) its substantive claim or defence. The intended outcome on the merits may also dictate the choice of forum, especially if a counterparty seeks to invoke local law to defeat an otherwise enforceable contract, and the strength of a claimant's case may have a direct bearing (in English law) on whether a claim may be served outside the jurisdiction. So too, such matters as the future enforceability of any judgment, the recovery of costs, the obtaining of evidence, and the mechanisms for applying foreign law, may significantly affect the parties' approach to proceedings. Any treatment of international commercial litigation must address, therefore, the legal framework of substantive disputes, their evidential infrastructure, and issues of enforcement, matters considered in Chapters 3–6, and 18–20.

Such matters give rise to important and sometimes challenging legal issues. The treatment of those issues, and the arrangement of the following chapters, is not, however, merely technical. It is intended to place them squarely in their practical and commercial context. In particular, the law must be seen in the light of three related considerations. First, the law's practical role is to supply the framework for the strategic choices of litigants and their advisers, matters addressed in Chapter 7. The rules of international civil procedure and private international law are not ends in themselves, but supply the levers, and the idioms, whereby litigants may seek advantage, especially in the matter of venue. Second, the purpose of litigation is settlement. No claimant claims, and no defendant defends, without thought of the final outcome, if only in the minimal sense that a claim or defence must be drafted, but nor do lawyers expect major commercial disputes to go to judgment, or even to a trial on the merits. The litigation process is the vehicle for compromise or capitulation. Third, commercial litigation is an investment. To paraphrase Clausewitz, it is a continuation of commerce by other means. Opting to sue or defend is a business decision, with attendant risks and opportunities, affecting each party's balance sheet, and their commercial reputation. It is not an end in itself, or a matter of vindicating legal rights for their own sake.

The reality that litigation is not an autonomous process, divorced from its commercial context, explains why litigants view such disputes in terms of risk, a perspective shared in this book, and developed in Chapter 1. The risks associated with litigation are both procedural, concerning the conduct of proceedings, and substantive, concerning the parties' rights and liabilities. The procedural risks involved concern especially the risk that proceedings will occur in a hostile or inappropriate venue, and the risk that any judgment will be unenforceable where the defendant's assets are located. These occupy much of this book, but issues of liability remain the fulcrum of any dispute. Transaction risk, the risk that a contractual agreement will be legally or practically unenforceable is the ultimate risk in any commercial proceedings, and is the subject of Chapters 3–6.

If, however, the law governing commercial disputes must be viewed in terms of the risks associated with litigation, so those risks must in turn be located in a wider commercial context. The procedural and substantive risks associated with litigation generate cost and uncertainty, but such risks do not become important only when only they crystallize in court proceedings. Such risks matter because they may influence the price of transactions, and possibly the willingness of businesses to contract at all. This is not to say, however, that the law governing multistate disputes concerns merely the risk associated with particular disputes, and particular transactions. Such risk is also systemic risk, concerning how the threat to transactions from litigation affects markets, by increasing transaction costs and guiding market practice. This is then a book for litigators, concerning the regulation of multistate disputes, and the associated risks. But in so far as the legal risk to any transaction crystallizes only in the event of litigation, it is a book for transaction lawyers too.

If the scope and assumptions of this edition remain unaltered, so the debts acknowledged in the first edition still stand. Not least, this is as much the offspring of the Cambridge LLM course on International Commercial Litigation as its predecessor. It owes much to the constant testing of ideas in lectures and workshops, before an audience invariably informed and enthusiastic, if sometimes properly sceptical. I have also been able to experiment safely with some of the ideas that appear in the following pages (and some, wisely, that do not) because of invitations to speak extended by the University of Cyprus, the Australian and New Zealand Society of International Law, the International Law Association Australian Branch, Griffith University, the University of Zagreb, 2 Temple Gardens, and the Hague Academy of International Law. Many friends and colleagues have also shared their knowledge and insight, making this a better book. I must especially thank Karen Birch, Sarah Garvey, Nikitas Hatzimihail, Thomas John, Adam Johnson, Mary Keyes, Marie Louise Kinsler, Campbell McLachlan, James McComish, Louise Merrett, Arnaud Nuyts, Oliver Parker, Jason Rix, Pippa Rogerson, and Philip Wood.

As always, however, the roots of any academic effort are as much domestic as professional. My wife Alicia has borne over-exposure to the niceties of cross-border litigation with fortitude, and is truly the silent partner in this endeavour.

Richard Fentiman
Cambridge
1 October 2014

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