INTERNATIONAL COMMERCIAL LITIGATION

RICHARD FENTIMAN

OXFORD

INTERNATIONAL COMMERCIAL LITIGATION

RICHARD FENTIMAN
Reader in Private International Law, University of Cambridge, Fellow of Queens' College, Cambridge
Solicitor

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS
Great Clarendon Street, Oxford OX2 6DP
Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in
Oxford New York
Auckland Cape Town Dar es Salaam Hong Kong Karachi
Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi Shanghai Taipei Toronto
With offices in
Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary Italy Japan Poland Portugal Singapore
South Korea Switzerland Thailand Turkey Ukraine Vietnam
Oxford is a registered trade mark of Oxford University Press
in the UK and in certain other countries
Published in the United States
by Oxford University Press Inc., New York

First published 2010

British Library Cataloguing in Publication Data
Data available
Library of Congress Cataloging-in-Publication Data
Data available
Typeset by Glyph International, Bangalore, India
Printed by CPI Antony Rowe
ISBN 978–0–19–926543–5
1 3 5 7 9 10 8 6 4 2

FOREWORD

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 (witness the discussion on assignment at paras 4.200 et seq).

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

It is usual for authors to offer some excuse for their efforts. But none is needed for writing this book. The last two decades have seen a revolution in the way that international commercial disputes are treated in the English courts, marked by a series of decisions of extraordinary creativity and importance. The result is a body of law at once remarkable in its intellectual rigour, and impressive in its practicality, which balances with considerable skill the competing demands of efficiency, justice, and comity. In a cluster of landmark decisions—*Spiliada v Cansulex, Aérospatiale v Lee Kui Jak, Airbus v Patel, Babanaft v Bassatne, Donohue v Armco, Credit Suisse v Cuoghi* are but examples—the higher courts have tapped the resources of adjudicatory discretion and equitable relief to create a new technology for handling the complexities of multistate litigation. In others—*Raiffeisen Zentralbank v Five Star Trading* and *Morgan Grenfell v SACE* are but two—they have sought to modernise some familiar components in the choice of law process. In numerous other cases the judges of the Commercial Court have calibrated the tools issued to them with equally impressive acuity and practical acumen. Underlying this renaissance in private international law is a powerful theory of what counts as the appropriate forum in cross-border disputes, a sure feel for commercial reality, and a strong sense of right conduct in litigation.

If this were all, the subject would warrant the closest scrutiny. But this creative effort by the English courts has coincided with another revolution, no less dramatic, but incongruously different. January 1987 saw the coming into force in England of the 1968 Brussels Convention on jurisdiction and the enforcement in civil and commercial matters, and the beginnings of a quite different approach to commercial litigation in Europe. The Brussels I, Rome I, and Rome II Regulations are the culmination of this process. This development is important in itself, as an ambitious attempt to create a 'federal' conflicts regime (of a kind not attempted even in the United States), and has spawned numerous fascinating issues of practical and theoretical importance. It has also placed English courts and commentators in a unique and enviable (if sometimes uncomfortable) position at the intersection of two contrasting and at times conflicting projects, each evolving, and occasionally colliding. English private international law has become perforce comparative law, and the tension between the indigenous and European regimes has come to supply the subject with its principal narrative. The determination of the Court of Justice to bend this emergent national regime to the requirements of Community law has also given the subject some landmark cases—*Turner v Grovit,*

Owusu v Jackson, *Allianz v West Tankers*—and its most frustrating moments. Further change, and controversy, is promised by current discussions about the future of the Brussels I Regulation, ensuring the subject's buoyancy in years to come.

For an author, however, the vitality of the subject is bane as much as boon. I have attempted to state the law as it seemed to me on 1 October 2009. And it has been possible to address some later developments, notably the important decision of the Court of Justice in *ICF (Intercontainer Interfrigo) SC v Balkenende Oosthuizen BV*. But the ingenuity of lawyers and the courts means inevitably that the law will not have stood still since, making what follows at best a snapshot at that date—though still I hope a true likeness.

If no excuse is warranted for this book, more explanation is needed for the way it treats its subject. Its scope is familiar. It is concerned with high-value, multi-venue disputes originating in the English Commercial Court, and with the rules of private international law and international civil procedure which regulate such cases. But the handling of the material is particularly guided by several considerations. Three concern the form of the analysis. First, however practical the subject, its conceptual structure must be discerned. It is of the first importance to excavate the framework of principle which shapes the law and defines its possibilities. This is especially so in an area of law which is still evolving, as litigants probe its conceptual limits. It is important when so much depends on the exercise of discretion—discretion entails choice, but a choice that must always be principled. And it is particularly necessary given that the judicial revolution in this area depends so much on the English courts' distinctive (and limited) view of access to justice and international comity—a position which must be clearly stated if it is to be defended. Second, the relevant principles are not merely those articulated by the higher courts. The law in this area has progressed from the landmark cases which define it, and is refined daily in the Commercial Court. What is required is an explication of the numerous decisions at first instance which explore its implications. Third, although what follows is intended to be comprehensive in its coverage, matters of particular practical importance are given special emphasis. For this reason, for example, the extent to which the parties to multistate transactions may reduce legal risk by employing jurisdiction and governing law clauses is considered separately and at length in Chapters 2 and 3. Similarly, the troublesome implications of the decisions in *Owusu v Jackson*, *Erich Gasser GmbH v MISAT*, and *Allianz v West Tankers*, receive extended treatment.

The shape of what follows is also informed by considerations concerning the practical context and wider significance of international commercial disputes:

First, even the most attractive legal solution may be commercially unrealistic. Consider, for example, the risk that an agile counterparty might immobilise a

jurisdiction agreement in favour of the courts of one Member State by suing in another such State—the problem notoriously revealed in *Gasser*. The danger disappears if the potentially wrong-footed party sues first in the named court. But this apparently obvious precaution is unrealistic if the potential claimant hopes to preserve its commercial relationship with the counterparty, and foolhardy if the effect is to trigger the counterparty's insolvency. Again, much attention is now focused on the extent to which breach of a jurisdiction agreement may be penalised by an action in damages, or by enforcing a counterparty's contractual promise to indemnify the innocent party for any resulting loss. Such solutions are theoretically attractive, and comforting. But such rights are only effective if enforced, and few commercial parties will think that the answer to abusive proceedings lies in yet more litigation.

Second, the law must be seen in the light of the strategic choices of litigants and their advisers, especially in the matter of forum selection. The rules of jurisdiction, procedure and choice of law, inherently fascinating as they are, are not ends in themselves, but a guide to choosing the most appropriate forum. The elemental distinction between substance and procedure, for example, matters in practice because it indicates which matters will be governed by the law of the forum, and controls their choice of venue.

Third, 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. Litigation provides the legal framework, and the technical levers, which prompt compromise or capitulation. The outcome of any jurisdictional dispute, in so far as it identifies the venue for proceedings, is likely to crystallize the parties' strengths and weaknesses, and frame a negotiated solution. So too, whether a claimant can be assured of effective enforcement of any judgment, often by securing a freezing injunction, is often decisive.

Fourth, international commercial disputes are almost invariably interlocutory, concerning the two principal matters in any multistate dispute—venue, and the preservation of assets pending judgment. Such disputes are likely to be hard fought, because their outcome is invariably decisive. But their effect is normally to prompt settlement, so ensuring that few disputes migrate to a trial on the merits.

Fifth, opting to litigate is an investment decision, 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. Whether to sue or defend, where to do so, and how to conduct proceedings, are issues which require litigants to measure the outlay against the return.

Sixth (as this suggests), litigation is about risk assessment. The importance of the legal rules regulating international commercial disputes is not merely that they govern the resolution of disputes (invariably by settlement). They allow the parties to assess the risk of their actions. Indeed, the success of those rules depends primarily on how readily they permit the assessment of risk.

Seventh, litigation risk is a species of transaction risk. Litigation, especially litigation in an inappropriate forum, generates cost and uncertainty. But, like all risks, litigation risk does not signify only when it crystallizes. It matters because it affects the price of transactions, and even the readiness of the parties to contract at all. This is a book about the conduct of international commercial disputes—about jurisdiction, injunctive relief, remedies and enforcement. But it is also about how such matters affect the negotiation, drafting, and pricing of commercial contracts. It reflects as much the perspective of the transaction lawyer as the litigator.

Eighth, the law governing multistate disputes concerns not merely the risk associated with particular disputes, and particular transactions, but also systemic risk. It concerns how the threat to transactions from litigation affects the market, by increasing transaction costs and guiding the decision to lend or borrow, to buy or sell, to invest or not. This is in no sense a book about economics. It concerns legal principle and practice. But it is written in the knowledge that commercial litigation is not an end in itself, but has significant economic implications.

Causally, this book would not have happened but for the creativity of the English courts, in fashioning so worthy a subject of study, and it owes much to the Court of Justice for adding the spice of controversy. But I must declare, with gratitude, many other more immediate debts:

My editors at Oxford University Press have shown unswerving enthusiasm for this project, and remarkable forbearance at my attempts to reimagine the concept of the deadline. I am especially grateful to Chris Rycroft, who first championed the work, and to Luke Adams and Clódagh McAteer, who steered it to harbour.

Authorship is paradoxically both a solitary and a collective activity, and many others have contributed to what follows, perhaps unwittingly. I need to register first my debt to the late Arthur von Mehren of Harvard Law School, master of academic reflection on matters of jurisdiction, for his support over the years, for his faith in this book when it first took shape, and for the example of his scholarship. I am also grateful to other colleagues and friends with whom I have discussed aspects of the subject, or who have commented on my views, or provided information, or who have suggested (or discouraged) lines of enquiry. In Cambridge I must thank John Collier, Louise Merrett, Alex Mills, and Pippa Rogerson, who have sparked or shaped many an idea, and witnessed tolerantly many an intellectual experiment. I am also grateful to Oliver Parker, who was

always ready with judicious insights into the realities of European harmonisation. I count it a compliment that these colleagues have sometimes disagreed with me, and absolve them entirely from any responsibility for what follows.

Such work is also labour-intensive, and I gratefully acknowledge the research assistance unstintingly provided by Jacqueline Vallat, and (as she has become) Professor Tanya Monestier (both late of the Cambridge course on International Commercial Litigation), and the support of the Squire Fund of the Cambridge University Faculty of Law which made their contribution possible.

This book also owes much to a long and fruitful association with Allen & Overy LLP. The quality of English law in this area comes as no surprise when its practitioners bring such intellectual rigour and commercial acuity to bear on the solution of practical problems. I owe a particular debt to Philip Wood QC, doyen of banking lawyers, and to Karen Birch, Sarah Garvey, Ed Murray, and John O'Conor. In similar vein, I have benefited greatly from my involvement with the Financial Markets Law Committee, whose influential work on the legal infrastructure of the London markets combines attention to legal principle with a firm grasp of commercial reality. I am grateful to my colleagues on its various working groups on aspects of private international law, and to the Committee's guiding hand, Joanna Perkins. The following pages take as their lodestar the assessment and management of legal risk, a theme they will find familiar.

My thoughts have been moulded by periods of sabbatical leave at Cornell Law School, and the Université Libre de Bruxelles. I am grateful to both for giving me the opportunity to view English law from a different perspective. I must especially thank the Faculty of Law at the ULB for inviting me to hold their Walter Ganshof van der Meersch chair in the academic year 2000–2001, and to the Weiner-Anspach Foundation, its sponsor. I must also acknowledge my colleagues in several studies funded by the European Commission in recent years, not least the 2005 Study on International Litigation in Europe and Relations with Third States. I am especially grateful to Arnaud Nuyts, prime mover in those projects, for many beneficial conversations.

I owe a very special debt to the Hague Academy of International Law for the singular honour of inviting me to deliver a course on 'The Appropriate Forum in International Litigation' in 2002. My work on those lectures has significantly shaped my thinking on the theoretical foundations of jurisdiction.

But the intellectual home of this book is Cambridge. Since 1993 the Cambridge LLM course on International Commercial Litigation has charted the progress of the subject, attempting to kneed it into academic shape, and state its principles. There is no better laboratory of ideas than the lecture or supervision, and I could not have wished for better collaborators than my students over the years in

the ICL course, and its sibling, the undergraduate course in the Conflict of Laws. This book is theirs in so many ways, a proprietary interest I gratefully acknowledge.

In the end, however, books are a family affair. To have an author loose in the house is a peculiar kind of intrusion. My debt to my wife Alicia, for her understanding and support, is beyond measure, and beyond compare.

Richard Fentiman
Cambridge
1 October 2009

CONTENTS—SUMMARY

CONTENTS

II LEGAL RISK AND MULTISTATE TRANSACTIONS

2. Managing Litigation Risk

3. Managing Transaction Risk

III THE LAWS GOVERNING MULTISTATE LITIGATION

4. The Laws Governing Multistate Transactions