

INTERNATIONAL COMMERCIAL LITIGATION

Text, Cases and Materials on Private International Law

Trevor C. Hartley

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International Commercial Litigation

This carefully structured, practice-orientated textbook provides everything the law student needs to know about international commercial litigation.

The strong comparative component provides a thought-provoking international perspective, while at the same time allowing readers to gain unique insights into litigation in English courts. Three important themes of the book analyse how the international element may call into question the power of the court to hear the case, whether it should exercise this power, whether foreign law applies, and whether the court should take into account any foreign judgment.

Hartley provides the reader with extracts from leading cases and relevant legislation, together with an extensive reference library of further reading for those who wish to explore the topic in more detail, making this a valuable, single-source textbook.

International commercial litigation is an area where the law changes fast. To keep the book up to date, new material will be posted on the book's website, www.cambridge.org/thartley/. This will cover both cases and legislation.

Trevor C. Hartley is Professor of Law Emeritus at the London School of Economics, where he specializes in private international law and European Community law.

Law is made for man, not man for the law.

I have taken this epigraph as the motto of my book. It is not clear where it comes from: a Google search suggests various possibilities, including Jesus and St Paul. No matter who said it first, it expresses better than anything else the approach I take. The same idea was advanced, less pithily and more mundanely, by the Supreme Court of Canada in 2006, in *Pro Swing v. Elta Golf*, when Deschamps J said, 'The law and the justice system are servants of society, not the reverse.' That is what I believe too.

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Preface

This is a book about international commercial transactions and the litigation that results from them. It focuses on litigation in national courts, not international ones. The international element may affect the proceedings in three main ways:

1. the international element may call into question the power of the court to hear the case (its jurisdiction) and raise the issue of whether it should exercise that power, even if it has it;
2. the court may have to consider the application of foreign law (choice of law); and
3. the court may have to take account of a foreign judgment.

These three issues form the main themes of the book, but we will also look at other aspects of international civil procedure – for example, international freezing injunctions and the procedures for obtaining evidence from abroad – as well as questions that verge on public international law, such as extraterritoriality.

The reference in the subtitle to ‘Private International Law’ links up with the more traditional subject that deals with these matters. However, this is not a traditional book. First, it is practice-oriented, not theory-oriented: extensive analysis of abstruse concepts will not be found. Secondly, it adopts a functional approach. Law should serve economic and social objectives: it is not an end in itself, based on supposedly self-justifying principles. This does not mean that logic has no place: it has a function, that of promoting certainty. But legal logic fulfils that function only to the extent that it makes the answer clear to the ordinary person, or at least the ordinary lawyer. Legal logic has no place if it goes beyond this. The convoluted reasoning of some cases in the past that has extended legal logic beyond the wildest imaginings of any reasonable lawyer has no place in a modern system of private international law.

A third characteristic of the book is that it gives jurisdiction and other aspects of international civil procedure more attention than choice of law, the main topic of more traditional books. This is because they are more important. The book also focuses on *commercial* litigation. Although there is discussion of personal-injury litigation and other topics in which the relevant legal principles are the same as those applied to commercial cases, there is no discussion of family law or succession.

The book includes a comparative element. Although focused primarily on English law, and the law of Commonwealth countries like Canada and Australia

that follow the English tradition, it pays attention to the wider world. The United Kingdom is part of the European Community, and a significant part of the subject-matter of the book has been taken over by the EC. Here, Community law *is* UK law. It is the law of the land and we have to know it. In addition, the book contains material on US law. The United States is so important today, especially in international business, that any book on international transactions and litigation has to take account of its law. A lawyer who lacks at least a basic grasp of some of its concepts and procedures cannot be regarded as qualified to practise in the area.

One final point: this is an area of law that changes rapidly. If the book simply presented a snapshot of the law as it existed at a given moment, it would be of only limited use. Within five years things would have changed. Of course, it is not possible to predict what will happen in the future. However, if we study the past, we can understand the forces that shape the present. These forces will continue to operate in the future. So, if we look at the past development of the law, we can get some idea of how it may change. Solutions that were rejected in the past are unlikely to prove any more successful in the future. For this reason, cases that have been superseded are sometimes set out in the text. They may no longer be good law, but they are still worth knowing about.

International commercial litigation is an area where the law changes fast. To keep the book up to date, new material will be posted on the book's website, www.cambridge.org/thartley. This will cover both cases and legislation.

Acknowledgments

I would like to thank the following for kindly granting me permission to reproduce extracts from cases for which they hold the copyright:

- the High Court of Australia;
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- Lloyd's Reports; and
- the Scottish Council of Law Reporting.

I am grateful for their generosity. I am also grateful that cases from certain other jurisdictions may be reproduced free of charge without the need to obtain permission. Books of this kind are possible only if authors are able to reproduce extracts from judicial decisions without having to make excessive payments.

The discussion in Chapter 10 of *Owusu v. Jackson*, *Turner v. Grovit* and *Gasser v. MISRAT* is based on my analysis of these cases in the *International and Comparative Law Quarterly* for October 2005;¹ and some of the material on the Rome II Regulation in Chapter 23 has been used as the basis for an article entitled 'Choice of Law for Non-Contractual Liability: Selected Problems under the "Rome II" Regulation', published in (2008) 57 *International and Comparative Law Quarterly* 899. In both cases, I am grateful for being able to reuse the material here.

In 2006, I gave the General Course on Private International Law at the Hague Academy of International Law, under the title 'The Modern Approach to Private International Law: International Litigation and Transactions from a Common-Law Perspective'.² Much material from those lectures has been incorporated into this book. In addition, the discussion of some cases in Part V of this book is based on a previous set of lectures given at the Hague Academy on 'Mandatory Rules in International Contracts: The Common Law Approach'.³ In both cases, I am grateful that I can reuse the material here.

The discussion of the Brussels Convention/Regulation in various chapters draws on work first published in 'Introduction to the Brussels Jurisdiction and Judgments Convention' (1994) V-1 *Collected Courses of the Academy of European Law* 223. I am grateful that I can reuse this material here.

I would like to thank Mr Peter Ringsted, attorney in Odense, Denmark, for telling me about the Danish case of *F ApS v. J (UK) Ltd.*

¹ 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 ICLQ 813.

² *Recueil des Cours*, Volume 319 (2006).

³ *Recueil des Cours*, Volume 266 (1997).

I have learnt a great deal over the years from my students, especially those in the International Business Transactions courses at the London School of Economics. I also owe a debt of gratitude to my own teachers of conflict of laws, Professor D. V. Cowan at the University of Cape Town in 1961 and Professor Otto Kahn-Freund at the London School of Economics in 1963/4. Both had the rare ability to awaken an interest in the subject in their students. In my case, the interest was abiding.

My greatest debt is to my wife, Sandra, my life-long companion and friend, who has helped me in many ways in the writing of this book.

Terminology

When the Civil Procedure Rules came into force in 1999, they made important changes to legal terminology in England. Some of these changes are as follows:

- 'Claim form' replaces 'writ'
- 'Claimant' replaces 'plaintiff'
- 'Disclosure' replaces 'discovery'
- 'Freezing injunction' replaces 'Mareva injunction'
- 'Interim injunction' replaces 'interlocutory injunction'
- 'Interim remedy' replaces 'interlocutory relief'
- 'Search order' replaces 'Anton Piller order'
- 'Statement of case' replaces 'pleadings'

This is now the accepted terminology in England. These changes do not apply in the Commonwealth and the United States. In these countries, words such as 'writ' and 'plaintiff' remain correct usage.

Table of Latin phrases

Action/judgment <i>in personam</i>	action/judgment against a person
Action/judgment <i>in rem</i>	action/judgment against (regarding) a thing (property)
<i>Forum conveniens</i>	appropriate court for hearing the action
<i>Forum non conveniens</i>	inappropriate court for hearing the action
<i>Lex contractus</i>	law governing a contract
<i>Lex loci actus</i>	law of the country where a transaction was concluded
<i>Lex loci contractus</i>	law of the country where a contract was concluded
<i>Lex situs</i>	law of the country in which property is situated
<i>Lis pendens</i> or <i>lis alibi pendens</i>	case pending elsewhere
<i>Qui facit per alium facit per se</i>	he who acts through another acts himself

Abbreviations

AJIL	<i>American Journal of International Law</i>
BYIL	<i>British Year Book of International Law</i>
CLC	<i>Commercial Law Cases</i> (a series of law reports published in England)
CLJ	<i>Cambridge Law Journal</i>
CLP	<i>Current Legal Problems</i>
CPR	Civil Procedure Rules (England)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EHRR	<i>European Human Rights Reports</i>
ICLQ	<i>International and Comparative Law Quarterly</i>
ILPr	<i>International Litigation Procedure</i> (a series of law reports published in England)
LQR	<i>Law Quarterly Review</i>
Ont.	Ontario (Canada)
R or r	Rule (rule)
RSC	Rules of the Supreme Court
USC	United States Code (not a code in the civil-law sense, but a compilation of statutes)

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