
CONTENTS

<i>Preface to the First Edition, 2012</i>	<i>vii</i>
<i>Preface to the Second Edition, 2016</i>	<i>ix</i>
<i>Preface to the Third Edition, 2021</i>	<i>xi</i>
<i>Table of Cases</i>	<i>xxi</i>
<i>Table of Legislation</i>	<i>lxxi</i>
1. Introduction	1
1.1. The Concept, Nature and Development of Private International Law	1
1.2. Sources of Private International Law	3
1.3. The Three Processes of Private International Law, and Standard ‘Connecting Factors’	4
1.3.1. Procedural Issues.....	4
1.3.2. Application of the Law	5
1.3.2.1. Characterisation (French: Qualification) of the Legal Question	6
1.3.2.2. Connecting Factor	6
1.3.2.3. <i>Lex Causae</i>	6
1.4. Characterisation, <i>Renvoi</i> and the ‘Incidental’ Issue or <i>Vorfrage</i>	6
1.5. Forum Shopping and <i>Forum non Conveniens</i>	9
1.6. The Impact of European Law on the Private International Law of the Member States.....	10
1.6.1. Legal Basis	10
1.6.2. The Development of European Private International Law Policy	13
1.7. Brexit	18
1.7.1. The Position of the United Kingdom vis-à-vis EU Private International Law Prior to Brexit	18
1.7.2. The EU–UK Withdrawal Agreement and Private International Law	19
1.7.3. The Situation Post Transition	20
1.7.3.1. At the Level of Jurisdiction and Recognition	21
1.7.3.2. At the Level of Applicable Law	24
1.7.4. Using the Book Post Brexit	24
2. The Core of European Private International Law: Jurisdiction	25
2.1. Summary	25
2.1.1. The Brussels I Recast Regulation.....	25
2.1.2. Scope of Application: Subject-Matter	28
2.1.3. Scope of Application – Ratione Personae	29
2.1.4. The Jurisdictional Rules of the Regulation	29

2.2.	Detailed Review of the Regulation.....	30
2.2.1.	Trust is Good, Control is Better	31
2.2.2.	Scope of Application: Subject-Matter.....	32
2.2.2.1.	The Existence of an International Element.....	32
2.2.2.2.	Civil and Commercial Matters.....	35
2.2.3.	Exclusions, Among which the Exclusion of Insolvency and Arbitration	49
2.2.3.1.	The Insolvency Exception	50
2.2.3.2.	The Arbitration Exception	54
2.2.3.3.	Gazprom: Should Arbitral Anti-Suit Injunctions Follow the <i>West Tankers</i> Fate?	64
2.2.3.4.	The Arbitration Exception and the Brussels I Recast.....	65
2.2.4.	Scope of Application – <i>Ratione Personae</i>	68
2.2.4.1.	Domicile.....	68
2.2.5.	The International Impact of the Regulation	72
2.2.6.	The Jurisdictional Rules of the Regulation: A Matrix	79
2.2.7.	Exclusive Jurisdiction, Regardless of Domicile: Article 24.....	80
2.2.7.1.	Rights in Rem and Tenancies of Immovable Property	81
2.2.7.2.	Specifically with Respect to the Extension to Tenancies.....	85
2.2.7.3.	Short-Term Holiday Lets	87
2.2.7.4.	Contractual Action in Combination with Actio in Rem.....	87
2.2.7.5.	The Incorporation of Companies and Certain Other Aspects of Company Law.....	87
2.2.7.6.	The Validity of Entries into Public Registers	91
2.2.7.7.	Proceedings Concerned with the Registration or Validity of Patents, Trade Marks, Designs or Other Similar Rights Required to be Deposited or Registered	91
2.2.7.8.	Proceedings Concerned with the Enforcement of Judgments.....	96
2.2.7.9.	Reflexive Application of the Exclusive Jurisdictional Rules?	98
2.2.8.	Jurisdiction by Appearance/Prorogation: Article 26	98
2.2.9.	Insurance, Consumer and Employment Contracts: Articles 10–23	101
2.2.9.1.	Protected Categories – Generally	101
2.2.9.2.	Consumer Contracts	102
2.2.9.3.	Contracts for Individual Employment	122
2.2.9.4.	Insurance Contracts.....	128
2.2.10.	Agreements on Jurisdiction (‘Choice of Forum’ or ‘Prorogation of Jurisdiction’): Article 25	132
2.2.10.1.	The Overall Intention of Choice of Court Agreements under the Brussels Regime	132
2.2.10.2.	Choice of Court in Favour of a Court Outside the EU: A Reflexive Effect for Article 25?	135
2.2.10.3.	Conditions with Respect to the Expression of Consent	137
2.2.10.4.	The Law Applicable to the Formation of Consent.....	143
2.2.10.5.	Sinking the Torpedo: <i>Lis Alibi Pendens</i> for Choice of Court	149

2.2.10.6. The EU's Accession to the Hague Convention and the Consequential Priority of the Latter.....	151
2.2.10.7. Privity and Binding Force of the Choice of Court Agreement on Third Parties	153
2.2.10.8. Choice of Court and Its Application to Claims of Infringement of Competition Law	156
2.2.11. General Jurisdiction: Defendants Domiciled in a Member State Where a Court is Seized: Article 4.....	159
2.2.12. 'Special' Jurisdiction: Defendants Domiciled in Another Member State: Articles 7–9	160
2.2.12.1. Article 7(1): Actions Relating to a Contract – Forum Contractus.....	162
2.2.12.2. The Special Jurisdictional Rule for Tort: Article 7(2) – <i>Forum Delicti</i>	176
2.2.13. Multipartite Litigation and Consolidated Claims: Articles 8 (and 9).....	209
2.2.13.1. Multiple Defendants and Using One of Them as an Anchor: Article 8(1)	210
2.2.13.2. Warranties, Guarantees and Any Other Third Party Proceedings: Article 8(2)	216
2.2.13.3. Counterclaims: Article 8(3).....	217
2.2.13.4. Matters Relating to Rights <i>in Rem</i> in Immovable Property: Article 8(4)	218
2.2.14. 'Residual' Jurisdiction: Defendants not Domiciled in Any Member State: Article 6.....	218
2.2.15. Loss of Jurisdiction: <i>Lis Alibi Pendens</i> ; and Related Actions: Articles 29–34	219
2.2.15.1. <i>Lis Alibi Pendens</i>	222
2.2.15.2. Related Actions	225
2.2.15.3. <i>Lis Alibi Pendens</i> , Related Actions and the <i>Forum Non Conveniens</i> Doctrine.....	230
2.2.16. Applications for Provisional or Protective Measures: Article 35	237
2.2.17. Recognition and Enforcement.....	241
2.2.17.1. Recognition.....	243
2.2.17.2. Enforcement	254
3. The Core of European Private International Law: Applicable Law – Contracts	256
3.1. Summary	256
3.1.1. Principles.....	257
3.1.2. Scope of Application.....	257
3.1.3. Basic Principle: Freedom of Choice.....	257
3.1.4. Applicable Law in the Absence of Choice.....	257
3.2. Detailed Review of the Regulation.....	258
3.2.1. Scope of Application.....	258
3.2.2. Exclusions.....	263

3.2.3.	Universal Application	265
3.2.4.	Freedom of Choice	266
3.2.5.	Protected Categories	270
3.2.6.	Applicable Law in the Absence of Choice	272
3.2.6.1.	Characterisation of the Contract	274
3.2.6.2.	The Characteristic Performance Test	276
3.2.6.3.	Manifestly Closer Connection	277
3.2.6.4.	The Ultimate Option: Closest Connection	277
3.2.7.	Formal Validity, Consent and Capacity	278
3.2.7.1.	Consent and Material Validity. The Bootstrap	278
3.2.7.2.	Incapacity	279
3.2.7.3.	Formal Validity	280
3.2.8.	Mandatory Law, and Public Order	281
3.2.8.1.	Purely Domestic Contracts: Article 3(3)	281
3.2.8.2.	Mandatory EU Law: Article 3(4)	282
3.2.8.3.	‘Overriding’ Mandatory Law, <i>lois de police</i> or <i>lois d’application immédiate</i> : Article 9	284
3.2.8.4.	Public Policy: Article 21	289
3.2.9.	The Relationship with Other Conventions	290
3.2.10.	Scope of the Law Applicable	291

4. The Core of European Private International Law:

Applicable Law – Tort	293
4.1. Introduction	293
4.2. General Principles	295
4.3. Scope of Application	296
4.3.1. ‘Situations Involving a Conflict of Laws’	296
4.3.2. Only Courts and Tribunals? Application to Arbitration Tribunals	296
4.3.3. ‘Non-Contractual Obligations’	298
4.3.4. Excluded Matters	299
4.3.4.1. Non-Contractual Obligations Arising Out of Family or Similar Relationships	300
4.3.4.2. Non-Contractual Obligations Arising Out of Matrimonial Property Regimes, Property Regimes of Relationships Deemed by the Law Applicable to such Relationships to have Comparable Effects to Marriage, and Wills and Succession	301
4.3.4.3. Non-Contractual Obligations Arising Under Bills of Exchange, Cheques and Promissory Notes and Other Negotiable Instruments to the Extent that the Obligations Under such Other Negotiable Instruments Arise Out of their Negotiable Character	301
4.3.4.4. The Lex Societatis Exception	301
4.3.4.5. Violations of Privacy and Rights Relating to Personality, Including Defamation	302
4.3.4.6. Other Exclusions	305
4.3.5. Civil and Commercial Matters	305

4.4.	Applicable Law – General Rule: <i>Lex Loci Damni</i>	305
4.5.	One General Exception to the General Rule and One Escape Clause.....	307
4.5.1.	General Exception: Parties Habitually Resident in the Same Country.....	307
4.5.2.	Escape Clause: Case Manifestly More Closely Connected with Other Country	308
4.6.	Specific Choice of Law Rules for Specific Torts – No Specific Rules for ‘Protected Categories’	310
4.6.1.	Product Liability.....	311
4.6.2.	Unfair Competition and Acts Restricting Free Competition.....	315
4.6.3.	Environmental Damage	317
4.6.4.	Damage Caused by Infringement of Intellectual Property Rights.....	321
4.6.5.	Damage Caused by Industrial Action.....	322
4.7.	Freedom to Choose Applicable Law	324
4.8.	Scope of the Law Applicable	325
4.9.	Contract-Related Tort Claims.....	328
4.10.	‘Overriding’ Mandatory Law and Public Order	329
5.	The Insolvency Regulation.....	331
5.1.	The Overall Nature of and Core Approaches to Insolvency and Private International Law	331
5.2.	Genesis of the Insolvency Regulation.....	332
5.3.	General Context of the 2015 Amendments	334
5.4.	Scope of Application, Dovetailing with the Brussels I Recast and Overall Aim	338
5.4.1.	The Insolvency Exception under the Jurisdiction Regulation	338
5.4.2.	The Definition and Scope of Insolvency Proceedings, and the Specific Case of Schemes of Arrangement.....	339
5.4.3.	Four Cumulative Conditions.....	344
5.4.3.1.	Collective Proceedings	345
5.4.3.2.	Based on the Debtor’s Insolvency	345
5.4.3.3.	Which Entail the Partial or Total Divestment of a Debtor	345
5.4.3.4.	Which Entail the Appointment of a ‘Liquidator’, Now Called an ‘Insolvency Practitioner’	346
5.4.4.	Opening by a ‘Court’ or Judicial Authority?.....	346
5.4.5.	Relation with the Brussels Ia Regulation: Dovetail or Not?.....	347
5.4.6.	Core Aim of the Regulation.....	349
5.5.	The International Impact of the Regulation.....	350
5.6.	The Jurisdictional Model: Universal Jurisdiction Based on COMI, alongside Limited Territorial Procedures.....	350
5.6.1.	Main Insolvency Proceeding: Centre of Main Interest (COMI).....	351
5.6.1.1.	‘COMI’ as (Un)Defined by the Regulation	351
5.6.1.2.	European and National Case-Law on COMI.....	353
5.6.1.3.	Universality of the Proceedings Opened in the COMI Member State.....	366
5.6.1.4.	When is an Insolvency Procedure ‘Opened’ within the Meaning of the Regulation?.....	367

5.6.2.	Secondary and Territorial Insolvency Proceedings	368
5.6.2.1.	Territorial Insolvency Proceedings.....	369
5.6.2.2.	Secondary Insolvency Proceedings	370
5.7.	Applicable Law.....	372
5.7.1.	Exceptions	373
5.8.	Recognition and Enforcement of Insolvency Proceedings	378
5.8.1.	Judgments Concerning the Opening of Insolvency Proceedings.....	379
5.8.2.	Other Judgments in the Course of Insolvency Proceedings.....	380
5.8.3.	Defences against Recognition and Enforcement	380
5.9.	Powers of the Liquidator/Insolvency Practitioner	381
6.	Free Movement of Establishment, <i>Lex Societatis</i> and Private International Law	382
6.1.	<i>Daily Mail</i>	386
6.2.	<i>Centros</i>	388
6.3.	<i>Überseering</i>	389
6.4.	<i>Inspire Art</i>	390
6.5.	<i>Cartesio</i> – And its Mirror Image: <i>Vale</i>	392
6.6.	<i>Grid Indus</i>	394
6.7.	Directive 2019/2121: The Cross-Border Conversion Directive.....	396
7.	Private International Law, Corporate Social Responsibility and Extraterritoriality	397
7.1.	The Role of Private International Law in Operationalising Corporate Social Responsibility	397
7.2.	The United States: Litigation Based on the ATS.....	399
7.2.1.	The Discovery of the ATS by the CSR Community.....	399
7.2.2.	Corporate Liability under ATS and the Setback Under <i>Kiobel</i>	400
7.2.3.	The ‘Touch and Concern’ Test of the US Supreme Court in <i>Kiobel</i>	401
7.2.4.	Post- <i>Kiobel</i> Case-Law	403
7.2.5.	Summary on the US.....	407
7.3.	The European Union.....	407
7.3.1.	Jurisdiction.....	407
7.3.1.1.	General Jurisdictional Rule: Article 4 Brussels Ia and Forum Non Conveniens.....	407
7.3.1.2.	Anchor Jurisdiction against Non-EU-Domiciled Subsidiaries: Article 8(1) Brussels Ia Whether or Not Applied <i>pro inspiratio</i>	408
7.3.1.3.	Special Jurisdictional Rule: Article 7(5) Brussels Ia – Operations Arising Out of a Branch	412
7.3.1.4.	Special Jurisdictional Rule: Article 7(2) Brussels I Recast – Tort.....	412

7.3.1.5. Special Jurisdictional Rule: Article 7(4) Jurisdiction Regulation	412
7.3.1.6. Review of the Jurisdiction Regulation – The ‘International Dimension’ of the Regulation	413
7.3.2. Applicable Law	413
7.4. Duty of Care, Attribution and Compliance Strategies.....	416
7.4.1. Inspiration from Competition Law?	417
7.4.2. Outside of Competition Law	418
7.5. Conclusion	418
<i>Index</i>	421