

International Commercial Litigation

Third Edition

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Trevor C. Hartley

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Contents

Table of Panels page xxiv
List of Figures xxviii
From the Preface to the First Edition xxix
From the Preface to the Second Edition xxxi
Preface to the Third Edition xxxiii
Acknowledgements: Copyright xxxvii
Terminology xxxix
Table of Equivalences xl
Table of Latin Phrases xlii
List of Abbreviations xliii
Table of Cases: Alphabetical xliv
Table of Cases: EU Cases in numerical order lxxii
Table of Legislative Instruments lxxviii
Table of Legislative Instruments: Panels xcvi

PART I STARTING OFF 1

1 Introduction 3
1 Private International Law 3
2 Names and What They Mean 3
3 What Is It Based On? 5
4 International Uniformity of Result: A Grand Objective? 5

PART II JURISDICTION 9

2 Jurisdiction: An Analysis 11
1 What Is Jurisdiction? 11
2 Jurisdiction *In Personam* 12
3 Jurisdiction *In Rem* 12
4 Objectives 12
 4.1 Conflicting Judgments 13
 4.2 Enforcement 13
 4.3 Keeping the Parties to Their Agreements 14

4.4	Wasting Time and Resources	14
4.5	Offending Foreign States	14
4.6	Fairness to the Defendant	14
4.7	Countervailing Considerations	15
5	Principles of Jurisdiction <i>In Personam</i>	15
6	Principles of Jurisdiction <i>In Rem</i>	16
	Further Reading	17
3	Jurisdiction under EU Law	18
1	Background	18
2	Origin of Brussels 2012	19
3	The Lugano Convention	20
4	Basic Principles	21
5	Defendants from Third Countries	22
6	Domicile	24
6.1	Area of Domicile	24
6.2	Domicile of Natural Persons (Individuals)	25
6.3	United Kingdom Rules of Domicile (Individuals)	25
6.4	Domicile of Legal Persons (Corporations)	27
6.5	The Role of Domicile	29
7	Jurisdiction Irrespective of Domicile	29
8	Which Instrument Applies: Brussels or Lugano?	30
9	Subject-Matter Scope	31
9.1	What Law Decides?	32
	<i>LTU v. Eurocontrol</i>	32
9.2	Applying the Test	34
	<i>Netherlands v. Rüffer</i>	35
	<i>Gemeente Steenberg v. Baten</i>	37
	<i>Commissioners for Revenue & Customs v. Sunico</i>	39
9.3	Interim Remedies	41
	<i>Realchemie Nederland v. Bayer</i>	
	<i>CropScience</i>	41
	Further Reading	43
	General Works on the Brussels Convention, the Brussels Regulation and the Lugano Convention	43
4	EU Law: Special Jurisdiction	44
1	Article 7	44
1.1	Contracts	45
1.1.1	When Does a Claim Relate to a Contract?	45
	<i>Brogstetter v. Fabrication de Montres Normandes</i>	45
	<i>Handte v. TMCS</i>	48
1.1.2	The Place of Performance	50
1.1.3	The Obligation in Question	50

1.1.4	<i>The Revised Version of Article 7(1)</i>	51
	<i>Rehder v. Air Baltic Corporation</i>	52
	<i>flightright GmbH v. Air Nostrum</i>	55
	<i>Car Trim v. KeySafety Systems</i>	60
	<i>Falco Privatstiftung and Rabitsch</i>	65
	<i>Corman-Collins v. La Maison du Whisky</i>	66
1.1.5	<i>Contracts Not Covered by Article 7(1)</i>	68
1.2	<i>Tort</i>	68
1.2.1	<i>The ‘Harmful Event’</i>	68
	<i>Bier v. Mines de Potasse d’Alsace</i>	69
	<i>Marinari v. Lloyds Bank</i>	71
1.2.2	<i>Declarations of Non-Liability</i>	72
	<i>Folien Fischer v. Ritrama</i>	73
1.2.3	<i>Internet Torts</i>	75
	<i>Pinckney v. Mediatech</i>	76
1.3	<i>Branches, Agencies and Other Establishments</i>	78
1.3.1	<i>What Constitutes a Branch, Agency or Other Establishment?</i>	78
1.3.2	<i>What Disputes Are Covered?</i>	79
	<i>Lloyd’s Register of Shipping v. Campeonon Bernard</i>	80
	<i>Anton Durbeck v. Den Norske Bank</i>	81
2	<i>Multiple Parties</i>	84
	<i>Reisch Montage v. Kiesel Baumaschinen</i>	85
3	<i>Counterclaims</i>	87
4	<i>Weak Parties</i>	87
4.1	<i>Employment Contracts</i>	87
	<i>Nogueira</i>	90
5	<i>Exclusive Jurisdiction</i>	91
5.1	<i>Scope</i>	92
5.1.1	<i>Immovable Property</i>	93
	<i>Webb v. Webb</i>	93
	<i>Weber v. Weber</i>	94
5.1.2	<i>Companies</i>	95
	<i>Berliner Verkehrsbetriebe (BVG) v. J P Morgan Chase Bank</i>	96
5.1.3	<i>Registered Intellectual-Property Rights</i>	99
	<i>Duijnstee v. Goderbauer</i>	99
	<i>Gesellschaft für Antriebstechnik (GAT) v. Lamellen und Kupplungsbau Beteiligungs (LuK)</i>	101
5.2	<i>Non-Member States</i>	104
6	<i>Procedure</i>	105
7	<i>Conclusions</i>	106
	<i>Further Reading</i>	107

5	EU Law: The Problem of Pure Financial Loss	108
1	Introduction	108
2	Claimant Prevented from Doing Something	108
	<i>DFDS Torline</i>	108
3	Bad Investments	110
	<i>Kronhofer</i>	110
	<i>Kolassa</i>	112
3.1	<i>Kolassa</i> ‘Explained’	114
	<i>Löber v. Barclays Bank</i>	117
4	Professional Negligence	119
	<i>Universal Music International Holding</i>	119
5	Competition-Law Claims	121
	<i>Cartel Damage Claims (CDC) Hydrogen Peroxide</i>	121
	<i>AB flyLAL-Lithuanian</i>	125
6	Conclusions	132
	Further Reading	132
6	The Traditional English Rules	133
1	Introduction	133
2	Service of the Claim Form	133
	<i>Colt Industries Inc. v. Sarlie</i>	135
	<i>Maharanee of Baroda v. Wildenstein</i>	138
3	Service on a Company	140
3.1	Introduction	140
3.2	Company’s Own Office	141
	<i>Dunlop Pneumatic Tyre Co. Ltd v. A. G. Cudell & Co.</i>	141
	<i>South India Shipping v. Bank of Korea</i>	143
3.3	Acting through an Agent	144
	<i>Adams v. Cape Industries</i>	145
3.4	Subsidiaries	147
3.5	Conclusions	147
4	Service Outside the Jurisdiction	148
4.1	Introduction	148
4.2	Contracts	150
4.2.1	<i>Contract Made within the Jurisdiction</i>	150
4.2.2	<i>Made by or through an Agent Trading or Residing within the Jurisdiction</i>	150
4.2.3	<i>Governed by English Law</i>	151
4.2.4	<i>Choice-of-Court Clause</i>	151
4.2.5	<i>Breach Committed within the Jurisdiction</i>	151
4.2.6	<i>Declaration that No Contract Exists</i>	152
4.3	Tort	152
	<i>Metall und Rohstoff v. Donaldson Lufkin & Jenrette</i>	152

	<i>Four Seasons Holdings Incorporated</i>	
	<i>v. Brownlie</i>	153
4.4	Multiple Parties	162
4.5	Weak Parties	162
5	Jurisdiction by Consent	162
6	Exclusive Jurisdiction	163
7	Conclusions	164
	Further Reading	165
7	US Law: An Outline	166
1	The US Legal System	166
1.1	Federal Jurisdiction	167
1.2	Applicable Law	169
1.2.1	State Courts	169
1.2.2	Federal Courts	169
2	International Jurisdiction	170
2.1	The ‘Minimum Contacts’ Doctrine	170
	<i>International Shoe Co. v. State of</i>	
	<i>Washington</i>	171
2.1.1	Specific Jurisdiction	173
	<i>World-Wide Volkswagen Corporation</i>	
	<i>v. Woodson</i>	173
2.1.2	General Jurisdiction	177
	<i>Helicopteros Nacionales de Colombia v. Hall</i> (‘Helicol’	
	<i>case</i>)	177
	<i>Daimler v. Bauman</i>	179
2.1.3	Transient Jurisdiction	184
	<i>Burnham v. Superior Court of California</i>	184
2.1.4	Federal Courts: Nationwide Minimum	
	<i>Contacts</i>	190
3	Venue	191
4	The United States and Europe Compared	191
4.1	Cases Where European Jurisdiction Is More	
	Extensive	192
4.2	Cases Where American Jurisdiction Is More	
	Extensive	193
4.3	Assessment	194
5	Conclusions	195
	Further Reading	196
8	Choice-of-Court Agreements	198
1	Introduction	198
1.1	Court Specified	198
1.2	Exclusive Jurisdiction	198
1.3	Asymmetric Choice-of-Court Agreements	199
1.4	Proceedings Covered	199

2	The European Union	199
2.1	Introduction	199
2.2	Consent and Form	201
2.2.1	Sub-Paragraph (a)	202
	<i>Berghoefer v. ASA</i>	203
2.2.2	Sub-Paragraph (b)	204
2.2.3	Sub-Paragraph (c)	204
	<i>Mainschiffahrts-Genossenschaft v. Les Gravières Rhénanes</i>	205
2.2.4	Electronic Communications	207
2.2.5	Relationship with Article 7(1)	208
2.3	Choice-of-Court Agreement in the Constitution of a Company	208
2.4	Substantive Validity	209
	<i>Elefanten Schuh v. Jacqmain</i>	210
2.5	Effect on Third Parties	212
	<i>Assens Havn v. Navigators Management (UK) Limited</i>	213
2.6	Insurance Contracts, Consumer Contracts and Employment Contracts	214
2.7	The Union and the Outside World	214
2.8	Conclusions	218
3	England	218
3.1	The General Principle	219
	<i>The Fehmarn</i>	219
	<i>The Eleftheria</i>	220
3.2	No Fair Trial	223
	<i>Carvalho v. Hull Blyth Ltd</i>	223
3.3	Mandatory Rules	225
3.4	Conclusions	228
4	The United States	228
	<i>M/S Bremen v. Zapata Offshore Company</i>	228
	<i>Carnival Cruise Lines v. Shute</i>	233
	<i>Vimar Seguros v. M/V Sky Reefer</i>	237
5	The Hague Choice-of-Court Convention	240
6	Conclusions	243
	Further Reading	243

9 Jurisdictional Conflicts: The Common-Law Approach 245

1	Introduction	245
2	England	247
2.1	<i>Forum Non Conveniens</i>	247
2.1.1	Historical Development	247
2.1.2	The Modern Law	252

	<i>Spiliada Maritime Corporation</i>	
	<i>v. Cansulex</i>	252
2.1.3	No Fair Trial in the Foreign Country	260
	<i>Altimo Holdings v. Kyrgyz Mobil Tel Ltd</i>	261
2.1.4	Conclusions	264
2.2	Antisuit Injunctions	264
2.2.1	When Injunctions Will Be Granted	265
	<i>Société Nationale Industrielle Aérospatiale v. Lee</i>	
	<i>Kui Jak</i>	265
2.2.2	The Natural Forum	269
2.2.3	Conflicting Injunctions	270
2.2.4	Conclusions	272
3	The United States	274
3.1	Forum Non Conveniens	274
	<i>Piper Aircraft v. Reyno</i>	275
3.2	Antisuit Injunctions	279
4	Conclusions	280
	Further Reading	280
10	Jurisdictional Conflicts: The EU Approach	282
1	<i>Lis Pendens</i>	282
1.1	The Same Cause of Action	284
	<i>Gubisch Maschinenfabrik v. Palumbo</i>	284
1.2	The Same Parties	285
1.3	Related Proceedings	286
1.4	Proceedings in Non-Member States	286
1.5	Conclusions	289
2	<i>Forum Non Conveniens</i>	289
	<i>Owusu v. Jackson</i>	290
3	Antisuit Injunctions	298
	<i>Turner v. Grovit</i>	298
4	Choice-of-Court Agreements and the ‘Italian Torpedo’	302
5	Arbitration and the Brussels I Regulation	305
5.1	Brussels 2012	306
5.1.1	The Regulation Does Not Apply to Arbitration	306
5.1.2	Relationship with the New York Convention	306
5.1.3	Recital 12	307
5.2	What Is Excluded?	309
5.2.1	Appointment of Arbitrators	309
	<i>Marc Rich v. Società Italiana Impianti</i>	309
5.2.2	Provisional (Interim) Measures in Support of Arbitration:	
	Asset-Freezing Orders	313
	<i>Van Uden v. Deco Line</i>	313
5.2.3	Antisuit Injunctions	315
	<i>Allianz v. West Tankers</i>	315
	<i>Gazprom v. Lithuania</i>	320

5.2.4	<i>Damages for Bringing Proceedings in Another Member State</i>	324
5.3	Recognition of Judgments and Awards	324
5.4	Conclusions	326
	Further Reading	326
11	Special Topic I: Product Liability	328
1	England	328
	<i>Distillers Co. v. Thompson</i>	329
	<i>Castree v. Squibb Ltd</i>	332
2	Canada	333
	<i>Moran v. Pyle National (Canada) Ltd</i>	333
3	The United States	335
	<i>Asahi Metal Industry v. Superior Court of California</i>	335
	<i>McIntyre Machinery v. Nicastrò</i>	339
4	The European Union	346
	<i>Zuid-Chemie v. Philippo's Mineralenfabriek</i>	346
	<i>Kainz v. Pantherwerke</i>	348
5	Conclusions	349
12	Special Topic II: Defamation	351
1	Introduction	351
2	EU Law	352
2.1	The General Rule	352
	<i>Shevill v. Presse Alliance</i>	352
2.2	The Internet	355
	<i>eDate Advertising v. X</i>	355
	<i>Bolagsupplysningen v. Svensk Handel</i>	360
3	English Law	366
3.1	The Traditional View	366
	<i>Berezovsky v. Michaels</i>	366
3.2	The Application of the Traditional View to the Internet	369
	<i>King v. Lewis</i>	369
3.3	Defamation and Free Speech	372
3.4	The American Reaction	374
3.5	The Defamation Act 2013	375
	Further Reading	377

PART III FOREIGN JUDGMENTS 379

13	Introduction to Part III	381
1	Principles	381

2	Recognition and Enforcement	381
3	Theories	381
4	Giving Effect to a Judgment	382
5	<i>Res Judicata</i> and Estoppel	382
	Further Reading	383

14	EU Law	384
1	Introduction	384
2	Principles	385
3	Jurisdiction of the Court of Origin	388
3.1	Four Exceptions	388
3.2	Exclusive Jurisdiction: Non-Member States	388
3.3	Conventions with Non-Member States	389
4	Judgments Outside the Scope of the Regulation	390
5	Public Policy	390
	<i>Krombach v. Bamberski</i>	390
	<i>Gambazzi v. DaimlerChrysler Canada Inc.</i>	397
	<i>Liberato v. Grigorescu</i>	401
	<i>Diageo Brands BV v. Simiramida-04 EOOD</i>	402
6	Conflicting Judgments	406
6.1	Judgments from the State Addressed	406
6.2	Judgments from Another State	407
6.3	Judgments outside the Scope of the Regulation	407
	<i>Hoffmann v. Krieg</i>	407
7	Conflicts with an Arbitration Award	410
8	Provisional Measures	410
9	Choice-of-Court Agreements	411
10	Arbitration Agreements	411
11	Fraud	411
12	Default Judgments	412
12.1	When Does Time Begin to Run?	414
12.2	Bringing Proceedings to Set the Default Judgment Aside	416
	<i>ASML Netherlands v. Semiconductor Industry Services (SEMIS)</i>	416
	<i>Apostolides v. Orams</i>	421
12.3	Giving Reasons in the Default Judgment	423
	<i>Trade Agency v. Seramico Investments</i>	424
12.4	Conclusions	428
13	Rulings on Jurisdictional Issues	428
	<i>Gothaer Allgemeine Versicherung v. Samskip</i>	428
14	Conclusions	431

Appendix: Principal Grounds on Which Recognition May Be Refused	432
Further Reading	433
15 English Law: Jurisdiction	434
1 Theoretical Basis for Recognition and Enforcement	434
2 Legislation	435
3 Jurisdiction	437
3.1 Home-Court Jurisdiction	437
3.1.1 Individuals	437
<i>Adams v. Cape Industries</i>	437
<i>Richman v. Ben-Tovim</i>	439
3.1.2 Corporations	441
<i>Vogel v. Kohnstamm Ltd</i>	441
3.2 Claim-Based Jurisdiction	444
3.3 Submission	444
3.4 Exceptions	446
3.5 Conclusions	446
Further Reading	447
16 English Law: Defences	448
1 Fraud	448
<i>Owens Bank v. Bracco</i>	449
<i>Owens Bank Ltd v. Fulvio Bracco and Bracco Industria Chimica SpA</i>	454
2 Public Policy, Natural Justice and Human Rights	456
3 Taxes, Penalties and Other Rules of Public Law	458
<i>Huntington v. Attrill</i>	458
<i>United States of America v. Inkley</i>	462
4 Conflicting Judgments	464
5 <i>Res Judicata</i> and Issue Estoppel	464
<i>The Sennar (No. 2)</i>	466
5.1 English Law or EU Law?	469
5.2 Judgment for the Claimant	470
Further Reading	471
17 US Law: Some Highlights	472
1 Reciprocity	472
2 Uniform Legislation	472
<i>Bank of Montreal v. Kough</i>	474
Appendix: Foreign-Judgment Recognition Legislation (UK and US)	477
Major Heads of Jurisdiction of the Foreign Court	477
Other Requirements and Defences	478
Further Reading	478

PART IV	PROCEDURE	479
18	Freezing Assets	481
1	Introduction	481
2	Procedure	482
	<i>Third Chandris Shipping Corporation v. Unimarine SA</i>	482
3	Third Parties	484
	<i>Z Ltd v. A-Z</i>	484
4	Jurisdiction	489
5	Worldwide Orders	490
5.1	Worldwide Orders in Aid of Foreign Proceedings	490
	<i>Crédit Suisse Fides Trust SA v. Cuoghi</i>	491
	<i>Motorola Credit Corporation v. Uzan (No. 2)</i>	496
5.2	Worldwide Orders and Third Parties	502
	<i>Derby & Co. Ltd v. Weldon (Nos. 3 and 4)</i>	502
	<i>Bank of China v. NBM LLC</i>	503
5.3	Conclusions	505
6	Commonwealth Countries	505
7	The United States	506
	<i>Grupo Mexicano de Desarrollo SA v. Alliance Bond Fund Inc.</i>	506
	<i>United States v. First National City Bank</i>	507
8	The European Union	509
8.1	Jurisdiction over the Substance	510
	<i>Denilauler v. Couchet Frères</i>	510
	<i>flyLAL-Lithuanian Airlines</i>	512
8.2	No Jurisdiction over the Substance	513
	<i>Van Uden v. Deco Line</i>	513
	<i>Mietz v. Intership Yachting Sneek</i>	517
8.3	Enforcing a Judgment from another Member State	520
	<i>Banco Nacional de Comercio Exterior SNC v. Empresa de Telecomunicaciones de Cuba SA</i>	520
8.4	When Does the Regulation Apply?	524
8.4.1	Subject-Matter Scope	524
8.4.2	Judgment in another Member State	524
8.4.3	No Judgment in another Member State	524
8.4.4	A Court of another Member State Is Seised First	525
8.4.5	No other Member State Court Is Seised	525
8.4.6	Conclusions	526
	Further Reading	526
19	Obtaining Evidence Abroad: Forum Procedures	527
1	Evidence from Parties to the Proceedings	527

1.1	England	527	
	<i>Lonrho Ltd v. Shell Petroleum Co. Ltd</i>	528	
1.2	United States	532	
	<i>Société Internationale v. Rogers</i>	532	
2	Evidence from Third Parties	535	
2.1	England	535	
	<i>Bankers Trust Co. v. Shapira</i>	535	
	<i>Mackinnon v. Donaldson, Lufkin & Jenrette Securities Corporation</i>	537	
	<i>Altext Inc. v. Advanced Data Communications Ltd</i>	542	
2.2	The United States	545	
	<i>In re Grand Jury Proceedings Bank of Nova Scotia</i>	545	
3	Foreign Proceedings	550	
	<i>X AG v. A Bank (also known as X, Y and Z v. B)</i>	550	
4	Conclusions	554	
	Further Reading	554	
20	Obtaining Evidence Abroad: International Co-Operation	555	
1	Introduction	555	
2	England	557	
2.1	'Fishing Expeditions'	557	
	<i>In re Asbestos Insurance Coverage Cases</i>	557	
2.2	Civil or Commercial Matters	559	
	<i>In re State of Norway's Application</i>	559	
2.3	Protecting National Sovereignty	560	
3	The United States	560	
4	England: Initiative by a Party	561	
	<i>South Carolina Insurance Co. v. Assurantie Maatschappij 'de Zeven Provinciën' NV</i>	561	
5	The Hague Convention: A Blocking Device?	565	
	<i>Société Nationale Industrielle Aérospatiale v. United States District Court for the Southern District of Iowa</i>	566	
6	Conclusions	571	
	Further Reading	571	

PART V CHOICE OF LAW 573

21	Introduction to Choice of Law	575
1	Why Apply Foreign Law?	575

2	Traditional Choice-of-Law Theory	576
2.1	The Methodology of Categorization	576
2.2	Substance and Procedure	577
2.3	Some Basic Ideas	577
2.3.1	<i>The Personal Law: Individuals</i>	578
2.3.2	<i>The Personal Law: Companies</i>	578
	<i>McDermott Inc. v. Lewis</i>	579
2.3.3	<i>The Lex Situs</i>	583
2.3.4	<i>The Lex Loci Actus</i>	583
2.4	Methodological Problems and Escape Devices	584
2.4.1	Characterization	584
2.4.2	Renvoi	585
2.4.3	Public Policy	586
3	Choice-of-Law Rules in International Instruments	587
4	American Theories	587
4.1	Interest Analysis	587
4.2	The Primacy of Forum Law	591
4.3	The ‘Better Law’ Theory	592
5	Proof of Foreign Law	592
	<i>Anton Durbeck v. Den Norske Bank</i>	595
6	Conclusions	599
	Further Reading	600
22	Torts	602
1	England: Historical Development	602
	<i>The Halley</i>	602
	<i>Phillips v. Eyre</i>	603
	<i>Machado v. Fontes</i>	605
2	The Rome II Regulation: General Rule	608
2.1	The Country in which the Damage Occurs	608
	<i>Lazar</i>	608
2.2	Common Habitual Residence	609
2.2.1	<i>Rules of the Road</i>	609
2.2.2	Multi-Party Cases	609
2.2.3	Meaning of ‘Country’	610
2.2.4	Meaning of ‘Habitual Residence’	611
2.3	Flexibility	611
3	Pre-Existing Relationship	612
	<i>McLean v. Pettigrew</i>	613
	<i>M’Elroy v. M’Allister</i>	613
	<i>Babcock v. Jackson</i>	615
	<i>Neilson v. Overseas Projects Corporation of Victoria Ltd</i>	618
4	Common Origin	620
	<i>Dym v. Gordon</i>	620
	<i>Chaplin v. Boys</i>	623

5	US Law: Interest Analysis and the ‘Better Law’ Theory	625
	<i>Milkovich v. Saari</i>	626
	<i>Rong Yao Zhou v. Jennifer Mall Restaurant Inc.</i>	627
	<i>Bernhard v. Harrah’s Club</i>	629
6	The Rome II Regulation: Special Rules	632
6.1	Product Liability	632
6.1.1	Structure	632
6.1.2	Primary Rule	633
6.1.3	Second-Ranking Rule	633
6.1.4	Third-Ranking Rule	633
6.1.5	Fourth-Ranking Rule	633
6.1.6	Product Marketed	634
6.1.7	No Rule Applicable	634
6.1.8	Conclusions	636
6.2	Intellectual Property	637
7	Defamation	637
8	Choice of Law by Agreement	637
9	Overriding Mandatory Provisions	638
	<i>Agostinho da Silva Martins v. Dekra Claims Services Portugal</i>	639
10	Subrogation	641
	<i>ERGO Insurance</i>	642
	Appendix: Subject-Matter Scope of the Regulation	646
	Further Reading	647
23	Contracts: The Principle of Party Autonomy	648
1	Introduction	648
2	The Theory of the Proper Law	648
3	The Rome Convention	653
4	The Rome I Regulation	653
4.1	Subject-Matter Scope	654
4.2	International Scope	655
4.3	Meaning of ‘Country’	655
4.4	Express Choice	656
4.4.1	Freedom of Choice	656
4.4.2	Non-State Law	656
4.5	Implied Choice	656
	<i>Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.</i>	657
	<i>Oldendorff v. Libera Corporation</i>	660
4.6	Applicable Law in the Absence of Choice	663
4.6.1	Structure and General Principles	663
4.6.2	Meaning of ‘Habitual Residence’	667
4.6.3	Linked Contracts	667

	<i>Bank of Baroda v. Vysya Bank</i>	668
	<i>Haeger & Smidt</i>	672
4.6.4	<i>The Escape Clause</i>	674
	<i>Definitely Maybe Ltd v. Lieberberg GmbH</i>	674
	<i>Kenburn Waste Management Ltd v. Bergmann</i>	678
	<i>Intercontainer Interfrigo v. Balkenende Oosthuizen</i>	679
4.6.5	<i>Exceptions</i>	681
4.6.6	<i>Carriage of Goods</i>	682
4.6.7	<i>Carriage of Passengers</i>	682
4.7	<i>The Problem of Consent</i>	683
4.8	<i>Capacity</i>	684
4.9	<i>Other Provisions</i>	685
	<i>Further Reading</i>	686
24	Contracts: Legal Policy and Choice of Law	687
1	<i>Introduction</i>	687
2	<i>Terminology</i>	687
3	<i>The Rome I Regulation</i>	688
3.1	<i>Purely Domestic Contracts</i>	689
	<i>Banco Santander Totta v. Companhia de Carris de Ferro de Lisboa</i>	690
3.2	<i>Consumer Contracts</i>	693
3.3	<i>Individual Employment Contracts</i>	694
	<i>Koelzsch v. Luxembourg</i>	697
3.4	<i>Contracts Concerning Immovable Property</i>	701
3.5	<i>Overriding Mandatory Provisions</i>	701
3.5.1	<i>Overriding Mandatory Provisions of the Forum</i>	703
	<i>Ingmar GB Ltd v. Eaton Leonard Technologies Inc.</i>	703
	<i>United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare</i>	706
3.5.2	<i>Overriding Mandatory Provisions of Foreign Law</i>	710
	<i>Republik Griechenland v. Nikiforidis</i>	710
4	<i>Foreign Illegality under English Common Law</i>	713
4.1	<i>Initial Illegality</i>	714
4.1.1	<i>Contracts to Commit a Crime</i>	714
	<i>Foster v. Driscoll</i>	714
	<i>Regazzoni v. K. C. Sethia (1944) Ltd</i>	716
4.1.2	<i>Foreign Public Policy</i>	720
	<i>Lemenda Trading Co. Ltd v. African Middle East Petroleum Co. Ltd</i>	720

4.1.3	Wider Forms of Illegality	722
	<i>Euro-Diam Ltd v. Bathurst</i>	722
4.1.4	Arbitration	725
	<i>Soleimany v. Soleimany</i>	725
4.2	Supervening Illegality	728
	<i>Ralli Brothers v. Compania Naviera Sota y Aznar</i>	728
4.3	Conclusions	730
5	Foreign Illegality under US Law	730
	<i>Triad Financial Establishment v. Tumpane Company</i>	732
	<i>Business Incentives Co. v. Sony Corporation of America</i>	734
	Further Reading	735
25	The Common-Law Countries: Regulating Business, Protecting Employees and Helping Consumers	736
1	Legal Principles	736
2	Estate Agents	737
	<i>Freehold Land Investments Ltd v. Queensland Estates Pty Ltd</i>	737
	<i>Dorothy K. Winston & Co. v. Town Heights Development Inc.</i>	740
3	Lawyers	741
	<i>Newcomb v. Daniels, Saltz, Mongeluzzi & Barrett Ltd</i>	742
4	Employees	745
4.1	Exemption Clauses	746
	<i>Sayers v. International Drilling Co. NV</i>	746
	<i>Brodin v. A/R Seljan</i>	753
4.2	Agreements Not to Compete	755
	<i>Nasco Inc. v. Gimbert</i>	755
	<i>Nordson Corporation v. Plasschaert</i>	756
	<i>Barnes Group Inc. v. C&C Products Inc.</i>	759
5	Consumers	764
	<i>English v. Donnelly</i>	764
	Further Reading	767
26	Foreign Currency	768
1	Exchange Controls	768
1.1	Exchange Controls of the Forum	768
	<i>Boissevain v. Weil</i>	769
1.2	Foreign Exchange Controls	771
1.2.1	General Principles	771
	<i>Kleinwort, Sons and Company v. Ungarische Baumwolle Industrie</i>	771

1.2.2	<i>The IMF Agreement</i>	772
	<i>Wilson, Smithett & Cope Ltd v. Terruzzi</i>	773
	<i>Sing Batra v. Ebrahim</i>	776
	<i>United City Merchants v. Royal Bank of Canada</i>	777
1.3	Conclusions	780
2	Claims in Foreign Currency	780
2.1	The ‘Breach-Date’ Rule	780
	<i>Competex v. LaBow</i>	781
	<i>Indag SA v. Irridelco Corporation</i>	782
2.2	Judgment in Foreign Currency	783
	<i>Miliangos v. George Frank (Textiles) Ltd</i>	783
	<i>Owners of the Eleftherotria v. Owners of the Despina R Services Europe Atlantique Sud (SEAS) v. Stockholms Rederiaktiebolag Svea</i>	788
	<i>Attorney General of Ghana v. Texaco Overseas Tankships Ltd</i>	794
2.3	Developments in New York	797
3	Currency-Exchange Loss	798
	<i>Ozalid Group (Export) Ltd v. African Continental Bank Ltd</i>	798
	Further Reading	799
27	Property: Tangible Movables	800
1	Introduction	800
2	Stolen Property	801
	<i>Winkworth v. Christie Manson and Woods Ltd</i>	801
3	Tax Claims	806
	<i>Brokaw v. Seatrains UK Ltd</i>	806
4	Nationalization: England and its Colonies	808
	<i>Luther Co. v. Sagor & Co.</i>	808
	<i>Anglo-Iranian Oil Co. Ltd v. Jaffrate (The Rose Mary)</i>	810
	<i>Re Helbert Wagg & Co. Ltd</i>	813
5	Nationalization: United States	814
	<i>Banco Nacional de Cuba v. Sabbatino</i>	814
	<i>Nelson Bunker Hunt v. Coastal States Gas Producing Company</i>	819
6	Conclusions	821
	<i>Oppenheimer v. Cattermole</i>	821
6.1	Situs of Claims under an Insurance Policy	823
	Further Reading	824

28	Contractual Rights and Property Interests – I	825
1	Introduction	825
2	<i>Situs</i>	825
3	The Distinction between Contract and Property	826
4	Contractual Debts and Bonds	826
	<i>Re Helbert Wagg & Co. Ltd</i>	826
	<i>National Bank of Greece and Athens v. Metliss</i>	832
	<i>Adams v. National Bank of Greece</i>	835
5	Bank Accounts	839
	<i>Libyan Arab Foreign Bank v. Bankers Trust Co.</i>	839
6	Letters of Credit	845
	<i>Power Curber International Ltd v. National Bank of Kuwait</i>	845
	<i>Taurus Petroleum v. SOMO</i>	848
7	Shares	851
7.1	The Common Law	852
	<i>Braun v. Custodian</i>	852
	<i>Macmillan Inc. v. Bishopsgate Investment Trust plc (No. 3)</i>	854
	<i>Williams & Humbert Ltd v. W&H Trade Marks (Jersey) Ltd</i>	857
7.2	The Rome I Regulation	860
	Further Reading	861
29	Contractual Rights and Property Interests – II	862
1	Voluntary Assignment: The Rome I Regulation	862
1.1	The Nature of an Assignment	862
1.1.1	Essential Requirements	862
1.1.2	Relationships	863
1.1.3	Assignment Distinguished from Novation	863
1.2	Article 14 of the Rome I Regulation	864
1.2.1	Paragraph 1	864
1.2.2	Paragraph 2	865
1.2.3	The Proposed Paragraph 3	866
1.3	The Problem of Characterization (Classification)	866
1.3.1	Attachment of Assets	867
	<i>Raiffeisen Zentralbank Österreich v. Five Star Trading</i>	867
1.3.2	Insolvency of the Assignor	874
1.3.3	Competing Assignments	876
2	Third-Party Debt Orders and Garnishment	877
2.1	English Law	877

	<i>Deutsche Schachtbau- und Tiefbohrgesellschaft mbH</i>	
	<i>v. Ras Al-Khaimah National Oil Co.</i>	878
	<i>Société Eram Shipping Co. Ltd v. Compagnie</i>	
	<i>Internationale de Navigation</i>	884
2.2	EU Law	887
2.3	Conclusions	887
	Further Reading	887
30	Contractual Rights and Property Interests – III	889
1	Original Approach	889
	<i>Republic of Iraq v. First National City</i>	
	<i>Bank</i>	889
	<i>United Bank Ltd v. Cosmic International</i>	
	<i>Inc.</i>	891
	<i>Vishipco Line v. Chase Manhattan</i>	
	<i>Bank</i>	894
2	New Approaches	895
	<i>Tabacalera Severiano Jorge SA v. Standard</i>	
	<i>Cigar</i>	896
	<i>Allied Bank International v. Banco Credito Agricola</i>	
	<i>de Cartago</i>	897
	<i>Callejo v. Bancomer</i>	900
	<i>Braka v. Bancomer</i>	903
3	Situs under US Law	904
4	The Hickenlooper Amendment	904
	<i>French v. Banco Nacional de Cuba</i>	904
5	Conclusions	909
5.1	England and the United States Compared	909
5.2	Should English Law Be Changed?	910
	Further Reading	911
	<i>Bibliography</i>	912
	<i>Index</i>	914

Table of Panels

3.1	Recognition and Enforcement of Judgments within the Union: EEC Treaty, Article 220	<i>page 21</i>
3.2	Defendants Domiciled in Third Countries: Brussels 2012 (Regulation 1215/2012), Article 6	23
3.3	Conventions with Third Countries: Brussels 2012 (Regulation 1215/2012), Article 72	24
3.4	General Jurisdiction: Brussels 2012 (Regulation 1215/2012), Article 4	24
3.5	Law Applicable to Determine the Domicile of an Individual: Brussels 2012 (Regulation 1215/2012), Article 62	25
3.6	UK Rules of Domicile for Individuals: Civil Jurisdiction and Judgments Order 2001, Article 9 (Brussels 2000 Version)	26
3.7	Domicile of Companies: Brussels 2012 (Regulation 1215/2012), Article 63	27
3.8	Which Instrument Applies? Lugano Convention 2007, Article 64	30
3.9	Subject-Matter Scope: Brussels 2012 (Regulation 1215/2012), Article 1	31
4.1	Persons Domiciled in Another Member State: Brussels 2012 (Regulation 1215/2012), Article 5	44
4.2	Matters Relating to a Contract: Brussels 2012 (Regulation 1215/2012), Article 7(1)	51
4.3	Matters Relating to a Tort: Brussels 2012 (Regulation 1215/2012), Article 7(2)	68
4.4	Branch, Agency or Other Establishment: Brussels 2012 (Regulation 1215/2012), Article 7(5)	78
4.5	Multiple Parties: Brussels 2012 (Regulation 1215/2012), Article 8	84
4.6	Counterclaims: Brussels 2012 (Regulation 1215/2012), Article 8(3)	87
4.7	Individual Contracts of Employment: Brussels 2012 (Regulation 1215/2012), Articles 20–23	89
4.8	Exclusive Jurisdiction: Brussels 2012 (Regulation 1215/2012), Article 24	92
4.9	Submission: Brussels 2012 (Regulation 1215/2012), Article 26	105
4.10	Examination as to Jurisdiction: Brussels 2012 (Regulation 1215/2012), Article 27	106

TABLE OF PANELS

xxv

4.11	Examination as to Jurisdiction: Service: Brussels 2012 (Regulation 1215/2012), Article 28	106
6.1	Service of Documents on an Overseas Company: Companies Act 2006	141
6.2	Contracts: Civil Procedure Rules, Rule 6.36 and Practice Direction 6B, paragraph 3.1(6), (7) and (8)	150
6.3	Tort: Civil Procedure Rules, Rule 6.36 and Practice Direction 6B, paragraph 3.1(9)	152
6.4	Multiple Parties: Civil Procedure Rules, Rule 6.36 and Practice Direction 6B, paragraph 3.1(3)	162
6.5	Foreign Land: Civil Jurisdiction and Judgments Act 1982, section 30	164
7.1	Federal Rules of Civil Procedure, Rule 4(k)(2)	190
8.1	Choice-of-Court Agreements: Brussels 2012 (Regulation 1215/2012), Article 25	200
8.2	Protection of Weak Parties: Brussels 2012 (Regulation 1215/2012), Articles 15, 19 and 23	215
10.1	<i>Lis Pendens</i> – Related Actions: Brussels 2012 (Regulation 1215/2012), Articles 29–32	282
10.2	<i>Lis Pendens</i> : Proceedings in a Non-EU State: Brussels 2012 (Regulation 1215/2012), Articles 33 and 34	287
10.3	Enhancing the Effectiveness of Choice-of-Court Agreements: Brussels 2012 (Regulation 1215/2012), Recital 22	305
10.4	Arbitration: Brussels 2012 (Regulation 1215/2012), Recital 12	308
12.1	The Defamation Act 2013, Section 9	376
14.1	Recognition and Enforcement: Brussels 2012, Articles 36–41	386
14.2	Refusal of Recognition: Brussels 2012, Article 45	387
14.3	Conventions with Third Countries: Brussels 2012, Article 72	389
14.4	Civil Claim in Criminal Proceedings: Brussels 2012, Article 7(3)	391
14.5	The Right to Defend Oneself: Brussels 2012, Article 64	392
15.1	Submission: Civil Jurisdiction and Judgments Act 1982, section 33	445
15.2	Choice-of-Court and Arbitration Agreements: Civil Jurisdiction and Judgments Act 1982, section 32	446
15.3	State (Sovereign) Immunity: Civil Jurisdiction and Judgments Act 1982, section 31	447
16.1	Foreign Judgments as a Bar to New Proceedings: Civil Jurisdiction and Judgments Act 1982, section 34	470
17.1	Foreign-Court Jurisdiction: Uniform Foreign-Country Money Judgments Recognition Act, section 5	473
18.1	Power to Grant Injunctions: Senior Courts Act 1981, section 37	481
18.2	Foreign Judgments: Civil Jurisdiction and Judgments Act 1982, section 25	489
18.3	Provisional, Including Protective, Measures: Brussels 2012 (Regulation 1215/2012), Articles 2(a) and 35; Recital 33	509

18.4	Provisional Measures in Enforcement Proceedings: Brussels 2012, Article 40	520
19.1	Disclosure and Inspection of Documents: Civil Procedure Rules, Rule 31.8	527
20.1	Protection of Trading Interests Act 1980, section 4	560
20.2	Assistance to Foreign and International Tribunals: 28 USC § 1782(a)	561
22.1	Torts: The General Rule: Rome II Regulation, Article 4	608
22.2	Rules of Safety and Conduct: Rome II Regulation, Article 17	609
22.3	States with More than One Legal System: Rome II Regulation, Article 25	610
22.4	Habitual Residence: Rome II Regulation, Article 23	611
22.5	Environmental Damage: Rome II Regulation, Article 7	627
22.6	Product Liability: Rome II Regulation, Article 5	633
22.7	Infringement of Intellectual Property Rights: Rome II Regulation, Article 8	637
22.8	Freedom of Choice: Rome II Regulation, Article 14	638
22.9	Subject-Matter Scope of the Rome II Regulation: Rome II Regulation, Article 1	646
23.1	Subject-Matter Scope of the Rome I Regulation: Rome I Regulation, Article 1	654
23.2	States with More than One Legal System: Rome I Regulation, Article 22	655
23.3	Express and Implied Choice of Law: Rome I Regulation, Article 3	656
23.4	Applicable Law in the Absence of Choice: Rome I Regulation, Article 4	666
23.5	Meaning of 'Habitual Residence': Rome I Regulation, Article 19	667
23.6	Carriage of Goods: Rome I Regulation, Preamble (Recital 22) and Article 5(1)	682
23.7	Carriage of Passengers: Rome I Regulation, Article 5	683
23.8	Consent and Material Validity: Rome I Regulation, Article 10	683
23.9	Incapacity: Rome I Regulation, Article 13	684
23.10	Other Provisions: Rome I Regulation, Articles 11 and 12	685
24.1	Overriding Mandatory Provisions: Rome I Regulation, Article 9(1)	688
24.2	Non-Derogable Provisions: Rome I Regulation, Article 3	689
24.3	Consumer Contracts: Rome I Regulation, Article 6	693
24.4	Consumer Contracts: Rome I Regulation, Recitals 23–32	695
24.5	Individual Employment Contracts: Rome I Regulation, Article 8	696
24.6	Overriding Mandatory Provisions: Rome I Regulation, Article 9	702
24.7	Overriding Mandatory Provisions of Foreign Law: Rome Convention, Article 7	702
24.8	Overriding Mandatory Provisions of the Forum: Rome Convention, Article 7	703
24.9	Restatement of the Law Second Conflict of Laws, § 187(2)	730

TABLE OF PANELS		xxvii
26.1	Computation of Judgments and Accounts: New York Judiciary Law, § 27	797
27.1	Hickenlooper Amendment: Foreign Assistance Act 1964, 22 USC § 2370(e)(2)	818
28.1	Material Scope (Company Shares): Rome I Regulation, Article 1	861
29.1	Voluntary Assignment and Contractual Subrogation: Rome I Regulation, Article 14	864

Figures

2.1	Jurisdiction	<i>page 13</i>
21.1	Traditional Choice-of-Law Methodology	577
29.1	Relationships	863
29.2	Competing Assignments	876

From the Preface to the First Edition

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.

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 clarity and 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 Union, and a significant part of the subject-matter of the book has been taken over by the EU. Here, EU 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.

From the Preface to the Second Edition

The most important development since the first edition has been the revised ('recast') version of the Brussels I Regulation.¹ This will be referred to in the book as 'Brussels 2012'. The original version of the Brussels I Regulation will be called 'Brussels 2000'. Since Brussels 2012 applies from 10 January 2015, the new edition has been based entirely on it. This has created an editorial problem since, although most of its provisions have been taken over unaltered from Brussels 2000, the Articles have been renumbered. To avoid confusion, I have inserted the new numbers, in square brackets, into the extracts from cases where, as is usually the case, the content of the Article is the same. This makes it easier for the reader to see what the case means for the present-day law. To provide further help, I have produced a Table of Equivalences, which gives the numbering of the key Articles in Brussels 2000 with their equivalents in Brussels 2012.

There have been other changes as well. What was previously the 'European Community' or the 'European Communities' (EC) is now the 'European Union' (EU).² The judicial institution of the EU (popularly known as the European Court) is now officially the 'Court of Justice of the European Union', a term which I have abbreviated to CJEU. It consists of the Court of Justice, the General Court and specialized courts.³ For the sake of simplicity, I use the new terminology even when talking about the past, except when it would be inappropriate.

¹ Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012, L 351/1.

² Article 11 TEU.

³ Article 19 TEU.

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Preface to the Third Edition

The main purpose of this edition is to cover the large number of new cases from the European Court of Justice as well as the smaller number from the English courts. To make room for this material, I decided to delete the two chapters specifically on Canadian law. Although it looked like a beacon of rationality at first, the Canadian conflicts revolution seems to have ended up in a mire, thus showing that good principles are not enough in themselves: they must be put into effect through a sound system of rules.

The Effect of Brexit on Private International Law

As might be expected, Brexit has been my biggest headache. The submission deadline for this edition is June 2019. On this date, the United Kingdom will still be a Member of the European Union. For this reason, I decided to write the book as if the UK was still a Member State. By the time the edition is published, this may no longer be the case. However, there are so many uncertainties regarding the effect of Brexit on private international law that this seems the only sensible course to take. Nevertheless, a few words should be said here as regards the possibilities.

Brexit will have one very stark and immediate effect on private international law: most of the legal instruments discussed in this book will, unless something is done, cease to be law in the United Kingdom the moment the UK ceases to be a Member State. These instruments fall into two categories: the first consists of EU legislation – in practice, regulations – and the second consists of international conventions which apply to the UK because of its membership of the EU.

Brussels I, Rome I and Rome II

The most important regulations as regards the subject matter of this book are Brussels I (Brussels 2012),¹ Rome I² and Rome II.³ Many of the legal rules

¹ Regulation 1215/2012.

² Regulation 593/2008.

³ Regulation 864/2007.

discussed in the book are laid down in these measures. When the UK leaves the EU, these regulations will no longer apply in the UK as EU law. They will of course continue to apply in the European Union. The consequences of this will be different for Brussels I, on the one hand, and the two 'Rome' regulations, on the other hand. This is because reciprocity plays an important part in Brussels I but not in Rome I and II.

The two 'Rome' regulations deal with choice of law: Rome I is concerned with contracts, and Rome II with torts and other non-contractual obligations. The purpose of these two regulations is to determine which law applies. The important point is that, under these two regulations, it does not matter whether the country the law of which is applicable is a Member State or not. Its law will be applied in exactly the same way. This means that if a case comes before the courts of an EU Member State and the rules in Rome I or II indicate that the law of England is applicable, English law will be applied in the same way after Brexit as before. Brexit will have no effect in this situation. Of course, the position will be different in a court in the United Kingdom, since the regulation will no longer be law. However, the UK Government is planning to deal with this by making the two 'Rome' Regulations applicable as a matter of UK law. If this is done, Brexit will have little effect if the case comes before a court in the UK. The only difference is that references to the CJEU will no longer take place.

The position is more complicated in the case of Brussels 2012. Here reciprocity *does* play a part. A court in an EU Member State will apply Brussels 2012 with regard to the UK in a very different way after Brexit. One of the most important objectives of the Brussels Regulation is to protect defendants from exorbitant jurisdiction. However, it does this only for defendants domiciled in other Member States: courts in EU Member States are entitled to take jurisdiction over defendants not domiciled in another Member State under their national rules of jurisdiction. Nevertheless, the resulting judgment must still be enforced in other Member States without the court asked to enforce it being able to apply any jurisdictional filter. This means that UK defendants will be seriously prejudiced after Brexit.

Under another provision, exclusive choice-of-court agreements must be respected, but this applies only if the designated court is in another EU Member State. So, English choice-of-court agreements will be less effective after Brexit. The same applies to other grounds of exclusive jurisdiction – for example, jurisdiction to determine rights *in rem* in land. This applies only if the country with exclusive jurisdiction is an EU Member State. Finally, the Brussels Regulation provides a simple and efficient way of enforcing foreign judgments, but this too applies only if the judgment was given by a court in another Member State. All these benefits will be lost once the UK leaves the European Union. Making the Brussels Regulation applicable under UK law would make no difference.

To solve the problem, the UK plan is to ask the European Union to conclude a convention with the UK under which the Brussels Regulation would apply to the UK after Brexit as if it was still a Member State. There is a precedent for this. The Brussels Regulation does not apply to Denmark as part of EU law because

the Treaty provision under which it was adopted does not apply to Denmark. However, a Convention was concluded between the EU and Denmark in 2005 under which the Brussels Regulation applies to Denmark under international law. If the EU agrees to a similar convention with the UK, the rules regarding jurisdiction and judgments will operate in much the same way as they did before Brexit.

The Lugano Convention and the Hague Choice-of-Court Convention

If, under EU law, the Union has exclusive competence to conclude a convention on a particular matter, the Member States are not allowed to conclude it; only the Union may do so. Nevertheless, the Convention is binding on the Member States as if they had concluded it. This follows from Article 216(2) TFEU. The Lugano Convention of 2007 and the Hague Choice-of-Court Convention of 2005 are both binding on the UK on this basis. They will cease to be binding after Brexit. However, it will then be possible for the UK to become a Party to the Convention in question in its own right. In the case of the Hague Convention, this will be simple and straightforward: all the UK has to do is to deposit its instrument of ratification, acceptance, approval or accession with the Foreign Ministry of the Netherlands. Three months later, the Convention will apply to the UK. With regard to the Lugano Convention, the position is more complicated. There would have to be a new convention and this would have to be agreed to by all the other Parties to the Convention, something which may take some time. The UK will certainly become a Party to the Hague Convention as soon as it leaves the EU; it will probably also seek to become a Party to the Lugano Convention.

But If . . .

If everything works out according to plan, international litigation will not be seriously harmed by Brexit; but if things go wrong, the effect could be disastrous.

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TCH
June 2019

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

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The discussion in Chapter 10 of *Owusu v. Jackson* and *Turner v. Grovit* is based on my analysis of these cases in the *International and Comparative Law Quarterly* for October 2005;¹ and the discussion on arbitration and the Brussels I Regulation is based on an article in the *International and Comparative Law Quarterly* for October 2014.² Some of the material on the Rome II Regulation in Chapter 22 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; and the discussion in Chapter 29 on voluntary assignment under the Rome I Regulation draws on my article 'Choice of Law Regarding the Voluntary Assignment of Contractual Obligations under the Rome I Regulation' (2011) 60 *ICLQ* 29. I am grateful for being able to reuse all this material here.

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In 2006, I gave the General Course on Private International Law at The Hague Academy of International Law, under the title 'The Modern Approach

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

² 'The Brussels I Regulation and Arbitration' (2014) 63 *ICLQ* 843.

to Private International Law: International Litigation and Transactions from a Common-Law Perspective'.³ 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'.⁴ 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.

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³ *Recueil des Cours*, vol. 319 (2006).

⁴ *Recueil des Cours*, vol. 266 (1997).

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 Equivalences

Selected Provisions of Brussels 2000 and 2012¹

Brussels 2000	Brussels 2012 ²	Subject matters
Article 1(1)	Article 1(1)	Scope: civil and commercial matters
Article 1(2)	Article 1(2)	Scope: matters excluded
Article 2	Article 4	General jurisdiction (domicile)
Article 3	Article 5	Defendants domiciled in another Member State
Article 4	Article 6	Defendants domiciled in non-member States
Article 5(1)	Article 7(1)	Special jurisdiction: contract
Article 5(3)	Article 7(2)	Special jurisdiction: tort
Article 5(5)	Article 7(5)	Special jurisdiction: branches, etc.
Article 6	Article 8	Joint defendants, third-party proceedings, counter-claims
Articles 8–14	Articles 10–16	Insurance
Articles 15–17	Articles 17–19	Consumers
Articles 18–21	Articles 20–23	Employees
Article 22	Article 24	Exclusive jurisdiction
Article 23	Article 25	Choice-of-court agreements
Article 24	Article 26(1)	Entry of appearance without challenging jurisdiction

¹ This Table gives only the most important provisions. For a full set of equivalences, see Brussels 2012, Annex III.
² In some cases, amendments have been made.

Brussels 2000	Brussels 2012	Subject matters
Article 27–30	Article 29–32	<i>Lis pendens</i> : proceedings in other Member States
Article 31	Article 35	Provisional and protective measures
Article 33	Article 36	Recognition of judgments
Article 34(1)	Article 45(1)(a)	Grounds of non-recognition: public policy
Article 34(2)	Article 45(1)(b)	Default judgments
Article 34(3)	Article 45(1)(c)	Conflicting judgments: conflict with home judgment
Article 34(4)	Article 45(1)(d)	Conflict between two foreign judgments
Article 35(1)	Article 45(1)(e)	Jurisdiction
Article 35(2)	Article 45(2)	Court bound by findings of fact of court of origin
Article 35(3)	Article 45(3)	Public policy cannot be used to check jurisdiction
Article 59	Article 62	Domicile of individuals
Article 60	Article 63	Domicile of companies
Article 72	Article 72	Agreements not to recognize judgments

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)
JPIL	<i>Journal of Private International Law</i>
LMCLQ	<i>Lloyd's Maritime and Commercial Law Quarterly</i>
LQR	<i>Law Quarterly Review</i>
Ont.	Ontario (Canada)
R or r	Rule (rule)
RSC	Rules of the Supreme Court
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
USC	United States Code (not a code in the civil-law sense, but a compilation of statutes)

Table of Cases: Alphabetical

Note: Page numbers in **bold** indicate extended treatment of the case.

AB flyLAL-Lithuanian Airlines v. Starptautiskā lidosta Rīga and Air Baltic Corporation, Case C-27/17, ECLI:EU:C:2018:533 **125–32**

Abbott-Smith v. Governors of University of Toronto (1964) 49 MPR 329; 45 DLR (2d) 672 (Nova Scotia CA, Canada) 328

Abidin Daver, The [1984] AC 398 251–2, 254, 261–3

Abouloff v. Oppenheimer & Co. (1882) 10 QBD 295 449–52

Adams v. Cape Industries [1990] 2 WLR 657 (CA); [1990] Ch 433 (CA) **145–7**, 148, 151, 434, **437–9**, 441

Adams v. National Bank of Greece [1961] AC 255; [1960] 3 WLR 8; [1960] 2 All ER 421 (HL) **835–9**

Aérospatiale, *See* Société Nationale Industrielle Aérospatiale

AES Ust-Kamenogorsk Hydropower Plant LLP v. Ust-Kamenogorsk Hydropower Plant JSC [2013] UKSC 35; [2013] 1 WLR 1889; [2014] 1 All ER 335; [2014] 1 All ER (Comm) 1; [2013] 2 Lloyd’s Rep 281 (Supreme Court) 272

Aetna Financial Services Ltd v. Feigelman [1985] 1 SCR 2 (Supreme Court, Canada) 505

Africa Line Ltd v. MAGIC Sportswear Corporation [2005] EWCA Civ 710; [2005] 2 Lloyd’s Rep 170. 273

Agostinho da Silva Martins v. Dekra Claims Services Portugal SA, Case C 149/18, ECLI:EU:C:2019:84 **639–41**

Airbus Industrie v. Patel [1999] 1 AC 119; [1998] 2 WLR 686; [1998] 2 All ER 257 (HL) 270, 491

Airways v. Pan AmericanWorld Airways, 568 F Supp 811 (DDC 1983) 270–1

Al-Koronky v. Time Life Entertainment Group Ltd [2006] CP Rep 736 263

Alessandra Yarns LLC v. Tongxiang Baoding Textile Co. Ltd [2015] QCCS 346 850

TABLE OF CASES: ALPHABETICAL

xlv

Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 US 682, 96 S Ct 2201, 48 L Ed. 2d 815 (1976) 894

Allianz v. West Tankers, Case C-185/07, [2009] ECR I-663 315–19

Allied Bank International v. Banco Credito Agricola de Cartago 757 F 2d 516 (1985) (US CA 2nd Cir. 1985) Cert. dismissed 473 US 934; 106 S Ct 30; 87 L Ed 2d 706 **897–900**, 902–3

Altertext Inc. v. Advanced Data Communications Ltd [1985] 1 WLR 457 (ChD) **542–5**

Altimo Holdings v. Kyrgyz Mobil Tel Ltd [2011] UKPC 7; [2012] 1 WLR 1804; [2011] 4 All ER1027 (PC) 155, 225, **261–4**

American Banana Co. v. United Fruit Co., 213 US 347; 29 S Ct 511; 53 L Ed 826 815–16

Amin Rasheed Shipping Corporation v. Kuwait Insurance Co. [1984] AC 50 (HL) 651–2, **657–60**

Anderson v. Nobels Explosive Co. (1906) 12 OLR 644 (Ontario CA, Canada) 328

Anglo-Iranian Oil Co. Ltd v. Jaffrate (The Rose Mary) [1953] 1 WLR 246 (Supreme Court, Aden) **810–13**, 821, 830

Anschuetz & Co., GmbH, In re 754 F 2d 602, 612 (CA 5th Cir. 1985) 568

Antelope, The (1825) 10 Wheaton 123; 23 US 66 (US Supreme Court) 460

Anton Durbeck v. Den Norske Bank [2003] 2 WLR 1296 (CA) **81–2**

Anton Durbeck v. Den Norske Bank [2005] EWHC 2497; [2005] All ER (D) 158 [2006] 1 Lloyd's Rep 93 (QBD Comm) 84, **595–8**

Apostolides v. Orams, Case C-420/07, [2009] ECR I-3571 218, **421–3**

Arab Monetary Fund v. Hashim [1989] 1 WLR 565 531

Arcado v. Haviland, Case 9/87, [1988] ECR 1539 34, 45

Arkwright Mutual Insurance Co. v. Bryanston Insurance Co. Ltd [1990] 2 QB 649 289

Asahi Metal Industry v. Superior Court of California 480 US 102; 107 S Ct 1026; 94 L Ed 2d 92 (1987) (US Supreme Court) **335–9**, 340–1, 343–4, 349–50

Asbestos Insurance Coverage Cases, In re [1985] 1 WLR 331; [1985] 1 All ER 716 (HL) **557–8**

ASML Netherlands v. Semiconductor Industry Services (SEMIS), Case C-283/05, [2006] ECR I-12041 **416–21**, 426

- Assens Havn v. Navigators Management (UK) Limited, Case C 368/16, ECLI:EU: C:2017:546 **213–14**
- Assunzione, The [1954] P 150 (CA) 650
- Atlantic Marine Construction Co., Inc. v. United States WD Texas, 571 US (US Supreme Court, 2013) 240
- Atlantic Star, The [1974] AC 436 (HL) 249–50
- Attorney General of Ghana v. Texaco Overseas Tankships Ltd [1994] 1 Lloyd's Rep 473 (HL) **794–7**
- Attorney General of New Zealand v. Ortiz [1984] AC 1 599
- Attorney-General (United Kingdom) v. Heinemann Publishers Australia Pty Ltd (1988) 165 CLR 30 262
- Attorney General v. Higgins (1857) 2 H & N 339 853
- Attorney General v. Times Newspapers Ltd [1992] 1 AC 191 (HL) 482
- Autocephalous Greek-Orthodox Church of Cyprus v. Goldberg 717 F Supp 1374 (FDC, SD Indiana, 1989); aff'd 917 F 2d 278 (7th Cir. 1990) 805–6, 808
- Babanaft International Co. SA v. Bassatne [1990] Ch. 13 490, 502
- Babcock v. Jackson 12 NY 2d 473; 240 NYS 2d 743; 191 NE 2d 279 (1963) (CA, New York) **615–17**, 621–3
- Baltic Shipping Co. v. Translink Shipping Ltd [1995] 1 Lloyd's Rep 673 503, 505
- Banco de Brasil v. A C Israel Commodity Co., 12 NY 2d 371; 190 NE 2d 235 (1963); cert. denied 376 US 906 (1964) 776
- Banco de Vizcaya v. Don Alfonso de Borbon y Austria [1935] 1 KB 140 830
- Banco Nacional de Comercio Exterior SNC v. Empresa de Telecomunicaciones de Cuba SA [2007] EWCA Civ 662; [2008] 1 WLR 1936; [2007] 2 All ER (Comm) 1093; [2007] 2 Lloyd's Rep 484 (CA) **520–3**, 524
- Banco Nacional de Cuba v. Sabbatino 376 US 398; 84 S Ct 923; 11 L Ed 2d 804 (1964) (US Supreme Court) 809, **814–19**, 890, 905–8
- Banco Santander Totta SA v. Companhia de Carris de Ferro de Lisboa SA [2016] EWCA Civ 1267; [2017] 1 WLR 1323; [2017] 3 All ER 838; [2017] 2 All ER (Comm) 551; [2017] 1 Lloyd's Rep 113 (CA) **690–3**
- Bank Melli Iran v. Pahlavi, 58 F 3d 1406 (9th Cir. 1995) 258, 477
- Bank of Baroda v. Vysya Bank [1994] 2 Lloyd's Rep 87 (QBD Comm) **668–71**, 845
- Bank of China v. NBM LLC [2002] 1 WLR 844 (CA) **503–5**
- Bank of Montreal v. Kough 612 F 2d 467 (9th Cir. 1980) 472, **474–6**

TABLE OF CASES: ALPHABETICAL

xlvii

- Bank of Nova Scotia, *See* Grand Jury Proceedings Bank of Nova Scotia, *In re*
- Bankers Trust Co. v. Shapira [1980] 1 WLR 1274 (CA) **535-7**, 540-1
- Barber & Sons v. Lloyd's Underwriters [1986] 3 WLR 515 556
- Barnes Group Inc. v. C&C Products Inc. 716 F 2d 1023; 38 Fed R Serv 2d 433 (CA, 4th Cir. 1983) **759-63**
- Baten, *See* Gemeente Steenbergen v. Baten
- Batra v. Ebrahim, *See* Sing Batra v. Ebrahim
- Bavaria Fluggesellschaft Schwabe v. Eurocontrol, Cases 9 and 10/77 [1977] ECR 1517 34
- Beals v. Saldanha [2003] 3 SCR 416 (Supreme Court, Canada) 453
- Berezovsky v. Michaels [2000] 1 WLR 1004; [2000] 2 All ER 986 (HL) **366-9**, 370
- Berghoefer v. ASA Case 221/84, [1985] ECR 2699 **203-4**
- Berlin, *See* Land Berlin
- Berliner Bank v. Karageorgis [1996] 1 Lloyd's Rep 426 428
- Berliner Verkehrsbetriebe (BVG) v. J P Morgan Chase Bank, Case C-144/10, [2011] ECR I-3961 **96-8**
- Bernhard v. Harrah's Club 16 Cal 3d 313; 546 P 2d 719; 128 Cal Rptr 215 (1976) (Supreme Court, California) **629-32**
- Bernstein v. NV Nederlandsche Amerikaansche Stoomvaart-Maatschappij 173 F 2d 71 (2nd Cir. 1949), amended 210 F 2d 375 (2nd Cir. 1954) 817-18
- Bernstein v. Van Heyghen Frères SA 163 F 2d 246 (2nd Cir. 1947); cert. denied 332 US 772; 92 L Ed 357; 68 S Ct 88. 817-18
- Bier Mines de potasse d'Alsace, Case 21/76 [1976] ECR 1735 54, **69-71**, 108, 152, 157, 333, 353-4
- Bisso v. Inland Waterways Corporation, 349 US 85, 75 S Ct 629, 99 L Ed. 911 (1955) 231-2
- Blanckaert and Willems v. Trost, Case 139/80, [1981] ECR 819 79, 148
- Block Bros Realty v. Mollard (1981) 122 DLR (3d) 323 (CA, British Columbia) 741
- Blohn v. Desser [1962] 2 QB 116; [1961] 3 WLR 719; [1961] 3 All ER 1. 440-1
- BNSF Railway Co. v. Tyrrell 137 S Ct 1549 (2017) 183-4
- Boissevain v. Weil [1950] AC 327; [1950] 1 All ER 728 (HL) **769-70**
- Bolagsupplysningen v. Svensk Handel, Case C-194/16, ECLI:EU:C:2017:766 **360-5**

- Bols Distilleries v Superior Yacht Services Ltd [2005] UKPC 45, [2007] 1 WLR 12, [2007] 1 All ER (Comm) 461, [2007] 1 LLR 683, [2007] 1 Lloyd's Rep 683 155
- Bonython v. Commonwealth of Australia [1951] AC 201 650
- Booth v Phillips [2004] EWCA 1437 (Comm); [2004] 1 WLR 3292 158–60
- Braka v. Bancomer 762 F 2d 222 (US CA 2nd Cir. 1985) **903**
- Brand and Overseas Food Importers and Distributors, Re (1981) 27 BCLR 31 (British Columbia CA) 445
- Brandsma qq v. Hansa Chemie AG 16 May 1997, Rechtspraak van de Week 126; NJ 1998, 585 874–6
- Brannigan v. Davison [1997] AC 238; [1996] UKPC 35 (PC) 531
- Brassard v. Smith [1925] AC 371 (PC) 853
- Braun v. Custodian [1944] 3 DLR 412; affirmed [1944] SCR 339; [1944] 4 DLR 209 (Supreme Court, Canada) **852–4**, 856
- British Airways Board v. Laker Airways [1984] QB 142 271
- British Airways Board v. Laker Airways [1984] QB 169 (CA) 271–2
- British Airways Board v. Laker Airways [1985] AC 58; [1984] 3 WLR 413 (HL) 272
- British Midland Airways Ltd v. International Travel Inc., 497 F 2d 869 (9th Cir. 1974) 472
- British Nylon Spinners Ltd v. Imperial Chemical Industries Ltd, [1953] Ch 19; [1952] 2 All ER 780 (CA); [1955] Ch 37; [1954] 3 WLR 505; [1954] 3 All ER 88 (ChD) 552
- British South Africa Co. v. Companhia de Moçambique [1893] AC 602 (HL) 133, 163
- Brodin v. A/R Seljan 1973 SC 213 (Court of Session, OH) 752, **753–5**
- Brogstetter v. Fabrication de Montres Normandes, Case C-548/12 ECLI:EU: C:2014:148 **45–8**
- Brokaw v. Seatrain UK Ltd [1971] 2 QB 476; [1971] 2 WLR 791; [1971] 2 All ER 98; [1971] 1 Lloyd's Rep 337 (CA) **806–8**
- Bumper Corporation v. Comr of Police of Metropolis [1991] 1 WLR 1362; [1991] 4 All ER 638 (CA) 223, 598
- Burger King Burnham v. Superior Court of California, 495 US 604; 110 S Ct 2105; 109 L Ed 2d 631 (US Supreme Court, 1990) 137, 182, **184–90**, 193, 342
- Burnham, *See* Burger King Burnham v. Superior Court of California

TABLE OF CASES: ALPHABETICAL

xlix

Buron v. Denman (1848) 2 Exch 167 589

Bushby v. Munday 5 Madd. 297 265–6

Business Incentives Co. v. Sony Corporation of America 397 F Supp 63 (1975)
 (US DC S New York) **734–5**

Buttes Gas and Oil Co. v. Hammer (No. 3) [1982] AC 888, [1981] 3 All ER 616,
 [1981] 3 WLR 787 262

Callejo v. Bancomer 764 F 2d 1101 (US CA 5th Cir. 1985) 899, **900–3**

Calvin's Case (1608) 7 Co Rep 1a 136

Cambridgeshire, The, 6 October 1982, unreported 257–8

Cammell v. Sewell (1858) 3 H & N 617; on appeal (1860) 5 H & N 728 (Exch).
 802–5

Canada Trust Co. v. Stolzenberg (No. 2) [2000] UKHL 51, [2000] 4 All ER 481,
 [2000] 3 WLR 1376, [2002] 1 AC 1, [2001] CLC 118, [2001] IL Pr 40 155

Car Trim v. KeySafety Systems, Case C-381/08, [2010] ECR 1255 50, **60–5**, 66

Carbon Black Export Inc. v. Monrosa, 254 F 2d 297 (5th Cir. 1958) 229

Carl Zeiss Stiftung v. Rayner and Keeler Ltd [1967] 1 AC 853, [1966] 2 All ER 536,
 [1967] RPC 497, [1966] 3 WLR 125 465

Carnival Cruise Lines v. Shute 499 US 585; 111 S Ct 1522; 113 L Ed 2d 622 (1991)
 (US Sup CT) **233–6**, 236–8

Carrick v. Hancock (1895) 12 TLR 59 (Div. Ct) 136, 438

Cartel Damage Claims (CDC) Hydrogen Peroxide, Case C-352/13, ECLI:EU:
 C:2015:335 **121–5**, 129, 131–2

Carvalho v. Hull Blyth Ltd [1979] 1 WLR 1228; [1979] 3 All ER 280; [1980] 1
 Lloyd's Rep 172 **223–5**

Castree v. Squibb Ltd [1980] 1 WLR 1248; [1980] 2 All ER 589 (CA) **332–3**, 349

Centros, Case C-212/97, [1999] ECR I-1459 582–3

Chabert v. Bacquie, 694 So 2d 805 (Fla. Ct App. 1997) 472

Chaplin v. Boys [1971] AC 356; [1969] 3 WLR 322; [1969] 2 All ER 1085 607, **623–5**, 637, 751–2

City Bank v. Barrow (1880) 5 App Cas 664 (HL) 800

Coast Lines Ltd v. Hudig & Veder Chartering NV [1972] 2 QB 34 (CA) 650–1

Coin Controls v. Suzo International [1998] 3 WLR 420; [1997] 3 All ER 45 102

Color Drack v. LEXX International, Case C-386/05, [2007] ECR I-3699 52, 63

I TABLE OF CASES: ALPHABETICAL

Colt Industries Inc. v. Sarlie (No. 1) [1966] 1 WLR 440 (CA) **135-8**

Colzani v. RÜWA, Case 24/76, [1976] ECR 1831 202

Commissioners for Revenue & Customs v. Sunico, Case C-49/12 ECLI:EU:C:2013:545 **39-41**

Competex v. LaBow 783 F 2d 333 (CA, 2nd Cir, 1986) **781-2**

Concurrence Sàrl v. Samsung Electronics France SAS and Amazon Services Europe, Case C-618/15, EU:C:2016:976 127

Continental Bank v. Aeakos Compania Naviera [1994] 1 WLR 588; [1994] 1 Lloyd's Rep 505 (CA) 199, 301-2

Cook Industries Inc. v. Galliher [1979] Ch 439 544

Cooley v. Ramsay [2008] EWHC 129 (QB) 158-60

Cooley v. Weinberger, 518 F 2d 1151 (10th Cir. 1975) 477

Coreck Maritime v. Handelsveem, Case C-387/98, [2000] ECR I-9337 212, 216-18

Corman-Collins v. La Maison du Whisky, Case C-9/12, ECLI:EU:C:2013:860 **66-8**

Crédit Lyonnais v. New Hampshire Insurance Co. [1997] 2 Lloyd's Rep 1 676

Crédit Suisse Fides Trust SA v. Cuoghi [1998] QB 818; [1997] 3 WLR 871 (CA) **491-6**, 498, 523

Cretanor Maritime Co. Ltd v. Irish Marine Management Ltd [1978] 1 WLR 966 482

CSR Ltd v. Cigna Insurance Australia Ltd (1997) 189 CLR 345 and 405 (High Court of Australia) 258

Daimler v. Bauman 134 S Ct 746; 187 L Ed 2d 624 (2014) (US Supreme Court) **179-83**, 189, 193

Dalmia Dairy Industries Ltd v. National Bank of Pakistan [1978] 2 Lloyd's Rep 223 223, 598

Danværn Production v. Schuhfabriken Otterbeck, Case C-341/93, [1995] ECR I-2053. 87

De Béêche v. South American Stores (Gath & Chaves) Ltd [1935] AC 148 717

De Bloos v. Bouyer, Case 14/76, [1976] ECR 1497 50, 78

De Cavel v. De Cavel, Case 120/79, [1980] ECR 731 34

De Cavel v. De Cavel, Case 143/78, [1979] ECR 1055 34, 42

TABLE OF CASES: ALPHABETICAL

li

- De Wütz v. Hendricks (1824) 2 Bing 314 717
- Dearle v. Hall (1828) 3 Russ. 1 876
- Debaecker v. Bouwman, Case 49/84, [1985] ECR 1779 415
- Definitely Maybe Ltd v. Lieberberg GmbH [2001] 1 WLR 1745 (QBD) **674-7**, 679
- Denilauler v. Couchet Frères, Case 125/79, [1980] ECR 1553 **510-12**, 514-15
- Derby & Co. Ltd v. Weldon (Nos 3 and 4) [1990] Ch 65; [1989] 2 WLR 412 (CA) 500, **502-3**, 503-5
- Despina R, *See* Owners of the Eleftherotria v. Owners of the Despina R
- Deutsche Bank und Disconto Gesellschaft v. Banque des Marchands de Moscou (1931-1932) 107 LJBK 386; [1931] 4 LDB 293 828
- Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v. Ras Al-Khaimah National Oil Co. [1990] 1 AC 295; [1988] 3 WLR 230; [1988] 2 All ER 833; [1988] 2 Lloyd's Rep =293 (HL) **878-83**
- DFDS Torline Case, C-18/02, ECLI:EU:C:2004:74, [2004] ECR I-1417 **108-10**
- Diageo Brands BV v. Simiramida-04 EOOD, Case C-681/13, ECLI:EU:C:2015:471 **402-6**
- Diamond v. Sutton (1866) LR 1 Ex. 130 369
- Distillers Co. v. Thompson [1971] AC 458; [1971] 2 WLR 441; [1971] 1 All ER 694 (PC) **329-32**, 332-4
- Donoghue v. Stevenson [1932] AC 562 331
- Donohue v. Armco [2001] UKHL 64; [2002] 1 All ER 749; [2002] 1 All ER (Comm) 97; [2002] 1 Lloyd's Rep 425 228
- Dorothy K. Winston & Co. v. Town Heights Development Inc. 376 F Supp 1214 (1974) (US DC, DC) **740-1**
- Dow Jones & Co. Inc. v. Gutnick (2003) 210 CLR 575; 77 ALJR 255; 194 ALR 433 (High Ct, Australia) 371-2
- Du Pont v. Agnew [1987] 2 Lloyd's Rep 585 (CA) 259, 269-70, 272
- Du Pont v. Agnew (No. 2) [1988] 2 Lloyd's Rep 240 (CA) 259, 270
- Duijnste v. Goderbauer, Case 288/82, [1983] ECR 3663; [1985] 1 CMLR 220 **99-100**
- Duke of Brunswick v. Harmer (1849) 14 QB 185 351, 370-1
- Duke v. Andler [1932] SCR 734; [1932] 4 DLR 529 (Supreme Court, Canada) 446

lii	TABLE OF CASES: ALPHABETICAL
	Dumez v. Hessische Landesbank, Case C-220/88, [1990] ECR I-49 71, 108, 157, 160, 608
	Dunlop Pneumatic Tyre Co. Ltd v. A. G. Cudell & Co. [1902] 1 KB 342 (CA) 141-3 , 438
	Dunn v. Bank of Nova Scotia, 374 F 2d 876 (5th Cir. 1967) 902
	Durbeck, <i>See</i> Anton Durbeck v. Den Norske Bank
	Dym v. Gordon 16 NY 2d 120; 209 NE 2d 792; 262 NYS 2d 463 (1965) (CA, New York) 620-3
	EBM Co. Ltd v. Dominion Bank [1937] 3 All ER 555 859
	eDate Advertising v. X, Olivier Martinez and Robert Martinez v. MGN, Joined Cases C-509/09 and C-161/10, [2011] ECR I-10269; [2012] QB 654; [2012] 3 WLR 227 355-60 , 361-4
	Electrosteel Europe v. Edil Centro, Case C-87/10, [2011] ECR I-4987 65
	Elefanten Schuh v. Jacqmain, Case 150/80, [1981] ECR 1671 210-12
	Eleftheria, The [1970] P 94; [1969] 2 WLR 1073; [1969] 2 All ER 641; [1969] 1 Lloyd's Rep 237 220-3 , 237, 247
	Eleftherotria, Owners of the, <i>See</i> Owners of the Eleftherotria v. Owners of the Despina R
	Ellinger v. Guinness, Mahon & Co. [1939] 4 All ER 16 263
	Engler v Janus Versand C-27/02 [2005] ECR I-481, EU:C:2005:33 56
	English v. Donnelly 1958 SC 494 (Ct of Session, 1st Div.) 754, 764-6
	Entores v. Miles Far Eastern Corporation [1955] 2 All ER 394, [1955] 2 QB 327, [1955] EWCA Civ 3, [1955] 3 WLR 48, [1955] 1 Lloyd's Rep 511 (CA) 150, 649
	ERGO Insurance and Gjensidige Baltic, Cases C 359/14 and C 475/14, EU: C:2016:40 640, 642-6
	Erie Railroad Company v. Thompkins 58 S Ct 817; 304 US 674; 82 L Ed 1188 (1938) 169, 472, 610
	Erste Group Bank AG (London Branch) v. JSC 'VMT Red October' [2015] EWCA Civ 379 [2003] WHC 2926 (Comm) 159-60
	Euro-Diam Ltd v. Bathurst [1990] QB 1; [1988] 2 WLR 517; [1988] 2 All ER 23; [1988] 1 Lloyd's Rep 228 (CA) 722-5
	F ApS v. J (UK) Ltd [1993] Ugeskrift for Retsvæsen 802 (Østre Landsret (Eastern High Court), Denmark, 24 June 1993) 51
	Falco Privatstiftung and Rabitsch, Case C-533/07, [2009] ECR I-3327 61, 65 , 67

TABLE OF CASES: ALPHABETICAL

liii

Falcon Manufacturing (Scarborough) Ltd v. Ames, 53 Misc 2d 332; 278 NYS 2d 684 (Civ. Ct New York 1967) 472

Fehmarn, The [1958] 1 WLR 159; [1958] 1 All ER 333; [1957] Lloyd's Rep 551 (CA) **219–20**

Ferrari v. Italy, 28 July 1999, www.echr.coe.int/hudoc 282 303

First National City Bank of New York v. Internal Revenue Service, 271 F 2d 616, 620 (2nd Cir. 1959); cert. denied, 361 US 948, 80 S Ct 402, 4 L Ed. 2d 381 (1960) 548–9

Flaherty v. Girgis (1985) 63 ALR 466 161

flightright GmbH v. Air Nostrum, Joined Cases C-274/16, C-447/16 and C-448/16, ECLI:EU:C:2018:160 **55–60**

flyLAL-Lithuanian Airlines v. Starptautiskā lidosta Rīga and Air Baltic Corporation, Case C-302/13 EU:C:2014:2319 403–4, **512**

Folias, The, *See* Services Europe Atlantique Sud (SEAS) of Paris v. Stockholms Rederiaktiebolag Svea

Folien Fischer v. Ritrama, Case C-133/11, ECLI:EU:C:2012:664 **73–5**, 363

Fort Dodge Animal Health Ltd v. Akzo Nobel NV [1998] FSR 222 (CA) 102

Foster v. Driscoll [1929] 1 KB 470 (CA) **714–15**, 716–19, 725, 841–2

Four Seasons Holdings Incorporated v. Brownlie [2017] UKSC 80; [2018] 2 All ER 91; [2018] 1 WLR 192 (SC) **153–62**

Frahuil v. Assitalia Case C-265/02 [2004] ECR I-1543, EU:C:2004:77 56

Frankfurter v. W L Exner Ltd [1947] Ch 629 831

Freehold Land Investments Ltd v. Queensland Estates Pty Ltd (1970) 123 CLR 418; (1970) 44 ALJR 329 (High Ct, Australia) **737–9**

French v. Banco Nacional de Cuba 23 NY 2d 46; 295 NYS 2d 433 (CA, New York 1968) **904–8**

Gambazzi v. DaimlerChrysler Canada Inc., Case C-394/07, [2009] ECR I-2563 **397–401**, 425–6

Garcia v. Chase Manhattan Bank 660 F.2d 854 (2d Cir.1981) 902

Garcin v. Amerindo Investment Advisors Ltd [1991] 1 WLR 114; The Times, 12 June 1991 556

Gasser v. MISAT, Case C-116/02, [2003] ECR I-14693 294, 299, 303–4

GAT, *See* Gesellschaft für Antriebstechnik mbH & Co. KG (GAT) v. Lamellen und Kupplungsbau Beteiligungs KG (LuK)

- Gazprom v. Lithuania, Case C-536/13, ECLI:EU:C:2015:316 **320-3**
- Gemeente Steenberghe v. Baten, Case C-271/00 [2002] ECR I-10489 **37-9**
- George Monro Ltd v. American Cyanamid and Chemical Corporation [1944] KB 432 328
- Gesellschaft für Antriebstechnik (GAT) v. Lamellen und Kupplungsbau Beteiligungs (LuK), Case C-4/03, [2006] ECR I-6509 98, **101-4**
- Geyer v. Aguilar (1798) 7 Term Rep 681 434
- Gienar v. Meyer (1796) 2 Hy Bl 603 (126 ER 728) 649
- Gilbert, *See* Gulf Oil v. Gilbert
- Gillespie Management Corporation v. Terrace Properties (1989) 62 DLR (4th) 221; =(1989) 39 BCLR (2d) 337 (CA, British Columbia) 741
- Godard v. Gray (1870) LR 6 QB 139 434
- Golden Acres v. Queensland Estates [1969] St R Qd 378 (Queensland) 738-9
- Goodyear Dunlop Tires v. Brown 131 S Ct 2846 (U Supreme Court, 2011) 179, 181-2
- Gothaer Allgemeine Versicherung v. Samskip, Case C-456/11, ECLI:EU:C:2012:719 **428-31**, 465
- Gourdain v. Nadler, Case 133/78, [1979] ECR 733 34
- Government of India v. Taylor [1955] AC 491 458
- Grand Jury Proceedings Bank of Nova Scotia, In re 740 F 2d 817 (1984) (CA 11th Cir.) **545-50**
- Grand Jury Proceedings United States v. Field, 532 F 2d 404, 410 (5th Cir.); cert. denied, 429 US 940, 97 S Ct 354, 50 L Ed. 2d 309 (1976) 548-9
- Grant v. McAuliffe, 41 Cal 2d 859; 264 P 2d 944 (Supreme Court, California, 1953) 615
- Grell v. Levy (1864) 10 CB (NS) 73 (143 ER 1052) 745
- Group Josi Reinsurance Company v. Universal General Insurance Company, Case C-412/98, [2000] ECR I-5925. 291
- Grupo Mexicano de Desarrollo SA v. Alliance Bond Fund Inc. 527 US 308; 119 S Ct 1961 (1999) (US Supreme Court) **506-7**
- Gubisch Maschinenfabrik v. Palumbo, Case 144/86, [1987] ECR 4861 **284-5**, 286
- Gulf Oil v. Gilbert 330 US 501; 67 S Ct 839; 91 L Ed 1055 (1947). 258, 274-6, 278

- Gutnick v. Dow Jones, *See* Dow Jones & Co. Inc. v. Gutnick
- Haeger & Smidt, Case C-305/13, ECLI:EU:C:2014:2320 **672-4**
- Halley, *The* (1868) LR 2 PC 193 (PC) **602-3**
- Handte v. TMCS, Case C-26/91 [1992] ECR I-3967 34, **48-50**, 59, 328
- Hanson v. Denckla, 357 US 235, 253; 78 S Ct 1228, 1239; 2 L Ed. 2d 1283 (1958) 336, 341
- Harrods (Buenos Aires) Ltd, *Re* [1992] Ch. 72; [1991] 3 WLR 397; [1991] 4 All ER 334 (CA) 289-90
- Harty v. Sabre International Security Ltd [2011] EWHC 852 (QB) 159
- Hassett and Doherty, Case C-372/07, [2008] ECR I-7403. 98
- Havana, *See* United Railways of Havana and Regla Warehouses Ltd
- Helbert Wagg & Co. Ltd, *Re* [1956] Ch 323; [1956] 2 WLR 183; [1956] 1 All ER 129 (ChD) **813-14**, **826-31**
- Helicopteros Nacionales de Colombia v. Hall (*Helicol* case) 466 US 408; 104 S Ct 1868; 80 L Ed 2d 404 (1984) (US Supreme Court) 176, **177-9**, 192-3
- Henry v. Geoprosco [1976] QB 726 (CA) 445
- Hi Hotel HCF, C-387/12, EU:C:2014:215 128
- Hilton v. Guyot 159 US 113; 16 S Ct 139; 40 L Ed 95 472
- HL Boulton Co. v. Banque Royale du Canada [1944] JQ 1448; [1995] RLQ 213 850
- Hoffmann v. Krieg, Case 145/86, [1988] ECR 645 326, 406, **407-10**
- Hollandia, *The* (*Morviken*) [1982] QB 872; [1982] 2 WLR 556; [1982] 1 All ER 1076 (CA); [1983] AC 565; [1982] 3 WLR 1111; [1982] 3 All ER 1141; [1983] 1 Lloyd's Rep 1 (HL) 226-8, 239-40, 273, 736
- Hope v. Carnegie (1866) 1 Ch App 320 265
- House of Spring Gardens Ltd v. Waite [1991] 1 QB 241; [1990] 3 WLR 347; [1990] 2 All ER 990 (CA) 469
- Hunt v. Mobil Oil Corporation, 550 F 2d 68 (2nd Cir. 1977), *Cert. denied*, 434 US 984, 98 S Ct 608, 54 L Ed. 2d 477 819-20
- Huntington v. Attrill [1893] AC 150 (PC, on Appeal from ontario, Canada) **458-62**, 463
- Indag SA v. Irridelco Corporation 658 F Supp 763 (FDC, New York 1987) **782-3**
- Indussa Corporation v. SS Ranborg 377 F 2d 200 (2nd Cir. 1967) 236-7

- Ingmar GB Ltd v. Eaton Leonard Technologies Inc., Case C-381/98, [2000] ECR I-9305 **703-6**, 707
- Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 US 694 (1982) 342
- Intel Corporation v. Advanced Micro Devices 542 US 241; 124 S Ct 2466; 159 L Ed 2d 355 (US Supreme Court, 2004) 561, 563
- Intercontainer Interfrigo v. Balkenende Oosthuizen, Case C-133/08, [2009] ECR I-9687; [2010] QB 411; [2010] 3 WLR 24; [2010] 1 All ER (Comm) 613; [2010] All ER (EC) 1 **679-81**
- Interdesco v. Nullifire [1992] 1 Lloyd's Rep 180 411
- International Shoe Co. v. State of Washington 326 US 310; 66 S Ct 154; 90 L Ed 2d 95 (1945) (US Supreme Court) **171-3**, 174-5, 181, 184, 186-8, 344
- Iraq, *See* Republic of Iraq v. First National City Bank
- Islamic Republic of Iran v. Pahlavi 62 NY 2d 474; 467 NE 2d 245; 478 NYS 2d 597; 57 ALR 4th 955 (CA New York, 1984). 258, 477
- Ivenel v. Schwab, Case 133/81, [1982] ECR 1891 88
- IX ZR 149/91 [1994] ILPr 602 (German Federal Supreme Court) 462
- J. Zeevi & Sons Ltd v. Grindlays Bank (Uganda) Ltd, 37 NY 2d 220; 333 NR 2d 168 (1975); cert. denied 423 US 866 (1975) 776
- Jabbour v. Custodian of Israeli Absentee Property [1954] 1 WLR 139; [1954] 1 All ER 145; [1953] 2 Lloyd's Rep 760. 146-7, 823-4
- Jackson v. Spittall (1870) LR 5 CP 542 330-1
- Jameel (Yousef) v. Dow Jones & Co. Inc. [2005] QB 946; [2005] 2 WLR 1614 (CA) 366
- Jeyaretnam v. Mahmood The Times, 21 May 1992 263
- John Sanderson & Co. (Wool) Pty Ltd v. Ludlow Jute Co. Ltd, 569 F 2d 696 (1st Cir. 1978). 776
- Johnston v. Compagnie Générale Transatlantique, 242 NY 381; 152 NE 121 (1926) 472
- Kainz v. Pantherwerke, Case C-45/13, ECLI:EU:C:2014:7 **348-9**
- Kalfelis v. Schröder, Case 189/87, [1988] ECR 5565 45-6, 68, 84
- Kareda, Case C-249/16, EU:C:2017:472 56, 59, 361
- Kay's Leasing Corporation v. Fletcher (1964) 116 CLR 124 (High Ct, Australia). 766

TABLE OF CASES: ALPHABETICAL

lvii

Keeton v. Hustler Magazine 465 US 770; 104 S Ct 1473; 79 L Ed 2d 790 (1984).
 355

Kenburn Waste Management Ltd v. Bergmann [2002] EWCA 98; [2002] CLC 644;
 =[2002] ILPr 33; 2002 WL 45282 (CA) **678-9**

Khalfaoui v. France, judgment of 14 December 1999 (ECtHR) (available on
www.echr.coe.int) 393

King v. Brandywine Reinsurance Co. [2005] EWCA Civ 235; [2005] 1 Lloyd's Rep
 655 (CA) 223, 598

King v. Lewis [2004] EWCA Civ 1329; [2005] EMLR 45 (CA) **369-72**, 376-7

Kingdom of Spain, *See* Spain v. Christie's

Klaxon Co. v. Stentor Electric Mfg Co., 313 US 487; 61 S Ct 1020; 85 L Ed 1477
 (1941) 472

Kleinwort, Sons and Company v. Ungarische Baumwolle Industrie [1939] 2 KB
 678; [1939] 3 All ER 38 (CA) **771-2**, 841

Kloms v. Michel, Case 166/80, [1981] ECR 1593 413-14

Koelzsch v. Luxembourg, Case C-29/10, [2011] ECR I-1595 **697-701**, 712

Kolassa, Case C-375/13, EU:C:2015:37 56, **112-17**, 117-19

Koster v. Lumbergens Mut. Cas. Co., 330 US 524; 91 L Ed. 2d 1067; 67 S Ct 828
 277

Kroch v. Rossell et Cie [1937] All ER 725 366

Krombach v. Bamberski [2002] ILPr 4. (German Federal Supreme Court) 397

Krombach v. Bamberski, Case C-7/98, [2000] ECR I-1935 **390-7**, 399, 412, 456-7

Krombach v. France, judgment of 13 February 2001 (ECtHR) (available on www.echr.coe.int) 393

Kronhofer, Case C-168/02, ECLI:EU:C:2004:364, [2004] ECR I-6009 54, **110-11**

Kurz v. Stella Musical GmbH [1992] Ch 196; [1991] 3 WLR 1046 200-1

Kuwait Oil Tanker Co. SAK v. Qabazard [2003] UKHL 31; [2004] 1 AC 300; [2003]
 3 WLR 14; [2003] 3 All ER 501 884

Kyrgyz Mobil Tel Ltd, *See* Altimio Holdings v. Kyrgyz Mobil Tel Ltd

La Bourgogne [1899] P 1, 146

Laker Airways v. Pan American World Airways, 559 F Supp 1124 (DDC 1983)
 affirmed 731 F 2d 909 (DC Cir. 1984) 270-1

- Laker Airways v. Pan American World Airways, 577 F Supp 348 (DDC 1983) 270–1
- Laker Airways v. Pan American World Airways, 596 F Supp 202 (DDC 1984) 270–1
- Laker Airways v. Sabena, 731 F 2d 909 (DC Cir. 1984). 270–1, 279–80
- Lala v. Netherlands, judgment of 22 September 1999 (ECtHR) (available on www.echr.coe.int) 393
- Land Berlin v. Sapir, Case C-645/11, ECLI:EU:C:2013:228 39
- Lange v. Australian Broadcasting Corporation (1997) 189 CLR 520 611
- Lazar, Case C-350/14, ECLI:EU:C:2015:802 **608–9**, 643
- Lecouturier v. Rey [1910] AC 262 809
- Lemenda Trading Co. Ltd v. African Middle East Petroleum Co. Ltd [1988] 2 WLR 735 (QBD) **720–2**
- Liberato v. Grigorescu, Case C-386/17, ECLI:EU:C:2019:24 **401–2**
- Libra Bank Ltd v. Banco Nacional de Costa Rica 570 F.Supp. 870 (1983) 902
- Libyan Arab Foreign Bank v. Bankers Trust Co. [1989] QB 728; [1989] 3 WLR 314; [1989] 3 All ER 252; [1988] 1 Lloyd's Rep 259 (QBD Comm Ct) **839–45**
- Lister & Co. v. Stubbs (1890) LR 45 Ch D 1 (CA) 481
- Littauer Glove Corporation v. Millington Ltd (1928) 44 TLR 746 140, 441
- Lloyd's Register of Shipping v. Campenon Bernard, Case C-439/93, [1995] ECR I-961 **80–1**, 82
- Löber v. Barclays Bank Case C-304/17, ECLI:EU:C:2018:701 **117–19**
- Logan v. Bank of Scotland (No. 2) [1906] 1 KB 141 139, 248–9
- London and County Securities Ltd (In Liquidation) v. Caplan (unreported, 26 May 1978) 540–1
- Lonrho Ltd v. Shell Petroleum Co. Ltd [80] 1 WLR 627 (HL) **528–32**
- LTU v. Eurocontrol, Case 29/76, [1976] ECR 1541 **32–4**, 390
- Lubbe v. Cape plc [2000] 1 WLR 1545; [2000] 4 All ER 268 (HL) 279
- Lucasfilm v. Ainsworth [2011] UKSC 39; [2012] 1 AC 208; [2011] 3 WLR 487; [2012] 1 All ER (Comm) 1011 (SC) 163
- Lugano Convention case Opinion 1/03, [2006] ECR I-1145 217–18
- Luther v. Sagor [1921] 3 KB 532 (CA) 717, **808–10**, 812, 814, 821, 859

TABLE OF CASES: ALPHABETICAL

lix

M/S Bremen v. Zapata Off-Shore Company 407 US 1; 32 L Ed 2d 513; 92 S Ct 1907 (1972) (US Supreme Court) **228-33**, 233-7

McDermott Inc. v. Lewis 531 A 2d 206 (1987) (Supreme Court, Delaware) **579-83**

Machado v. Fontes [1897] 2 QB 231 (CA) **605-7**, 613-15

McHenry v. Lewis (1882) 22 ChD 397 267-8

Maciej Rataj (The Tatra), Case C-406/92 [1994] ECR I-5439 74, 286

McIntyre Machinery v. Nicastro 564 US – (2011); 131 S Ct 2780 (2011) (US Supreme Court) **339-46**, 349

Mackinnon v. Donaldson, Lufkin & Jenrette Securities Corporation [1986] Ch 482; [1986] 2 WLR 453; [1986] 1 All ER 653 11, 167, 501, 531, **537-42**, 549-50

McLean v. Pettigrew [1945] SCR 62; [1945] 2 DLR 65 (Supreme Court, Canada) **613**, 615

MacMahon v. Taugher (1914) 32 OLR 494; 20 DLR 521 (CA) 745

Macmillan Inc. v. Bishopsgate Investment Trust plc (No. 3) [1996] 1 WLR 387; [1996] 1 All ER 585 (CA) **854-7**

MacShannon v. Rockware Glass [1978] AC 795; [1978] 2 WLR 362; [1978] 1 All ER 625 (HL) 248-51

MAGIC Sportswear Corp. v. OT Africa Line Ltd [2007] 2 FCR 733 (Federal Court of Appeal, Canada). 273

Mahamdia v. Algeria, Case C-154/11, ECLI:EU:C:2012:491 78

Maharane of Baroda v. Wildenstein [1972] 2 QB 283; [1972] 2 WLR 1077; [1972] 2 All ER 689 (CA) **138-9**

Mainschiffahrts-Genossenschaft v. Les Gravières Rhénanes, Case C-106/95, [1997] ECR I-911 **204-7**, 208

Marc Rich and Co. v. Società Italiana Impianti, Case C-190/89, [1991] ECR I-3855 34, **309-13**, 314, 317, 321, 455

Marc Rich and Co. v. Società Italiana Impianti pA (No. 2) [1992] 1 Lloyd's Rep 624 (CA). 313, 469-70

Mareva Compania Naviera SA v. International Bulkcarriers SA [1980] 1 All ER 213; [1975] 2 Lloyd's Rep 509 481

Marinari v. Lloyds Bank, Case C-364/93, [1995] ECR I-2719; [1996] 2 WLR 159 **71-2**, 108, 114-15, 126, 157, 160, 333, 608

Martinez, *See* *eDate Advertising v. X*

ix	TABLE OF CASES: ALPHABETICAL
	Martinez v. Aero Caribbean 764 F 3d 1062 (9th Cir. 2014) 189
	Masri v. Consolidated Contractors International [2008] EWCA Civ 625; [2008] 2 Lloyd's Rep 301, [2008] ILPr 48, [2008] 1 CLC 887, [2009] Bus LR 216, [2008] 2 All ER (Comm) 1146, [2009] 2 WLR 669, [2008] BLR 391, [2009] QB 503 524
	MCC Proceeds v. Bishopsgate [1999] CLC 417 (CA) 223, 598
	Meeth v. Glacetal, Case 23/78, [1978] ECR 2133 198
	M'Elroy v. M'Allister 1949 SC 110; 1949 SLT 139 (Ct of Sessions, IH) 613–15
	Melzer v. MF Global, C-228/11 EU:C:2013:305 123, 130
	Menendez v. Saks and Company 485 F 2d. 1355 (2nd Cir. 1973). 892–4
	Metall und Rohstoff v. Donaldson Lufkin & Jenrette [1990] 1 QB 391; [1989] 3 WLR 563 (CA) 152–3 , 158, 161
	Mietz v. Intership Yachting Sneek, Case C-99/96, [1999] ECR I-2277 410, 431, 517–20
	Miliangos v. George Frank (Textiles) Ltd [1976] AC 443; [1975] 3 WLR 758; [1975] 3 All ER 801; [1976] 1 Lloyd's Rep 201 (HL) 783–8 , 789–90, 792
	Milkovich v. Saari 295 Minn 155; 203 NW 2d 408 (1973) (Supreme Court, Minnesota) 592, 626–7
	Millikin v. Pratt (1878) 125 Mass 374 587–90
	Mines, <i>See</i> Bier v. Mines de Potasse d'Alsace
	Minorplanet Systems USA Ltd v. American Aire Inc., 368 SC 146; 628 SE 2d 43 (Supreme Court, S Carolina, 2006) 240
	Mobil Cerro Negro Ltd v. Petroleos de Venezuela SA [2008] EWHC 532; [2008] 1 Lloyd's Rep 684 501
	Mokbel v. Attorney- General for the Commonwealth of Australia [2007] FCA 1536 262
	Monro, <i>See</i> George Monro Ltd v. American Cyanamid and Chemical Corporation
	Moran v. Pyle National (Canada) Ltd [1975] 1 SCR 393; (1973) 43 DLR (3d) 239; [1974] 2 WWR 586 (Supreme Court, Canada) 333–5 , 349
	Morgan Grenfell v. SACE [2001] EWCA Civ 1932 (CA) 223, 598
	Morris v. Banque Arabe et Internationale d'Investissement [2001] ILPr 37; The Times, 23 December 1999 531
	Motorola Credit Corporation v. Uzan (No. 2) [2003] EWCA Civ 752, [2004] 1 WLR 113 490, 496–501 , 523

TABLE OF CASES: ALPHABETICAL

lxi

- Mulox v. Geels, Case C-125/92, [1993] ECR I-4075 697, 701
- Murphy v. J. S. Winter & Co., 18 Ga. 690 (1855) 185
- Muscutt v. Courcelles (2002) 213 DLR (4th) 577 (Ontario Court of Appeal) 196
- Nasco Inc. v. Gimbert 239 Ga 675; 238 SE 2d 368 (1977) (Supreme Court, Georgia) **755-6**, 757
- National Bank of Greece and Athens v. Metliss [1958] AC 509; [1957] 3 WLR 1056; [1957] 3 All ER 608 (HL) **832-5**
- National Mortgage and Agency Company of New Zealand v. Gosselin (1922) 18 TLR 832 (CA) 150-1
- National Surety Co. v. Larsen [1929] 4 DLR 918 (CA, British Columbia) 464
- Neilson v. Overseas Projects Corporation of Victoria Ltd [2005] HCA 54; (2005) 223 CLR 331; (2005) 221 ALR 213 (High Ct, Australia) 585, **618-20**
- Nelson Bunker Hunt v. Coastal States Gas Producing Company 583 SW 2d 322 (1979); cert. denied 444 US 992; 100 S Ct 523; 62 L Ed 2d 421 (1979); rehearing denied 444 US 1103; 100 S Ct 1071; 62 L Ed 2d 790 (1980) (Supreme Court, Texas) 813, **819-21**, 908
- Netherlands v. Rüffer, Case 814/79, [1980] ECR 3807 **34-7**
- New York Life Insurance Co. v. Public Trustee [1924] 2 Ch 101 828-9
- Newcomb v. Daniels, Saltz, Mongeluzzi & Barrett Ltd (DNJ) 847 F Supp 1244 (1994); affirmed 67 F 3d 292 (3rd Cir. 1995); cert. denied 516 US 1117; 116 S Ct 921; 133 L Ed 2d 850 (US Supreme Court, 1996) **742-5**
- Nickel & Goeldner Spedition v. Kintra UAB, Case C-157/13 EU:C:2014:2145 58
- Nippon Yusen Kaisha v. Karageorgis [1975] 1 WLR 1093 481
- Nogueira v. Ryanair, Joined Cases C-168/16 and C-169/16, ECLI:EU:C:2017:688 **90-1**
- Nordson Corporation v. Plasschaert 674 F 2d 1371 (CA, 1th Cir. 1982) **756-9**, 761
- Norway, *See* State of Norway's Application
- Norwich Pharmacal Co. v. Customs and Excise Commissioners [1974] AC 133; [1973] 3 WLR 164 (HL) 535-6, 540
- Nouvion v. Freeman (1889) 15 App Cas 1 (HL) 435
- Oetjen v. Central Leather Co., 246 US 297; 38 S Ct 309 (US Supreme Court, 1918) 809, 813, 815-16
- Okura v. Forsbacka Jernverks [1914] 1 KB 715 (CA) 79, 145, 442-3

- Oldendorff v. Libera Corporation [1996] 1 Lloyd's Rep 380 (QBD Comm) 660, **660-3**
- Omni Capital International v. Wolff, 484 US 97; 18 S Ct 404; 98 L Ed 2d 415 (US Supreme Court, 1987) 190
- Oppenheimer v. Cattermole [1976] AC 249; [1975] 2 WLR 347; [1975] 1 All ER 538 (HL) **821-3**
- Oppenheimer v. Louis Rosenthal & Co. [1937] 1 All ER 23 263
- OT Africa Line Ltd v. MAGIC Sportswear Corporation [2005] EWCA Civ 710; [2005] 2 Lloyd's Rep 170. 273
- Overseas Union Insurance v. New Hampshire Insurance, Case C-351/89, [1991] ECR I-3317 29, 525
- Owens Bank Ltd v. Etoile Commerciale SA [1995] 1 WLR 44 (PC) 448
- Owens Bank Ltd v. Fulvio Bracco and Bracco Industria Chimica SpA, Case C-129/92, [1994] ECR I-117 [1994] 2 WLR 759 (ECJ) 31, **454-6**
- Owens Bank v. Bracco [1992] AC 443; [1992] 2 WLR 621; [1992] 2 All ER 193 (HL) **449-54**
- Owners of the Eleftherotria v. Owners of the Despina [1979] AC 685; [1978] 3 WLR 804; [1979] 1 All ER 421; [1979] 1 Lloyd's Rep 1 (HL) **788-94**
- Owusu v. Jackson Case C-281/02[2005] ECR I-1383; [2005] QB 801; [2005] 2 WLR 942; [2005] 2 All ER (Comm) 577; [2005] 1 Lloyd's Rep 452 (ECJ) 105, **290-8**
- Owusu v. Jackson[2002] EWCA Civ 877; [2003] 1 CLC 246; [2002] ILPr 45 (CA); Case C-281/02, [2005] ECR I-1383; [2005] QB 801; [2005] 2 WLR 942; [2005] 2 All ER (Comm) 577; [2005] 1 Lloyd's Rep 452 (ECJ) 291-2
- Ozalid Group (Export) Ltd v. African Continental Bank Ltd [1979] 2 Lloyd's Rep 231 (QBD Comm Ct) **798-9**
- Papon v. France, judgment of 25 July 2002 (ECtHR) (available on www.echr.coe.int) 393
- Parkasho v. Singh [1968] P 223 223, 598
- Partenreederei M/S Heidberg v. Grosvenor Grain & Feed Co. (No. 1) [1993] 2 Lloyd's Rep 32 531
- Peer International Corporation v. Termidor Music Publishers Ltd (No. 1) [2003] EWCA Civ 1156; [2004] Ch 212; [2004] 2 WLR 849 (CA) 891
- Pelladoah v. Netherlands, judgment of 22 September 1994 (ECtHR) (available on www.echr.coe.int) 393

TABLE OF CASES: ALPHABETICAL

lxiii

- Pellegrini v. Italy, judgment of 20 July 2001 (ECtHR) (available on www.echr.coe.int) 412, 457–8
- Pemberton v. Hughes [1899] 1 Ch 781 438
- Pendy Plastic Products v. Pluspunkt, Case 228/81, [1982] ECR 2723/81, [1982] ECR 2723 413
- Pennoyer v. Neff, 95 US 714; 24 L Ed 565 (1878) 188–9
- Perkins v. Benguet Consolidated Mining Co., 342 US 437; 72 S Ct 413; 96 L Ed 485 (US Supreme Court 1952) 178, 182–3
- Peruvian Guano Co. v. Bockwoldt (1883) 23 Ch D 225 267
- Peters v. Zuid Nederlandse Aannemers Vereniging, Case 34/82, [1983] ECR 987 34
- Phillips v. Eyre (1870) LR 6 QB 1 (Exch) **603–5**, 606, 614–15
- Pike v Indian Hotels [2013] EWHC 4096 (QB) 160
- Pinckney v. Mediatech, Case C-170/12 ECLI:EU:C:2013:635 **76–7**
- Piper Aircraft v. Reyno 454 US 235; 102 S Ct 252; 70 L Ed 2d 419 (1981) (US Supreme Court) **275–9**
- Poitrimol v. France, judgment of 23 November 1993, (1994) 18 EHRR 130 (ECtHR, available on www.echr.coe.int) 393
- Polanski v. Condé Nast Publications Ltd [2005] UKHL 10; [2005] 1 WLR 637; [2005] 1 All ER 945 (HL) 556
- Powell Duffryn v. Petereit, Case C-214/89, [1992] ECR I-1745 208–9
- Power Curber International Ltd v. National Bank of Kuwait [1981] 1 WLR 1233; [1981] 3 All ER 607; [1981] 2 Lloyd's Rep 3 (CA) **845–7**, 849–51, 883
- President of India v. Lips Maritime Corporation [1988] AC 395; [1987] 3 WLR 572; [1987] 3 All ER 110; [1987] 2 Lloyd's Rep 311 (HL) 799
- Princess Paley Olga v. Weisz [1929] 1 KB 718; 45 TLR 365 814, 830
- Pro Swing Inc. v. Elta Golf Inc. [2006] 2 SCR 612; (2006) 273 DLR (4th) 663 (Supreme Court, Canada) 435
- Queen in Right of British Columbia v. Gilbertson, 597 F 2d 1161 (9th Cir. 1979) 458
- R. v. Hammer [1923] 2 KB 786 599
- Raiffeisen Zentralbank Österreich v. Five Star Trading [2001] EWCA Civ 68; [2001] QB 825; [2001] 2 WLR 1344; [2001] 3 All ER 257; [2001] 1 Lloyd's Rep 597 (CA) **867–74**

- Ralli Brothers v. Compania Naviera Sota y Aznar [1920] 2 KB 287 (CA) 717, **728-30**, 771-2
- Ramsay v. Liverpool Royal Infirmary [1930] AC 588 568
- Realchemie Nederland v. Bayer CropScience, Case C-406/09 [2011] ECR I-9773 **41-3**
- Red Sea Insurance Co. Ltd v. Bouygues SA [1995] 1 AC 190 (PC) 607, 637
- Regazzoni v. Sethia [1958] AC 301; [1957] 3 WLR 752; [1957] 3 All ER 286 (HL) 586, **716-20**, 724-5, 730, 737, 771, 841
- Regie Nationale des Usines Renault SA v. Zhang (2002) 210 CLR 491 (High Ct, Australia) 618
- Rehder v. Air Baltic Corporation, Case C-204/08 [2009] ECR I-6073, EU: C:2009:439 57-8, 60, 63
- Reichert and Kockler v. Dresdner Bank, Case C-261/90, [1992] ECR I-2149 509, 514
- Reisch Montage v. Kiesel Baumaschinen, Case C-103/05, [2006] ECR I-6827 **85-6**
- Reiss Engineering Co. Ltd v Isamcor (Pty) Ltd (1983) (1) SA 1033 (W) 439
- Republic of Haiti v. Duvalier [1990] 1 QB 202 494, 500
- Republic of India v. India Steamship Co. Ltd (No. 2) [1998] AC 878 (HL) 470
- Republic of Iraq v. First National City Bank 353 F 2d 47 (1965) Cert. denied 382 US 1027; 86 S Ct 648; 15 L Ed 2d 540 (US CA 2nd Cir.) **889-91**
- Republik Griechenland v. Nikiforidis, Case C-135/15, ECLI:EU:C:2016:774 **710-13**
- Revell v. Lidov, 317 F 3d 467 (5th Cir. 2002) 372
- Rex v. Williams [1942] AC 541 (PC) 853
- Ricaud v. American Metal Co., 246 US 304; 38 S Ct 312; 62 L Ed 733 815
- Richardson v. Richardson [1927] P 228 877-8, 885
- Richman v. Ben-Tovim [2006] SCA 148; 2007 (2) SA 283 (Supreme Court of App, SA) **439-41**
- Robinson v. Bland (1760) Black W 257 (96 ER 141) 649
- Rogers v. Guaranty Trust Co. of New York, 288 US 123, 130; 53 S Ct 295, 297; 77 L Ed. 652 (1933) 580
- Roneleigh Ltd v. MII Exports Inc [1989] 1 WLR 619 (CA) 260, 279

Rong Yao Zhou v. Jennifer Mall Restaurant Inc. 534 A 2d 1268 (1987) (CA, DC)
627-8

Rose Mary, The, *See* Anglo-Iranian Oil Co. Ltd v. Jaffrate (The Rose Mary)

Rösler v. Rottwinkel, Case 241/83, [1985] ECR 99 92

Ross v. McMullen (1971) 21 DLR (3d) 228 (Alberta) 741

Rossano v. Manufacturers Life Insurance Co. [1963] 2 QB 352; [1962] 3 WLR 157
 824, 883

Rosseel NV v. Oriental Commercial Shipping (UK) Ltd [1990] 1 WLR 1387 494

Rudetsky v. O'Dowd 660 F Supp 341 (ED New York 1987) 279

Russo-Asiatic Bank, In re [1934] Ch 720 827-8

Rutten, Case C-383/95 [1997] ECR-I57 699

SA Consortium General Textiles v. Sun and Sand Agencies Ltd [1978] QB 279
 462

Saab v. Saudi American Bank [1999] 1 WLR 1861 (CA) 140

Sabbatino, *See* Banco Nacional de Cuba v. Sabbatino

Saccharin Corporation v. Chemische Fabrik von Heyden [1911] 2 KB 516 (CA)
 79, 144-5

St Pierre v. South American Stores [1936] 1 KB 382 (HL) 138, 248-50, 266

Salomon v. A Salomon & Co. Ltd [1897] AC 22 859

Samengo-Turner v. March & McLennan (Services) Ltd [2007] EWCA Civ 723;
 [2007] 2 All ER (Comm) 813 (CA) 273-4

Samskip, *See* Gothaer Allgemeine Versicherung v. Samskip

Sanders v. Van der Putte, Case 73/77, [1977] ECR 2383 92

Sanderson & Co, *See* John Sanderson & Co.

Sanicentral v. Collin, Case 25/79, [1979] ECR 3423 88

SAR Schotte v. Parfums Rothschild, Case 218/86 [1987] ECR 4905 78

Sayers v. International Drilling Co. NV [1971] 1 WLR 1176; [1971] 2 Lloyd's Rep
 105; [1971] 3 All ER 163 (CA) **746-53**, 753

SCF Finance v. Masri (No. 3) [1987] 1 QB 1028; [1987] 2 WLR 81; [1987] 1 All ER
 194 (CA) 878, 885-6

Schorsch Meier GmbH v. Hennin [1975] QB 416; [1974] 3 WLR 823; [1975] 1 All
 =ER 152; [1975] 1 Lloyd's Rep 1 (CA) 784, 787

- Seaconsar Ltd v. Bank Markazi [1994] 1 AC 438; [1993] 3 WLR 756 (HL) 149
- SEAS, *See* Services Europe Atlantique Sud (SEAS) v. Stockholms Rederiaktiebolag Svea
- Seattle Totems Hockey Club v. National Hockey League, 652 F 2d 852 (9th Cir. 1981); cert. denied, 457 US 105 (1982) 280
- Segoura v. Bonakdarian, Case 25/76, [1976] ECR 1851 202–4
- Sennar, The (No. 2) [1985] 1 WLR 490; [1985] 2 All ER 104 (HL) 431, 465, **466–9**
- Services Europe Atlantique Sud (SEAS) v. Stockholms Rederiaktiebolag Svea [1979] AC 685; [1978] 3 WLR 804; [1979] 1 All ER 421; [1979] 1 Lloyd’s Rep 1 (HL) **788–94**
- Sfeir & Co. v. National Insurance Company of New Zealand [1964] 1 Lloyd’s Rep 330 443
- Shaffer v. Heitner 433 US 186; 97 S Ct 2569 (1977) 184, 187–8
- Shapleigh v. Mier, 299 US 468; 57 S Ct 261; 81 L Ed 355. 816
- Sharif v. Azad [1967] 1 QB 605 775
- Shenavai v. Kreischer, Case 266/85, [1987] ECR 239 50
- Shevill v. Presse Alliance, Case C-68/93, [1995] ECR I-415; [1995] 2 AC 18; [1995] 2 WLR 499; [1995] All ER (EU) 289 71–2, **352–5**, 356–7, 362
- Showlag v. Mansour [1995] 1 AC 431; [1994] 2 WLR 615; [1994] 2 All ER 129 (PC). 464
- Sim v. Robinow (1892) 19 R 665 247, 255
- Sing Batra v. Ebrahim, The Times, 3 May 1977 (CA) **776–7**, 778
- Siskina, The [1979] AC 210; [1979] 3 WLR 818, [1979] 3 All ER 803 (HL) 483, 489
- Skrine & Co. v. Euromoney Publications plc [2001] EMLR 434 263
- Smith Kline & French v. Bloch [1983] 2 All ER 72 (CA) 195, 351
- Société d’Informatique Service Réalisation Organisation (SISRO) v. Ampersand Software [1994] ILPr 55; (1993) 90(35) LSG 36; (1993) 137 SJLB 189; The Times, 29 July 1993 (CA) 411
- Société du Gaz de Paris (1926) SC 13 (HL) 253–4
- Société Eram Shipping Co. Ltd v. Compagnie Internationale de Navigation [2003] UKHL 30; [2004] 1 AC 260; [2003] 3 WLR 21; [2003] 3 All ER 465; [2003] 2 Lloyd’s Rep 405 (HL) 501, 848–9, **884–7**
- Société Internationale v. Rogers 357 US 197; 78 S Ct 1087; 2 L Ed 2d 1255 (1958) (US Supreme Court) **532–4**

TABLE OF CASES: ALPHABETICAL

lxvii

Société Nationale Industrielle Aérospatiale v. Lee Kui Jak [1987] AC 871; [1987] 3 WLR 59; [1987] 3 All ER 510 (PC) 257, **265-9**

Société Nationale Industrielle Aérospatiale v. United States DC SD Iowa 482 US 522; 107 S Ct 2542; 96 L Ed 2d 461 (US Supreme Court, 1987) **566-71**

Soleimany v. Soleimany [1999] QB 785; [1998] 3 WLR 811; [1999] 3 All ER 847 (CA) **725-8**

Somafer v. Saar-Ferngas, Case 33/78, [1978] ECR 2183 78-80, 82

Somportex Ltd v. Philadelphia Chewing Gum Corporation, 453 F 2d 435 (3rd Cir. 1971); cert. denied 405 US 1017; 92 S Ct 1294; 31 L Ed 2d 479 (US Supreme Court, 1972) 472

Sonntag v. Waidmann, Case C-172/91, [1993] ECR I-1963. 34

South Carolina Insurance Co. v. Assurantie Maatschappij 'de Zeven Provinciën' NV [1987] AC 24; [1986] 3 WLR 398; [1986] 3 All ER 487 (HL) **561-5**

South India Shipping v. Bank of Korea [1985] 1 WLR 585; [1985] 2 All ER 219; [1985] 1 Lloyd's Rep 413 (CA) **143-4**, 147-8

Spain v. Christie's [1986] 1 WLR 1120; [1986] 3 All ER 28 (ChD) 806

Spiliada Maritime Corp. v. Cansulex Ltd [1987] AC 460; [1986] 3 WLR 972; [1986] 3 All ER 843; [1987] 1 Lloyd's Rep 1 (HL) 158, 161, **252-7**, 257-60, 369

SSL International v. TTK LIG [2011] EWCA Civ 1170; [2012] 1 WLR 1842 (CA) 140

State of Norway's Application, In re [1990] 1 AC 723; [1989] 2 WLR 458; [1989] 1 All ER 745 (HL) **559-60**

Stein v. Valkenhuysen (1858) EB & E 65 134

Stewart Organization Inc. v. Ricoh Corporation, 487 US 22; 108 S Ct 2239; 101 L Ed 2d 22 (US Supreme Court, 1988) 240

Stylianou v Toyoshima [2013] EWHC 2188 (QB) 159

S&W Berisford plc v. New Hampshire Insurance Co. [1990] 2 QB 631 289

Szechter v. Szechter [1971] P 286; [1971] 2 WLR 170; [1970] 3 All ER 905 599-600

Tabacalera Severiano Jorge, SA v. Standard Cigar Co., 392 F 2d 706 (US CA 5th Cir. 1968) Cert. denied 393 US 924; 89 S Ct 255; 21 L Ed 2d 260 893, **896-7**, 898-9, 901-3

Tatry, The (Maciej Rataj), Case C-406/92 [1994] ECR I-5439 74, 286

Taurus Petroleum v. SOMO [2017] UKSC 64 (SC) **848-51**, 887

Terruzzi, See Wilson, Smithett & Cope v. Terruzzi

Tessili v. Dunlop, Case 12/76, [1976] ECR 1473 34, 50, 64

Texaco Melbourne, The, *See* Attorney General of Ghana v. Texaco Overseas Tankships Ltd

Theodohos, The [1977] 2 Lloyd's Rep 428 140, 147

Third Chandris Shipping Corporation v. Unimarine SA [1979] 3 WLR 122 (CA) **481-4**

Tilly Russ v. Nova, Case 71/83, [1984] ECR 2417; [1984] 3 CMLR 499; [1985] 3 WLR 179 213

TNT Express Nederland v. AXA Versicherung, Case C-533/08 [2010] ECR I-4107 EU:C:2010:243 323

Tolofson v. Jensen [1994] 3 SCR 1022; (1994) 120 DLR (4th) 289 (Supreme Court, Canada) **613**

Toprak Mahsulleri Ofisi v. Finagrain Compagnie Commerciale Agricole et Financiere SA [1979] 2 Lloyd's Rep 98 840-1

Toronto-Dominion Bank v. Hall, 367 F Supp 1009 (ED Ark., 1973) 472

Trade Agency v. Seramico Investments, Case C-619/10, ECLI:EU:C:2012:531 414, 420-1, **424-8**

Trasporti Castelletti v. Hugo Trumpy, Case C-159/97, [1999] ECR I-1597 207, 302-3

Trepca Mines, Re [1960] 1 WLR 1273 446

Triad Financial Establishment v. Tumpane Company 611 F Supp 157 (1985) (US DC ND New York) **732-3**

Turner v. Grovit [1999] EWCA Civ 1532; [2000] 1 QB 345; [1999] 3 WLR 794 (CA) 299

Turner v. Grovit, Case C-159/02, [2004] ECR I-3565; [2005] 1 AC 101; [2005] ICR 23, [2004] 3 WLR 1193; [2004] All ER (EC) 485 (ECJ) 294, **298-301**, 319

Überseering, Case C-208/00, [2002] ECR I-9919 583

Underhill v. Hernandez, 168 US 250; 18 S Ct 83; 42 L Ed 456 809, 815-16, 819

Union Insurance v. SS Elikon, 642 F 2d 721 (4th Cir. 1981) 237

United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare C 184/12, EU:C:2013:663 640, **706-10**, 712

United Bank Ltd v. Cosmic International Inc. 542 F 2d 868 (US Ca, 2nd Cir. 1976) **891-4**, 898

United City Merchants v. Royal Bank of Canada [1983] AC 168; [1982] 2 WLR 1039; [1982] 2 All ER 720 (HL) **777-80**

TABLE OF CASES: ALPHABETICAL

lxix

United Electrical, Radio and Machine Workers of America v. 163 Pleasant St Corporation, 960 F 2d 1080 (1st Cir. 1992) 190

United Railways of Havana and Regla Warehouses Ltd, In re [1961] AC 1007; [1960] 2 WLR 969; [1960] 2 All ER 332 (HL) 774, 784–8

United States, In re v. Carver [1980–83] CILR 297 (Jamaica CA 1982) 548–9

United States v. First National City Bank 379 US 378; 85 S Ct 528; 13 L Ed 2d 365 (1965) (US Supreme Court) **507–8**

United States v. Harden [1963] SCR 366; (1963) 41 DLR (2d) 721 (Supreme Court, Canada) 458

United States v. Inkley [1989] 2 QB 255; [1988] 3 WLR 304; [1988] 3 All ER 344 (CA) **462–4**

United States v. Ivey (1996) 130 DLR (4th) 674 (Ontario High Court, Canada) affirmed (1998) 139 DLR (4th) 570 (Ontario CA) 37

United States v. Montgomery (No. 2) [2004] 1 WLR 2241; [2004] 4 All ER 289 (HL) 457–8

United States v. Swiss American Bank, 191 F 3d 30 (1st Cir. 1999) 190

Universal Music, Case C 12/15, ECLI:EU:C:2016:449 114, 116–18, **119–21**, 125, 130, 132

Unterweser Reederei v. Zapata Off-Shore Company (The ‘Chaparral’) [1968] 2 Lloyd’s Rep 158 (CA) 229, 232

Ust-Kamenogorsk Hydropower Plant, *See* AES Ust-Kamenogorsk Hydropower Plant

Vadala v. Lawes (1890) 25 QBD 310 452

Van Geyseghem v. Netherlands, judgment of 21 January 1999 (ERCtHR) 393

Van Uden v. Deco Line, Case C-391/95 [1998] ECR I-7091 42, **313–15**, 410, 498, **513–16**, 517, 520–1, 523–4

Vimar Seguros v. M/V Sky Reefer 515 US 528; 115 S Ct 2322; 132 L Ed 2d 462 (US Supreme Court, 1995) **237–40**

Vishipco Line v. Chase Manhattan Bank 660 F 2d 854 (US CA 2nd Cir. 1981) **894–5**

Vita Food Products v. Unus Shipping Co. Ltd [1939] AC 277 (PC) 649, 738

Vladikavkazsky Ry Co. v. New York Trust Co. 263 NY 369, 378; 189 NE 456, 460; 91 ALR 1426 (1934) 890–1

Vogel v. Kohnstamm Ltd [1973] 1 QB 133; [1971] 3 WLR 537; [1971] 2 All ER 1428 **441–4**

lxx	TABLE OF CASES: ALPHABETICAL
	Voth v. Manildra Flour Mills Pty Ltd (1990) 171 CLR 538; (1990) 65 ALJR 83; (1990) 97 ALR 124 (High Court of Australia) 258, 262
	Waters v. Campbell (1914) 17 DLR 79 (CA, Alberta) 745
	Watkins v. North American Lands Co. (1904) 20 TLR 534 (HL) 134, 136–7
	Webb v. Webb, Case C-294/92, [1994] ECR I-1733; [1994] 3 WLR 801 93–4 , 100
	Weber, Case C-37/00 [2002] ECR-I2013 699
	Weber v. Weber, Case C-438/12, ECLI:EU:C:2014:212 94–5
	West Tankers (2009), <i>See</i> Allianz v. West Tankers
	West Tankers v. Allianz [2012] EWCA Civ 27; [2012] 2 All ER (Comm) 113; [2012] 1 Lloyd’s Rep 398; [2012] Bus LR 1701; [2012] WLR(D) 9; 140 Con LR 45 326
	West Tankers v. Allianz [2012] EWHC 854 (Comm); [2012] 2 All ER (Comm) 395; [2012] 2 Lloyd’s Rep 103 324, 326
	West Tankers v. RAS (The Front Comor) [2005] EWHC 454 (Comm); [2005] 2 All ER (Comm) 240; [2005] 2 Lloyd’s Rep 257 308, 316, 319, 322–4
	Westacre Investments Inc. v. Jugoimport-SPDR Ltd[2000] QB 288; [1999] 3 WLR =811; [1999] 3 All ER 864 (CA) 728
	Western Air Lines, Inc. v. Sobieski, Cal. App., 191 Cal. App. 2d 399; 12 Cal. Rptr 719 (1961) 580
	Westinghouse Electric Corporation Uranium Contract Litigation, In re [1978] AC 547 [1978] AC 547; [1978] 2 WLR 81; [1978] 1 All ER 434 (HL) 539, 558, 560
	Westinghouse Electric Corporation v. Duquesne Light Co. (1977) 16 OR (2d) 273; 78 DLR (3d) 3 (Ontario High Court) 560
	Weston Banking Corporation v. Türkiye Garanti Bankasi, 57 NY 2d 315; 456 NYS 2d 684; 442 NE 2d 1195 (1982) 902
	Whitworth Street Estates Ltd v. Miller [1970] AC 583 (HL) 652
	Williams & Humbert Ltd v. W&H Trade Marks (Jersey) Ltd [1986] AC 368; [1986] 2 WLR 24; [1986] 1 All ER 129 (HL) 857–60
	Williams v. Green Bay & Western R Co., 326 US 459, 557; 90 L Ed. 311; 66 S Ct 284 (1946) 275–6
	Williams v. Jones (1845) 13 M & W 628 434
	Wilson, Smithett & Cope Ltd v. Terruzzi [1976] QB 703; [1976] 2 WLR 418; [1976] 1 All ER 818; [1976] 1 Lloyd’s Rep 509 (CA) 773–6 , 778
	Wink v. Croatia Osiguranje DD [2013] EWHC 1118 (QB) 159
	Winkworth v. Christie Manson and Woods Ltd [1980] 2 WLR 937 (ChD) 801–6

TABLE OF CASES: ALPHABETICAL	lxxi
Wintersteiger, Case C-523/10, ECLI:EU:C:2012:220 74–5	
Wisconsin v. Pelican Insurance Company (1888) 127 US 265 460–1	
Wood Floor Solutions Andreas Domberger v. Silva Trade, Case C-19/09 [2010] ECR I-2121 EU:C:2010:137 57	
World-Wide Volkswagen Corporation v. Woodson 444 US 286; 62 L Ed 2d 490; 100 S Ct 559 (1980) (US Supreme Court) 173–6 , 192, 336–8	
X AG v. A Bank (also known as X, Y and Z v. B) [1983] 2 All ER 464; [1983] 2 Lloyd’s Rep 535 (QBD Comm) 550–4	
Young v. New Haven Advocate, 315 F 3d 256 (4th Cir. 2002) 372	
Z Ltd v. A-Z [1982] 2 WLR 288 (CA) 481–2, 484–9	
Zeevi & Sons Ltd, <i>See</i> J Zeevi & Sons Ltd	
Zelger v. Salinitri (No. 1), Case 76/79, [1980] ECR 89 208	
Zelger v. Salinitri (No. 2), Case 129/83, [1984] ECR 2397 34, 283	
Zuid-Chemie v. Philippo’s Mineralenfabriek, Case C-189/08, [2009] ECR I-6917 346–8	

Table of Cases: EU Cases in numerical order

Note: Page numbers in **bold** indicate extended treatment of the case.

Case 12/76 Tessili v. Dunlop [1976] ECR 1473 34, 50, 64

Case 14/76 De Bloos v. Bouyer [1976] ECR 1497 50, 78

Case 21/76 Bier Mines de potasse d'Alsace [1976] ECR 1735 52, **69–71**, 108, 152, 157, 333, 353–4

Case 24/76 Colzani v. RÜWA [1976] ECR 1831 202

Case 25/76 Segoura v. Bonakdarian [1976] ECR 1851 202–4

Case 29/76, LTU v. Eurocontrol [1976] ECR 1541 **32–4**, 390

Cases 9 and 10/77, Bavaria Fluggesellschaft Schwabe v. Eurocontrol [1977] ECR 1517 34

Case 73/77 Sanders v. Van der Putte [1977] ECR 2383 92

Case 23/78 Meeth v. Glacetal [1978] ECR 2133 128

Case 33/78 Somafer v. Saar-Ferngas [1978] ECR 2183 78–80, 82

Case 133/78 Gourdain v. Nadler [1979] ECR 733 34

Case 143/78 De Cavel v. De Cavel, [1979] ECR 1055 34, 42

Case 25/79 Sanicentral v. Collin [1979] ECR 3423 88

Case 76/79 Zelger v. Salinitri (No. 1) [1980] ECR 89 208

Case 120/79 De Cavel v. De Cavel, [1980] ECR 731 34

Case 125/79 Denilauler v. Couchet Frères [1980] ECR 1553 **510–12**, 514–15

Case 814/79 Netherlands v. Rüffer [1980] ECR 3807 **34–7**

Case 139/80 Blanckaert and Willems v. Trost [1981] ECR 819 79

Case 150/80 Elefanten Schuh v. Jacqmain [1981] ECR 1671 **210–12**

Case 166/80 Klomps v. Michel [1981] ECR 1593 413–14

TABLE OF CASES: EU CASES IN NUMERICAL ORDER

lxxiii

Case 133/81 Ivenel v. Schwab [1982] ECR 1891 88

Case 228/81 Pendy Plastic Products v. Pluspunkt [1982] ECR 2723/81, [1982] ECR 2723 413

Case 34/82 Peters v. Zuid Nederlandse Aannemers Vereniging = [1983] ECR 987 34

Case 288/82 Duijnste v. Goderbauer [1983] ECR 3663 **99–100**

Case 71/83 Tilly Russ v. Nova [1984] ECR 2417; [1984] 3 CMLR 499; [1985] 3 WLR 179 213

Case 129/83 Zelger v. Salinitri (No. 2) [1984] ECR 2397 34, 283

Case 241/83 Rösler v. Rottwinkel [1985] ECR 99 92

Case 49/84 Debaecker v. Bouwman [1985] ECR 1779 415

Case 221/84 Berghoefer v. ASA [1985] ECR 2699 **203–4**

Case 266/85 Shenavai v. Kreischer [1987] ECR 239 50

Case 144/86 Gubisch Maschinenfabrik v. Palumbo [1987] ECR 4861 **84–285**, 286

Case 145/86 Hoffmann v. Krieg [1988] ECR 645 326, 406, **407–10**

Case 218/86 SAR Schotte v. Parfums Rothschild [1987] ECR 4905 78

Case 9/87 Arcado v. Haviland [1988] ECR 1539 34

Case 189/87 Kalfelis v. Schröder [1988] ECR 5565 45–6, 68, 84

Case C-220/88 Dumez v. Hessische Landesbank [1990] ECR I-49 71, 108, 157, 160, 608

Case C-190/89 Marc Rich and Co. v. Società Italiana Impianti [1991] ECR I-3855 34, **309–13**, 314, 317, 321, 455

Case C-214/89 Powell Duffryn v. Petereit [1992] ECR I-1745 208–9

Case C-351/89 Overseas Union Insurance v. New Hampshire Insurance [1991] ECR I-3317 29, 525

Case C-261/90 Reichert and Kockler v. Dresdner Bank [1992] ECR I-2149 509, 514

Case C-26/91 Handte v. TMCS [1992] ECR I-3967 34, **48–50**, 59

Case C-172/91 Sonntag v. Waidmann [1993] ECR I-1963. 34

Case C-125/92 Mulox v. Geels [1993] ECR I-4075 697, 701

Case C-129/92 Owens Bank Ltd v. Fulvio Bracco and Bracco Industria Chimica SpA, [1994] ECR I-117 [1994] 2 WLR 759 31, **454–6**

- Case C-406/92 Tatry, The (Maciej Rataj) [1994] ECR I-5439 74, 286
- Case C-294/92 Webb v. Webb [1994] ECR I-1733; [1994] 3 WLR 801 **93-4**, 100
- Case C-68/93 Shevill v. Presse Alliance [1995] ECR I-415; [1995] 2 AC 18; [1995] 2 WLR 499; [1995] All ER (EU) 289 71-2, **352-5**, 356-7, 362
- Case C-341/93 Danværn Production v. Schuhfabriken Otterbeck [1995] ECR I-2053. 87
- Case C-364/93 Marinari v. Lloyds Bank [1995] ECR I-2719 **71-2**, 108, 114-15, 126, 157, 160, 333, 608
- Case C-439/93 Lloyd's Register of Shipping v. Campenon Bernard [1995] ECR I-961 **80-1**, 82
- Case C-106/95 Mainschiffahrts-Genossenschaft v. Les Gravières Rhénanes [1997] ECR I-911 **204-7**, 208
- Case C-383/95 Rutten [1997] ECR-I57 699
- Case C-391/95 Van Uden v. Deco Line [1998] ECR I-7091 42, **312-15**, 410, 498, **513-16**, 517, 520-1, 523-4
- Case C-99/96 Mietz v. Intership Yachting Sneek [1999] ECR I-2277 410, 431, **517-20**
- Case C-159/97 Trasporti Castelletti v. Hugo Trumpy [1999] ECR I-1597 207, 302-3
- Case C-212/97 Centros [1999] ECR I-1459 582-3
- Case C-7/98 Krombach v. Bamberski [2000] ECR I-1935 **390-7**, 412, 456-7
- Case C-381/98 Ingmar GB Ltd v. Eaton Leonard Technologies Inc. [2000] ECR I-9305 **703-6**, 707
- Case C-387/98 Coreck Maritime v. Handelsveem, [2000] ECR I-9337 212, 216-18
- Case C-37/00 Weber [2002] ECR-I2013 699
- Case C-208/00 Überseering [2002] ECR I-9919 583
- Case C-271/00 Gemeente Steenbergen v. Baten [2002] ECR I-10489 **37-9**
- Case C-18/02 DFDS Torline ECLI:EU:C:2004:74, [2004] ECR I-1417 **108-10**
- Case C-27/02 Engler v. Janus Versand [2005] ECR I-481, EU:C:2005:33 56
- Case C-116/02 Gasser v. MISAT [2003] ECR I-14693 294, 299, 303-4
- Case C-159/02 Turner v. Grovit [2004] ECR I-3565 294, **298-301**, 319
- Case C-168/02, Kronhofer ECLI:EU:C:2004:364, [2004] ECR I-6009 52, **110-11**
- Case C-265/02, Frahuil v. Assitalia [2004] ECR I-1543, EU:C:2004:77 56

TABLE OF CASES: EU CASES IN NUMERICAL ORDER

lxxv

Case C-281/02 Owusu v. Jackson [2005] ECR I-1383; [2005] QB 801; [2005] 2 WLR 942; [2005] 2 All ER (Comm) 577 105, **290-8**

Case C-4/03 Gesellschaft für Antriebstechnik (GAT) v. Lamellen und Kupplungsbau Beteiligungs (LuK) [2006] ECR I-6509 98, **101-4**

Case C-103/05 Reisch Montage v. Kiesel Baumaschinen [2006] ECR I-6827 **85-6**

Case C-283/05 ASML Netherlands v. Semiconductor Industry Services (SEMIS) [2006] ECR I-12041 **416-21**, 426

Case C-386/05 Color Drack v. LEXX International [2007] ECR I-3699 52, 63

Case C-185/07 Allianz v. West Tankers [2009] ECR I-663 **315-19**

Case C-372/07 Hassett and Doherty [2008] ECR I-7403 98

Case C-394/07 Gambazzi v. DaimlerChrysler Canada Inc. [2009] ECR I-2563 **397-401**, 425-6

Case C-420/07 Apostolides v. Orams [2009] ECR I-3571 218, **421-3**

Case C-533/07 Falco Privatstiftung and Rabitsch [2009] ECR I-3327 61, **65**, 67

Case C-133/08 Intercontainer Interfrigo v. Balkenende Oosthuizen [2009] ECR I-9687; [2010] QB 411; [2010] 3 WLR 24; [2010] 1 All ER (Comm) 613; [2010] All ER (EC) 1 **679-81**

Case C-189/08 Zuid-Chemie v. Philippo's Mineralenfabriek [2009] ECR I-6917 **346-8**

Case C-204/08 Rehder v. Air Baltic Corporation [2009] ECR I-6073, EU: C:2009:439 57-8, 60, 63

Case C-381/08 Car Trim v. KeySafety Systems [2010] ECR 1255 50, **60-5**, 66

Case C-533/08 TNT Express Nederland v. AXA Versicherung [2010] ECR I-4107, EU:C:2010:243 323

Case C-19/09, Wood Floor Solutions Andreas Domberger v. Silva Trade, Case C-19/09 [2010] ECR I-2121, EU:C:2010:137 57

Case C-406/09 Realchemie Nederland v. Bayer CropScience [2011] ECR I-9773 **41-3**

Joined Cases C-509/09 and C-161/10, [2011] ECR I-10269 eDate Advertising v. X, Olivier Martinez and Robert Martinez v. MGN [2012] QB 654; [2012] 3 WLR 227 **355-60**, 361-4

Case C-29/10 Koelzsch v. Luxembourg [2011] ECR I-1595 **697-701**, 712

Case C-87/10 Electrosteel Europe v. Edil Centro [2011] ECR I-4987 65

lxxvi	TABLE OF CASES: EU CASES IN NUMERICAL ORDER
	Case C-144/10 Berliner Verkehrsbetriebe (BVG) v. J P Morgan Chase Bank [2011] ECR I-3961 96-8
	Case C-523/10 Wintersteiger, ECLI:EU:C:2012:220 74-5
	Case C-619/10 Trade Agency v. Seramico Investments, ECLI:EU:C:2012:531 414, 420-1, 424-8
	Case C-133/11 Folien Fischer v. Ritrama, ECLI:EU:C:2012:664 73-5 , 363
	Case C-154/11 Mahamdia v. Algeria, ECLI:EU:C:2012:491 78
	Case C-228/11 Melzer v. MF Global, EU:C:2013:305 123, 130
	Case C-456/11 Gothaer Allgemeine Versicherung v. Samskip, ECLI:EU:C:2012:719 428-31 , 465
	Case C-645/11 Land Berlin v. Sapir, ECLI:EU:C:2013:228 39
	Case C-9/12 Corman-Collins v. La Maison du Whisky, ECLI:EU:C:2013:860 66-8
	Case C-49/12 Commissioners for Revenue & Customs v. Sunico, ECLI:EU:C:2013:545 39-41
	Case C-170/12 Pinckney v. Mediatech, ECLI:EU:C:2013:635 76-7
	C 184/12 United Antwerp Maritime Agencies (Unamar) NV v. Navigation Maritime Bulgare, EU:C:2013:663 640, 706-10 , 712
	Case C-387/12 Hi Hotel HCF, EU:C:2014:215 128
	Case C-438/12 Weber v. Weber, ECLI:EU:C:2014:212 94-5
	Case C-548/12 Brogsitter v. Fabrication de Montres Normandes, ECLI:EU:C:2014:148 45-8
	Case C-45/13 Kainz v. Pantherwerke, ECLI:EU:C:2014:7 348-9
	Case C-157/13 Nickel & Goeldner Spedition v. Kintra UAB, EU:C:2014:2145, 58
	Case C-302/13 flyLAL-Lithuanian Airlines v. Starptautiskā lidosta Rīga and Air Baltic Corporation, EU:C:2014:2319 403-4, 512
	Case C-305/13 Haeger & Smidt, ECLI:EU:C:2014:2320 672-4
	Case C-352/13 Cartel Damage Claims (CDC) Hydrogen Peroxide, ECLI:EU:C:2015:335 121-5 , 129, 131-2
	Case C-375/13 Kolassa, EU:C:2015:37 56, 112-17 , 117-19
	Case C-536/13 Gazprom v. Lithuania, ECLI:EU:C:2015:316 320-3
	Case C-681/13 Diageo Brands BV v. Simiramida-04 EOOD, ECLI:EU:C:2015:471 402-6
	Case C-350/14 Lazar, ECLI:EU:C:2015:802 608-9 , 643

TABLE OF CASES: EU CASES IN NUMERICAL ORDER

lxxvii

Joined Cases C 359/14 and C 475/14 ERGO Insurance and Gjensidige Baltic, EU:
 C:2016:40 640, **642-6**

Case C- 12/15 Universal Music, ECLI:EU:C:2016:449 114, 116-18, **119-21**, 125,
 130, 132

Case C-135/15 Republik Griechenland v. Nikiforidis, ECLI:EU:C:2016:774
710-13

Case C-618/15 Concurrence Sàrl v. Samsung Electronics France SAS and
 Amazon Services Europe, EU:C:2016:976 127

Joined Cases C-168/16 and C-169/16 Nogueira v. Ryanair, ECLI:EU:C:2017:688
90-1

Case C-194/16 Bolagsupplysningen v. Svensk Handel, ECLI:EU:C:2017:766
360-5

Case C-249/16 Kareda, EU:C:2017:472 56, 59, 361

Joined Cases C-274/16, C-447/16 and C-448/16, flightright GmbH v. Air
 Nostrum, ECLI:EU:C:2018:160 **55-60**

Case C 368/16 Assens Havn v. Navigators Management (UK) Limited, ECLI:EU:
 C:2017:546 **213-14**

Case C-27/17 AB flyLAL-Lithuanian Airlines v. Starptautiskā lidosta Rīga and Air
 Baltic Corporation, ECLI:EU:C:2018:533 **125-32**

Case C-304/17 Löber v. Barclays Bank, ECLI:EU:C:2018:701 **117-19**

Case C-386/17 Liberato v. Grigorescu, ECLI:EU:C:2019:24 **401-2**

Case C 149/18 Agostinho da Silva Martins v. Dekra Claims Services Portugal SA,
 ECLI:EU:C:2019:84 **639-41**

Opinion 1/03, [2006] ECR I-1145 Lugano case 217-18

Table of Legislative Instruments

NOTE: Page numbers in **bold** indicate reproduction of article/ section in Panel

Conventions and Treaties

Accession Convention 1978

Article 17 205–7

Accession Convention 1989

Article 4 45, 88

Article 7 88

Bretton Woods Agreement 1945

Article I(ii) 775

Article VI(3) 775

Article VIII(2)(a) 775

Article VIII(2)(b) 773–8

Article XIX(i) 775

Charter of Fundamental Rights and Freedoms of the European Union 2012

[2012] OJ C 326/391

Article 47 425–6

Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 [1978] OJ L 304/77 19–20

Article 1 32–6, 38–9, 454

Article 1(4) 309–11

Article 2 49, 291–6, 353–5

Article 3 23, 389, 513–14, 519

Article 4(2) 290

Article 5(1) 45, 50, 88, 674, 678, 697–701

Article 5(3) 45, 68–71, 73–7, 80–1, 109–25, 352–60

Article 5(4) 390–7

Article 16 293, 296

Article 16(1) 93–4

Article 16(4) 98, 101–4

Article 17 103, 200, 203–8, 210–12, 216–17, 293, 303–4

Article 18 103, 212, 518, 520

Article 19 103

TABLE OF LEGISLATIVE INSTRUMENTS	lxxix
Article 21 74, 282, 284–5, 290, 454	
Article 22 286, 454	
Article 24 313–15, 509–20	
Article 26 454	
Article 27 455	
Article 27(1) 392–6, 400, 408	
Article 27(2) 417, 419, 422	
Article 27(3) 408–9	
Article 27(4) 408–9	
Article 28 299, 389, 394, 455	
Article 28(1) 103	
Article 28(3) 517–18	
Article 29 400	
Article 34 395, 455	
Article 34(1) 400	
Article 34(2) 103	
Article 39 522	
Article 53 27	
Article 55 34	
Article 56 34	
Article 59 23–4, 389	
Protocol Article II 392, 396	
EEA Agreement	
Article 53 122	
EEC Treaty	
Article 50 65	
Article 220 20–2, 21 , 293, 310, 393	
EU Treaty	
Article 4(3) 711, 713	
Article 6(2) 394	
Article 94 294	
Article 293 293	
European Convention on Human Rights 1950	
Article 6 393–4, 417–18, 423–4, 427, 458, 482, 532	
Article 6(1) 303, 418	
Article 6(3) 418	
Hague Choice of Court Convention 2005 214–15, 240–1	
Article 1(2) 241	
Article 1(3) 241	
Article 2(2)(f) 241, 273	
Article 2(2)(g) 241	
Article 4(2) 243	

lxxx	TABLE OF LEGISLATIVE INSTRUMENTS
	Article 5(1) 242
	Article 6(a)–(e) 242
	Article 8(1) 242
	Article 9(a)–(e) 242–3
	Article 20 242
	Article 22 241
	Article 26 242–3
	Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970 555, 566–70
	Article 1 555, 559
	Article 9 556
	Article 10 556
	Article 11 556–7
	Article 12 556
	Article 14 567
	Article 16 567
	Article 17 567
	Article 23 556, 567–8
	Article 27 568
	International Convention for the Unification of Certain Rules of Law relating to Bills of Lading 1921 226
	Lugano Convention 1988 [1988] OJ L 319/9 217–18
	Art 5(1) 83
	Art 5(3) 83
	Art 5(5) 82–3, 595
	Art 24 493
	Protocol 2 Article 1 398
	Lugano Convention 2007 [2009] OJ L 147/5 20–1, 191
	Article 64 30 , 30–1
	Luxembourg Protocol 1971 [1978] OJ L 304/50. 20
	Montreal Convention on International Carriage by Air 1999 52
	Article 33 54
	New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 31, 306–7, 324–6
	Article II(3) 242, 318
	Article V(2)(b) 320
	Rome Convention on the Law Applicable to Contractual Obligations 1980 [1980] OJ L 266/1 653
	Article 1 870
	Article 3 661–2, 677, 706
	Article 3(1) 638, 709–10

TABLE OF LEGISLATIVE INSTRUMENTS

lxxxi

Article 3(3) 691–3, 703
 Article 4 661, 663–5
 Article 4(1) 665–6, 671, 679–80
 Article 4(2) 666, 668–71, 673, 675–7, 679–81
 Article 4(3) 664, 671, 679–81
 Article 4(4) 664, 671–2, 679–81
 Article 4(5) 664–6, 670–1, 673, 675–6, 679–81
 Article 5 664
 Article 5(2) 766
 Article 6 664, 696, 698–701
 Article 6(1) 701
 Article 6(2)(a) 697–701
 Article 6(2)(b) 697–701
 Article 7(1) 708
 Article 7(2) 703–4, 706–10
 Article 12 861
 Article 12(1) 864, 872–3, 875–6
 Article 12(2) 872–3, 875–6
 Article 17 704
 Article 18 677
 Article 24 653

Treaty on the Functioning of the European Communities

Article 57 65
 Article 101 121–2, 128–31
 Article 102 121, 128–31
 Article 216(2) 21

UNCITRAL Model Law on Electronic Commerce 1996

Article 6(1) 241

United Nations Convention on Contracts for the International Sale of Goods 1980

Article 3(1) 61–2

United Nations Convention on the Limitation Period in the International Sale of Goods 1974

Article 6(2) 62

Warsaw Convention on the Carriage of Goods by Air 1929 787

Hague Protocol 1955 787

EU Directives

Directive 86/653 on commercial agents [1986] OJ L 382/17 690, 703–4, 706–10

Article 17 704–6, 708
 Article 18 704–6, 708
 Article 19 705

Article 22 705

Directive 89/104 on trade marks [1989] OJ L 40/1
 Article 5(3) 404–6
 Article 7 405

Directive 1999/44 on sale of consumer goods [1999] OJ L 171/12
 Article 1(2)(b) 61
 Article 1(4) 61

Directive 2000/31/EC on electronic commerce [2000] OJ L 178/1 356
 Recital 23 358
 Article 1(4) 358
 Article 3 358–9

Directive 2003/71/EC on prospectuses for public offers [2003] OJ L 345/64 112

EU Regulations

Regulation (EEC) 3922/1991 on the harmonization in civil aviation [1991] OJ L 373/4 91

Regulation (EC) 1346/2000 on insolvency proceedings [2000] OJ L 160/1 31

Regulation (EC) 1348/2000 on service of judicial documents in civil or commercial matters [2000] OJ L 160/37 106
 Article 19(1) 418

Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1 (Brussels Regulation) 19–20, 24
 Recital 2 417
 Recital 6 417
 Recital 16 417, 421
 Recital 17 417, 421
 Recital 18 421
 Article 1 19–20, 24, 41–3
 Article 1(1) 316, 321
 Article 1(2)(d) 316–18, 321–3
 Article 4 83
 Article 5(1) 56
 Article 5(1)(a) 56–7, 112
 Article 5(1)(b) 57–68, 71–5, 665
 Article 5(3) 112–20, 125–32, 157, 316–18, 347–9, 361
 Article 5(5) 126
 Article 6(1) 85–6
 Article 7(1) 51, 307
 Article 8 701
 Article 19(2)(a) 697
 Article 22 296

Article 22(1)	94–5
Article 22(2)	96–8
Article 23	429
Article 26(2)	418
Article 27	282, 302, 402
Article 27(3)	285
Article 28	286, 302
Article 31	521
Article 32	429, 431
Article 33	429, 432
Article 34(1)	403–6, 424–8
Article 34(2)	413–14, 416–23
Article 34(3)	326
Article 35(3)	402
Article 36	430
Article 47	520–3
Article 54	424
Article 60	27
Article 71(1)	323
Article 72	389–90
Annex V	414, 424
Regulation (EC) 1206/2001 on cooperation between courts in the taking of evidence [2001] OJ L 174/1	557
Article 14(1)	557
Article 21(1)	557
Regulation (EC) 2201/2003 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters [2003] OJ L 338/1	
Article 19	402
Article 24	402
Regulation (EC) 261/2004 on compensation for air passengers [2004] OJ L 46/1	
52, 54–5, 58–9	
Article 2(b)	55
Article 3(5)	56, 59
Regulation (EC) 864/2007 [Rome II Regulation] [2007] OJ L 199/40	578, 583, 587, 863
Article 1	642–3, 646
Article 1(2)(g)	637
Article 2(1)	159
Article 4	608 , 611–12, 614–15, 628, 632–4, 643–4, 763
Article 4(1)	159, 583, 608–9, 620, 628, 633, 639–41, 752
Article 4(2)	578, 609, 613, 632–3, 635–6
Article 4(3)	610, 612, 617, 628, 633, 635, 752
Article 5	349, 632–4, 633

Article 5(1)	632–4
Article 5(1)(a)	578, 632–6
Article 5(1)(b)	632–6
Article 5(1)(c)	632–5
Article 5(2)	633–4, 636
Article 6(2)	763
Article 6(3)(a)	127–8
Article 7	627, 627 , 632
Article 8	632, 637, 637
Article 9	632
Article 10–13	610
Article 10(2)	578
Article 11(2)	578
Article 12(2)(b)	578
Article 14	637–8, 638 , 691
Article 15(a)	643–4
Article 15(b)	644, 752
Article 15(e)	615
Article 15(h)	614, 620, 639–41
Article 16	638–41
Article 17	609, 609 , 617
Article 18	627
Article 19	643–6
Article 23	611, 611
Article 23(1)	583, 611, 620
Article 24	585, 587, 620
Article 25	610, 610
Article 25(1)	655
Article 25(2)	615
Article 30(2)	607
Article 31	607
Article 32	607
Recital 7	127
Regulation (EC) 1393/2007 on service of judicial documents in civil or commercial matters [2007]	OJ L 324/79 106, 149
Regulation (EC) 593/2008 [Rome I Regulation] [2008]	OJ L 177/6 578, 583, 653–4, 672
Recital 12	660
Recital 13	656
Recital 15	688–9, 691
Recital 17	665
Recital 19	665
Recital 20	666, 673
Recital 21	667

TABLE OF LEGISLATIVE INSTRUMENTS

lxxxv

Recital 22	682
Recital 23	695
Recital 24	695
Recital 25	695
Recital 26	695
Recital 27	695
Recital 28	695
Recital 29	695
Recital 30	696
Recital 31	696
Recital 32	696
Recital 37	688, 711–12
Recital 38	864, 875
Article 1	653–4, 654
Article 1(2)	861
Article 1(2)(a)	684
Article 1(2)(d)	860–1
Article 1(2)(e)	209
Article 1(2)(f)	861
Article 3	638, 656, 656 , 689
Article 3(1)	638, 656, 711
Article 3(3)	688–91, 689
Article 3(4)	688–90, 689 , 703
Article 4	578, 666
Article 5	578, 694
Article 5(1)	681–2, 682
Article 5(2)	656, 681–2, 683
Article 5(3)	683
Article 6	578, 681, 688, 693 , 693–4, 745
Article 6(1)	694, 766
Article 6(2)	688
Article 7	578, 643–4, 655, 682, 694, 702
Article 7(1)	702
Article 7(2)	703, 703
Article 7(3)	656, 686
Article 8	682, 694–5, 696 , 712, 755, 759, 763
Article 8(1)	56, 688, 696, 711
Article 8(2)	696–7
Article 8(3)	696
Article 9	701–2, 702 , 724–5
Article 9(1)	639–40, 688 , 688–9, 702, 709, 711, 759
Article 9(2)	639, 702–3, 711–12, 715, 755, 759, 763
Article 9(3)	702, 710–15, 720, 725, 730, 735, 763, 771
Article 10	578, 683
Article 10(1)	683–4

Article 10(2)	684
Article 11	578, 685 , 685–6
Article 11(5)	688, 701
Article 12	685
Article 13	684 , 684–5
Article 14	860–4, 864 , 867–74, 887
Article 14(1)	864–6, 876–7
Article 14(2)	316, 865–6, 876–7
Article 15	695
Article 19	667, 667
Article 19(1)	583
Article 20	585, 587, 685–6
Article 22	655
Article 22(1)	655
Article 22(2)	655
Article 28	654
Regulation (EU) 650/2012 on EU Succession [2012] OJ L 201/107	800
Regulation (EC) 1215/2012 Brussels I Regulation - recast [2012] OJ L 351/1	19–20
Recital 12	307–8, 308 , 312, 315, 320–1, 324–5, 470
Recital 20	209–10
Recital 22	304–5, 305
Recital 26	385
Recital 27	384, 469
Recital 33	509 , 513
Article 1	31 , 31–2, 432
Article 1(1)	316
Article 1(2)(c)	39
Article 1(2)(d)	306–7, 309–10
Article 2(a)	387, 509
Article 2(d)	385
Article 2(e)	385
Article 2(f)	385
Article 4	24, 24 , 29, 70, 72, 288
Article 4(1)	75, 216, 352, 355, 360
Article 5	44 , 385, 519
Article 5(1)	525
Article 5(2)	392, 513–14
Article 5(5)	441
Article 6	22–3, 23 , 88
Article 6(1)	22–3
Article 6(2)	22–3, 23 , 194, 290
Article 7	44, 288
Article 7(1)	45–8, 50–5, 51 , 66–7, 75, 79, 83, 88, 151–2, 208, 307
Article 7(1)(a)	50–1, 56, 59, 67–8

TABLE OF LEGISLATIVE INSTRUMENTS

lxxxvii

- Article 7(1)(b) 51–5, 58–65, 67–8, 674
 Article 7(2) 45–8, 54, **68**, 68–79, 83, 108–32, 151–3, 157, 196, 214, 316, 346–9,
 352–65
 Article 7(3) **391**
 Article 7(5) **78**, 78–84, 88, 126, 147–8, 595, 667
 Article 8 **84**, 288
 Article 8(1) 84–6, 122, 162, 179, 193, 196
 Article 8(2) 84–5, 162
 Article 8(3) 87, **87**
 Article 8(4) 92
 Article 9 288
 Article 10 87, 388
 Article 11 87, 388
 Article 12 87, 213, 388
 Article 13 87, 388
 Article 13(2) 213
 Article 14 87, 388
 Article 15 87, 200, **215**, 388
 Article 15(5) 213–14
 Article 16 87, 388
 Article 16(1)(a) 213–14
 Article 16(2)(a) 213–14
 Article 17 87, 88, 388
 Article 17(3) 55
 Article 17(c) 77
 Article 18 87, 388
 Article 19 87, 200, **215**, 388
 Article 20 87–8, **89**, 388
 Article 20(2) 78, 89
 Article 21 87–8, **89**, 388
 Article 21(1)(a) 89
 Article 21(1)(b) 89
 Article 21(1)(b)(i) 90, 697
 Article 21(1)(b)(ii) 90
 Article 22 87–8, **89**, 388
 Article 22(1) 89
 Article 23 87–8, **89**, 200, **215**, 388
 Article 24 29, 91–5, **92**, 104–5, 200, 288, 388, 407
 Article 24(1) 93–5
 Article 24(2) 95–8
 Article 24(4) 99–101
 Article 24(5) 887
 Article 25 **200**, 200–2, 208–10, 214–15, 407, 429
 Article 25(1) 29, 209
 Article 25(2) 207–8, 521–2

Article 25(4)	103–4
Article 25(a)	202–4
Article 25(b)	202, 204
Article 25(c)	204–7
Article 26	105 , 212, 520
Article 26(1)	103–4, 163, 518
Article 27	103, 105, 106 , 454
Article 27(2)	413
Article 28	105–6, 106 , 454
Article 28(2)	413
Article 29	29, 74, 282, 282 , 284–7, 525
Article 29(1)	304
Article 30	29, 282 , 286–7, 454
Article 30(3)	286
Article 31	29, 283 , 513
Article 31(2)	304
Article 32	29, 283
Article 32(1)	283
Article 33	286–8, 287
Article 34	286–8, 287
Article 35	313–15, 410, 495, 501, 509 , 509–26
Article 35(1)	389
Article 36	386 , 429
Article 36(1)	324
Article 37	386
Article 38	386
Article 39	385, 386 , 387
Article 40	386 , 520 , 520–3
Article 41	386
Article 41(1)	453
Article 42(2)	420
Article 43	386
Article 43(1)	420–1
Article 45	302, 386, 387
Article 45(1)	243, 326, 386
Article 45(1)(a)	390, 392, 403, 408, 411–12, 424–8, 432, 453
Article 45(1)(b)	387 , 412, 423, 432
Article 45(1)(c)	326, 406, 408–10, 432
Article 45(1)(c)(ii)	103
Article 45(1)(d)	325, 406–7, 409, 432–3
Article 45(1)(e)	389, 432
Article 45(1)(e)(ii)	388
Article 45(2)	388
Article 45(3)	388, 390, 402
Article 46	386

- Article 52 411, 430
- Article 53 414, 424
- Article 54 414
- Article 62 25, **25**, 86
- Article 63 **27**, 27–8
- Article 63(1) 54
- Article 64 **392**, 392–3
- Article 69 34
- Article 70 34
- Article 71 227, 412
- Article 72 24, **24**, **389**, 389–90
- Article 73(1) 433
- Article 73(2) 306–7
- Article 73(a) 31
- Article 76(1)(a) 23
- Annex I 414, 424

Regulation (EU) 2017/1129 on Prospectuses for Public Offers [2017] OJ L 168/12
 112

National Laws

- Australia
 - Auctioneers, Real Estate Agents, Debt Collectors and Motor Dealers Act 1922 (Queensland) 738
 - Common Law Procedure Act of 1899 (NSW)
 - section 18(4)(a) 329–30
- Canada
 - Maritime Liability Act 2001
 - section 46(1) 273
- France
 - Civil Code
 - Article 14 6, 23–4, 134, 191–2, 194, 290, 385, 392
- Law 80-538
 - Article 1 *bis* 531
- Germany
 - Constitution
 - Article 116(2) 821–2
- Greece
 - Act 2292 (1953) 832–8
 - Act 3504 (2011) 836–8
- Iraq
 - Ordinance No. 23 889–91

Netherlands

Code of Civil Procedure 38

Article 126(3) 513–14, 519–20

Article 1638X 747–8

Law on Social Assistance

Article 93 38

Article 94 38

Article 103 38

Panama

Civil Code

Article 1644 595

Judicial Code

Article 217 595–8

Portugal

Civil Code

Article 437 690–1

Article 498(1) 640–1

Decree Law No. 291/2006

Article 11(1)(b) 640

Saudi Arabia

Decree No. 1275 (of 17 September 1975) 733

South Africa

Law of Jurisdiction 1937 440

Spain

Law of 29 June 1983 859

United Kingdom

Administration of Justice Act 1920 435–6, 440–1

Section 9(1) 451

Section 9(2) 451–2

Section 9(2)(b) 440–1, 443, 445, 477

Section 9(2)(c) 477–8

Section 9(2)(d) 448–54, 478

Section 9(2)(e) 435

Section 9(2)(f) 448, 478

Section 9(5) 436

Section 12(1) 435, 478

Section 14 436

Section 15 599

Administration of Justice Act 1982

Section 1 614

TABLE OF LEGISLATIVE INSTRUMENTS

xci

Arbitration Act 1996

Section 44 501

Section 66(2) 326

Section 69 324

Bankers' Books Evidence Act 1879 536–7

Banking Act 1979 538

Bretton Woods Agreement Order [SR&O 1946/36] 779

Article 3 773

Carriage of Goods by Air Act 1961 787

Carriage of Goods by Road Act 1965

Section 27(2) 787

Carriage of Goods by Sea Act 1924 226

Carriage of Goods by Sea Act 1971 226

Civil Jurisdiction and Judgments Act 1982 157–8

Section 18 436

Section 25 **489**, 497, 500, 503–5, 509, 522–6

Section 25(1) 489–92, 500

Section 25(2) 490, 494–5

Section 25(3) 490

Section 30 164, **164**Section 31 446, **447**Section 32 446, **446**, 478Section 33 445, **445**Section 34 382, 470, **470**

Schedule 6 436

Schedule 7 436

Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 [SI 1997 No. 302] 490

Civil Jurisdiction and Judgments Order 2001 [SI 2001/3929]

Para. 9 **26**

Para. 9(3) 25–6

Para. 9(6) 27

Civil Jurisdiction and Judgments (Amendment) Regulations [SI 2014/2947]

Section 41 26, **26**

Civil Procedure Rules

Practice Direction 6B, para. 3.1 148, **150**, **152**, 158–9Practice Direction 6B, para. 3.1(3) 84, 162, **162**, 179, 193, 291

Practice Direction 6B, para. 3.1(5) 497

Practice Direction 6B, para. 3.1(6) **150**

Practice Direction 6B, para. 3.1(6)(a) 150, 154–5

Practice Direction 6B, para. 3.1(6)(b) 150

Practice Direction 6B, para. 3.1(6)(c) 151

Practice Direction 6B, para. 3.1(6)(d)	151, 163
Practice Direction 6B, para. 3.1(7)	151
Practice Direction 6B, para. 3.1(9)	152 , 152–3, 366
Practice Direction 6B, para. 3.1(9)(a)	154–7, 159
Practice Direction 6B, para. 3.1(10)	435
Rule 2.3	134
Rule 6.3(1)	134
Rule 6.3(2)	140
Rule 6.4	134
Rule 6.9(2)	140
Rule 6.15	134, 149
Rule 6.18(5)(c)	668
Rule 6.20(3)	291
Rule 6.20(8)	158
Rule 6.21(2A)	158
Rule 6.36	84, 148, 150 , 152 , 158–9, 179, 193, 366, 435, 497
Rule 6.40 <i>et seq.</i>	149
Rule 6.40(4)	149
Rule 11	149
Rule 31.8	527, 527
Rule 35.3	594
Rule 35.7	593
Rule 72	877
Commercial Agents (Council Directive) Regulations 1993 [SI 1993/3053]	703–4
Common Law Procedure Act 1852	148
Section 18	329
Section 19	329
Companies Act 1985	
Section 14	851
Section 691	538
Companies Act 2006	
Section 33	851
Section 1044	141
Section 1046	141
Section 1056	141
Section 1139	141
Section 1139(1)	140
Crime (International Co-operation) Act 2003	557
Defamation Act 2013	351, 375
Section 9	376
Section 9(2)	376
Evidence (Proceedings in Other Jurisdictions) Act 1975	

TABLE OF LEGISLATIVE INSTRUMENTS	xciii
Section 1(b) 557	
Section 2 559	
Section 2(4) 556–8	
Section 3 557	
Section 9(1) 557, 559–60	
Fatal Accidents Act 1864 614–15	
Fatal Accidents Act 1976 154, 156	
Foreign Judgments (Reciprocal Enforcement) Act 1933 435–6, 440–1, 473–4	
Section 1 436	
Section 1(2)(a) 435, 478	
Section 1(2)(b) 435, 478	
Section 4(1)(a)(iii) 478	
Section 4(1)(a)(iv) 448–9, 451, 477–8	
Section 4(1)(a)(v) 448, 477–8	
Section 4(1)(b) 478	
Section 4(2)(a)(i)–(iii) 445, 477	
Section 4(2)(a)(iv) 440	
Section 4(2)(a)(v) 441, 443–4	
Section 4(3)(a) 446	
Section 4(3)(c) 446	
Section 6 436	
Section 11(1) 435	
Foreign Tribunals Evidence Act 1856 559	
Hire Purchase and Small Debt (Scotland) Act 1954	
Section 1 764–6	
Section 2 765–6	
Section 9 764	
Section 11 765	
International Monetary Fund Act 1979 773	
Judgments Extension Act 1868 451–2	
Law Applicable to Contractual Obligations (England and Wales and Northern Ireland) Regulations [SI 2009/3064] 655	
Law Applicable to Non-Contractual Obligations (Scotland) Regulations 2008 [SI 2008/404]	
Reg. 4 610	
Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 [SI 2008/2986]	
Reg. 6 610	
Law of property Act 1925	
Section 136(1) 873	

Law Reform (Miscellaneous Provisions) Act 1934 154, 614

Law Reform (Personal Injuries) Act 1948
 Section 1(3) 746–9, 752–5

Marine Insurance Act 1906 652, 658–9
 Section 50 873

Patents Act 1977
 Section 70 678

Private International Law (Miscellaneous Provisions) Act 1995 351, 607, 637
 Section 9(3) 637
 Section 10 637
 Section 13(2) 637

Protection of Trading Interests Act 1980 531
 Section 1 271
 Section 2(1) 271
 Section 5 462

Restriction of Evidence (Proceedings in Other Jurisdictions) Act 1975
 Section 4 **560**

Rules of the Supreme Court
 Order 11 148, 254, 542–5
 Order 11, Rule 1(1) 542–3
 Order 11, Rule 1(1)(d)(iii) 668
 Order 11, Rule 1(1)(f) 152, 157–8, 366, 368
 Order 11, Rule 1(1)(j) 543
 Order 24 527–30, 539, 562
 Order 26 562
 Order 38 563
 Order 38, Rule 13 563

Sale of Goods (Amendment) Act 1994 801

Senior Courts Act 1981
 Section 37 **481**, 497, 522
 Section 37(3) 481

Supreme Court Act 1981 522

United States
 18 USC [Criminal Procedure]
 Section 1961 *et seq.* 463
 Section 3146 *et seq.* 496

22 USC [Foreign Relations]
 Section 2370(e)(2) (Hickenlooper Amendment) **818**
 Section 2370(e)(2) 818–21, 904–8

TABLE OF LEGISLATIVE INSTRUMENTS

XCV

28 USC [Judicial Procedure]

Section 1252–1254 166

Section 1331 167

Section 1331–1361 167

Section 1332 168

Section 1332(c) 168

Section 1333 168, 236

Section 1391–1392 191

Section 1782 563–5

Section 1782(a) 560, **561**

California Code of Civil Procedure

Section 410.10 173

Section 1713 474–5

Carriage of Goods by Sea Act 1936 236–40

Section 3(1) 238

Section 3(2) 238–9

Section 3(3) 238

Section 3(6) 238

Section 3(8) 237–9

Constitution 1791

Fifth Amendment: Due Process Clause 171, 180, 534

Fourteenth Amendment: Due Process Clause 171, 174–8, 177, 185–9, 336–8,
 341

Article III 167, 236

Article IV Full Faith and Credit Clause 4, 170–1

Article IV Privileges and Immunities Clause 188

Article VI Supremacy Clause 169

District of Columbia Code (1981)

Section 25–121(b) 628

Federal Rules of Civil Procedure

Rule 4(k)(1)(A) 170

Rule 4(k)(2) 190, **190**

Rule 34 532–4

Foreign Assistance Act 1964

Hickenlooper Amendment 818–19

Louisiana Civil Code

Article 3544(1) 611

New York Civil Practice Law and Rules

Section 5302 783

New York General Obligations Law

Title 14 section 5–1401	653
New York Judiciary Law 1987	
Section 27	797
New York Statute 1875	459–60
Section 18	461
Section 21	461
Section 34	461
Section 37	461
Racketeer Influenced and Corrupt Organizations Act (RICO) 1970	496
Restatement of Foreign Relations Law (Second) of the United States (1965)	890
Section 40	547–8
Section 420(2)	553
Restatement of Foreign Relations Law (Third) of the United States (1986)	
Section 403	549
Section 431	549
Section 442	553
Section 482(2)(d)	239
Restatement of the Law (Second) Conflict of Laws (1971)	
Section 187(1)	653
Section 187(2)	653, 730 , 730–1, 733–5, 761–2
section 187(2)(b)	761–2
section 187(b)	743–4
Section 188	653
section 188(1)	744
section 188(2)	731
Restatement of the Law (Second) Torts [date]	
Section 577A	352
Securing the Protection of our Enduring and Established Constitutional Heritage	
Act 2010 (SPEECH Act)	374–5
Trading with the Enemy Act in 1941	533–4
Section 1	893
Uniform Commercial Code	
Section 1-105(1)	653
Uniform Foreign-Country Money Judgments Recognition Act 2005	473
Section 3(a)(1)	478
Section 3(a)(2)	478
Section 3(b)(1)	478
Section 3(b)(2)	478
Section 4(c)(1)	478

TABLE OF LEGISLATIVE INSTRUMENTS

xcvii

Section 4(c)(2) 478
Section 4(c)(3) 478
Section 4(c)(4) 478
Section 4(c)(5) 478
Section 5 473–4, **473–4**
Section 5(a)(1) 477
Section 5(a)(3) 477
Section 5(a)(4) 477
Section 5(a)(5) 477
Section 5(a)(6) 474
Section 5(b) 474
Section 11 473

Uniform Foreign Money Judgments Recognition Act 1962 472–3
Section 1(2) 478
Section 2 478
Section 3 478
Section 4(b)(1) 478
Section 4(b)(2) 478
Section 4(b)(3) 478
Section 4(b)(4) 478
Section 4(b)(5) 478
Section 5(a)(1) 477
Section 5(a)(2) 477
Section 5(a)(3) 477
Section 5(a)(4) 443, 477
Section 5(a)(5) 477
Section 5(a)(6) 474
Section 5(b) 474–6
Section 7 473

Table of Legislative Instruments: Panels

Conventions and Treaties

- EEC Treaty
 - Article 220 [Panel 3.1] 21
- Lugano Convention 2007 [2009] OJ L 147/5
 - Article 64 [Panel 3.8] 30

EU Regulations

- Regulation (EC) 864/2007 [Rome II Regulation] [2007] OJ L 199/40
 - Article 1 [Panel 22.9] 646
 - Article 4 [Panel 22.1] 608
 - Article 5 [Panel 22.6] 633
 - Article 7 [Panel 22.5] 627
 - Article 8 [Panel 22.7] 637
 - Article 14 [Panel 22.8] 638
 - Article 17 [Panel 22.2] 609
 - Article 23 [Panel 22.4] 611
 - Article 25 [Panel 22.3] 610
- Regulation (EC) 593/2008 [Rome I Regulation] [2008] OJ L 177/6
 - Recital 22 [Panel 23.6] 682
 - Recital 23 [Panel 24.2] 695
 - Recital 24 [Panel 24.2] 695
 - Recital 25 [Panel 24.2] 695
 - Recital 26 [Panel 24.2] 695
 - Recital 27 [Panel 24.2] 695
 - Recital 28 [Panel 24.2] 695
 - Recital 29 [Panel 24.2] 695
 - Recital 30 [Panel 24.2] 696
 - Recital 31 [Panel 24.2] 696
 - Recital 32 [Panel 24.2] 696
 - Article 1 [Panel 23.1] 654
 - Article 1(2) [Panel 28.1] 861
 - Article 3 [Panel 23.3] 656, 689
 - Article 3(3) [Panel 24.2] 689

TABLE OF LEGISLATIVE INSTRUMENTS: PANELS

xcix

Article 3(4) [Panel 24.2] 689
 Article 4 [Panel 23.4] 666
 Article 5(1) [Panel 23.6] 682
 Article 5(2) [Panel 23.7] 683
 Article 5(3) [Panel 23.7] 683
 Article 6 [Panel 24.3] 693
 Article 7 [Panel 24.7] 702
 Article 7(2) [Panel 24.8] 703
 Article 8 [Panel 24.5] 696
 Article 9 [Panel 24.6] 702
 Article 9(1) [Panel 24.1] 688
 Article 10 [Panel 23.8] 683
 Article 11 [Panel 23.10] 685
 Article 12 [Panel 23.10] 685
 Article 13 [Panel 23.9] 684
 Article 14 [Panel 29.1] 864
 Article 19 [Panel 23.5] 667
 Article 22 [Panel 23.2] 655

Regulation (EC) 1215/2012 Brussels I Regulation – recast [2012] OJ L 351/1

Recital 12 [Panel 10.4] 308
 Recital 22 [Panel 10.3] 305
 Recital 33 [Panel 18.3] 509
 Article 1 [Panel 3.9] 31
 Article 2(a) [Panel 18.3] 509
 Article 4 [Panel 3.4] 24
 Article 5 [Panel 4.1] 44
 Article 6 [Panel 3.2] 23
 Article 6(2) [Panel 3.2] 23
 Article 7(1) [Panel 4.2] 51
 Article 7(2) [Panel 4.3] 68
 Article 7(3) [Panel 14.4] 391
 Article 7(5) [Panel 4.4] 78
 Article 8 [Panel 4.5] 84
 Article 8(3) [Panel 4.6] 87
 Article 15 [Panel 8.2] 215
 Article 19 [Panel 8.2] 215
 Article 20 [Panel 4.7] 89
 Article 21 [Panel 4.7] 89
 Article 22 [Panel 4.7] 89
 Article 23 [Panel 4.7] 89
 Article 23 [Panel 8.2] 215
 Article 24 [Panel 4.8] 92
 Article 25 [Panel 8.1] 200
 Article 26 [Panel 4.9] 105

Article 27 [Panel 4.10]	106
Article 28 [Panel 4.11]	106
Article 29 [Panel 10.1]	282
Article 30 [Panel 10.1]	282
Article 31 [Panel 10.1]	283
Article 32 [Panel 10.1]	283
Article 33 [Panel 10.2]	287
Article 34 [Panel 10.2]	287
Article 35 [Panel 18.3]	509
Article 36 [Panel 14.1]	386
Article 37 [Panel 14.1]	386
Article 38 [Panel 14.1]	386
Article 39 [Panel 14.1]	386
Article 40 [Panel 14.1]	386, 520
Article 41 [Panel 14.1]	386
Article 45 [Panel 14.2]	387
Article 45(1)(b) [Panel 14.2]	387
Article 62 [Panel 3.5]	25
Article 63 [Panel 3.7]	27
Article 64 [Panel 14.5]	392
Article 72 [Panel 3.3]	24, 389

National Laws

United Kingdom

Civil Jurisdiction and Judgments Act 1982

Section 25 [Panel 18.2]	489
Section 30 [Panel 6.5]	164
Section 31 [Panel 15.3]	447
Section 32 [Panel 15.2]	446
Section 33 [Panel 15.1]	445
Section 34 [Panel 16.1]	470

Civil Jurisdiction and Judgments (Amendment) Regulations [SI 2014/2947]

Section 41 [Panel 3.6]	26
------------------------	----

Civil Procedure Rules

Practice Direction 6B, para. 3.1 [Panel 6.2]	150, 152
Practice Direction 6B, para. 3.1(3) [Panel 6.4]	162
Practice Direction 6B, para. 3.1(6) [Panel 6.2]	150
Practice Direction 6B, para. 3.1(9) [Panel 6.3]	152
Rule 6.36 [Panel 6.2]	150, 152
Rule 31.8 [Panel 19.1]	527

Companies Act 2006

Section 1044 [Panel 6.1]	141
Section 1046 [Panel 6.1]	141

TABLE OF LEGISLATIVE INSTRUMENTS: PANELS	ci
Section 1056 [Panel 6.1]	141
Section 1139 [Panel 6.1]	141
Defamation Act 2013	
Section 9 [Panel 12.1]	376
Restriction of Evidence (Proceedings in Other Jurisdictions) Act 1975	
Section 4 [Panel 20.1]	560
Senior Courts Act 1981	
Section 37 [Panel 18.1]	481
United States	
22 USC [Foreign Relations]	
Section 2370(e)(2) [Panel 27.1] (Hickenlooper Amendment)	818
28 USC [Judicial Procedure]	
Section 1782(a) [Panel 20.2]	561
Federal Rules of Civil Procedure	
Rule 4(k)(2) [Panel 7.1]	190
New York Judiciary Law 1987	
Section 27 [Panel 26.1]	797
Restatement of the Law (Second) Conflict of Laws (1971)	
Section 187(2) [Panel 24.9]	730
Uniform Foreign-Country Money Judgments Recognition Act 2005	
Section 5 [Panel 17.1]	473–4

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Frontmatter
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