

---

# CONTENTS

---

<i>Preface to the First Edition, 2012</i> .....	v
<i>Preface to the Second Edition, 2016</i> .....	vii
<i>Table of Cases</i> .....	xvii
<i>Table of Legislation</i> .....	xxxv
<i>Table of Conventions, Treaties</i> .....	liii
1. Introduction .....	1
1.1 The Concept, Nature and Development of Private International Law.....	1
1.2 Sources of Private International Law .....	2
1.3 The Three Processes of Private International Law, and Standard ‘Connecting Factors’.....	3
1.3.1 Procedural Issues .....	3
1.3.2 Application of the Law .....	4
1.3.2.1 Characterisation (French: Qualification) of the Legal Question .....	5
1.3.2.2 Connecting Factor.....	5
1.3.2.3 <i>Lex Causae</i> .....	5
1.4 Characterisation, <i>Renvoi</i> and the ‘Incidental’ Issue or <i>Vorfrage</i> .....	5
1.5 Forum Shopping and <i>Forum non Conveniens</i> .....	8
1.6 The Impact of European Law on the Private International Law of the Member States.....	12
1.6.1 Legal Basis .....	12
1.6.2 The Development of European Private International Law Policy.....	15
2. The Core of European Private International Law: Jurisdiction .....	21
2.1 Summary .....	21
2.1.1 The Brussels I Recast Regulation .....	21
2.1.2 Scope of Application: Subject-Matter.....	23
2.1.3 Scope of Application— <i>Ratione Personae</i> .....	24
2.1.4 The Jurisdictional Rules of the Regulation.....	25
2.2 Detailed Review of the Regulation .....	26
2.2.1 Trust is Good, Control is Better .....	26
2.2.2 Scope of Application: Subject-Matter.....	27
2.2.2.1 The Existence of an International Element.....	27
2.2.2.2 Civil and Commercial Matters .....	30

2.2.2.3	Case 29/76 <i>Eurocontrol</i> .....	32
2.2.2.4	Case 814/79 <i>Ruffer</i> .....	33
2.2.2.5	Case C-271/00 <i>Gemeente Steenberg</i> .....	33
2.2.2.6	Case C-292/05 <i>Lechouritou</i> .....	35
2.2.2.7	C-645/11 <i>Sapir</i> .....	36
2.2.2.8	Case C-302/13 <i>fly LAL</i> .....	36
2.2.2.9	Joined Cases C-226/13, C-245/13, C-247/13 and C-578/13 <i>Fahnenbrock</i> (‘Direct and Immediate Effect’).....	37
2.2.2.10	Exclusions, Among which Exclusion of Insolvency and Arbitration.....	40
2.2.3	Scope of Application— <i>Ratione Personae</i> .....	60
2.2.3.1	Domicile.....	60
2.2.4	The International Impact of the Regulation.....	64
2.2.5	The Jurisdictional Rules of the Regulation: A Matrix.....	71
2.2.6	Exclusive Jurisdiction, Regardless of Domicile: Article 24.....	72
2.2.6.1	Rights in Rem and Tenancies of Immovable Property.....	73
2.2.6.2	Specifically with Respect to the Extension to Tenancies.....	76
2.2.6.3	Short-Term Holiday Lets.....	77
2.2.6.4	Contractual Action in Combination with <i>Actio in Rem</i> .....	78
2.2.6.5	The Incorporation of Companies and Certain Other Aspects of Company Law.....	78
2.2.6.6	The Validity of Entries into Public Registers.....	82
2.2.6.7	Proceedings Concerned with the Registration or Validity of Patents, Trade Marks, Designs or other Similar Rights Required to be Deposited or Registered.....	82
2.2.6.8	Proceedings Concerned with the Enforcement of Judgments.....	85
2.2.6.9	Reflexive Application of the Exclusive Jurisdictional Rules?.....	87
2.2.7	Jurisdiction by Appearance/Prorogation: Article 26.....	87
2.2.8	Insurance, Consumer and Employment Contracts: Articles 10–23.....	89
2.2.8.1	Protected Categories—Generally.....	89
2.2.8.2	Consumer Contracts.....	90
2.2.8.3	Contracts for Individual Employment.....	107
2.2.8.4	Insurance Contracts.....	112
2.2.9	Agreements on Jurisdiction (‘Choice of Forum’ or ‘Prorogation of Jurisdiction’): Article 25.....	113
2.2.9.1	The Overall Intention of Choice of Court Agreements Under the Brussels Regime.....	114
2.2.9.2	Choice of Court in Favour of a Court Outside the EU: A Reflexive Effect for Article 25?.....	115

2.2.9.3	Conditions with Respect to the Expression of Consent.....	119
2.2.9.4	The Law Applicable to the Formation of Consent .....	123
2.2.9.5	Sinking the Torpedo: <i>Lis Alibi Pendens</i> for Choice of Court.....	129
2.2.9.6	The EU's Accession to the Hague Convention and the Consequential Priority of the Latter .....	129
2.2.9.7	Binding Force of the Choice of Court Agreement on Third Parties.....	131
2.2.10	General Jurisdiction: Defendants Domiciled in a Member State Where a Court is Seized: Article 4.....	135
2.2.11	'Special' Jurisdiction: Defendants Domiciled in Another Member State: Articles 7–9.....	135
2.2.11.1	Article 7(1): Actions Relating to a Contract— <i>Forum Contractus</i> .....	136
2.2.11.2	The Special Jurisdictional Rule for Tort: Article 7(2)— <i>Forum Delicti Commissi</i> .....	144
2.2.12	Multipartite Litigation and Consolidated Claims: Articles 8 (and 9) .....	164
2.2.12.1	Multiple Defendants: Article 8(1).....	165
2.2.12.2	Warranties, Guarantees and Any Other Third Party Proceedings: Article 8(2).....	170
2.2.12.3	Counterclaims: Article 8(3) .....	171
2.2.12.4	Matters Relating to Rights <i>in Rem</i> in Immovable Property: Article 8(4) .....	171
2.2.13	'Residual' Jurisdiction: Defendants not Domiciled in any Member State: Article 6 .....	171
2.2.14	Loss of Jurisdiction; <i>Lis Alibi Pendens</i> ; and Related Actions: Articles 29–34 .....	172
2.2.14.1	<i>Lis Alibi Pendens</i> .....	174
2.2.14.2	Identity of Parties .....	176
2.2.14.3	Identity of Object or 'Subject-Matter'.....	177
2.2.14.4	Identity of Cause of Action .....	177
2.2.14.5	<i>Lis Alibi Pendens</i> and the <i>Forum Non Conveniens</i> Doctrine.....	177
2.2.14.6	Related Actions .....	182
2.2.15	Applications for Provisional or Protective Measures: Article 35.....	185
2.2.16	Recognition and Enforcement .....	188
2.2.16.1	Recognition.....	190
2.2.16.2	Enforcement .....	200
3.	The Core of European Private International Law: Applicable Law—Contracts .....	202
3.1	Summary .....	202
3.1.1	Principles.....	203

3.1.2	Scope of Application.....	203
3.1.3	Basic Principle: Freedom of Choice.....	203
3.1.4	Applicable Law in the Absence of Choice.....	204
3.2	Detailed Review of the Regulation .....	204
3.2.1	Scope of Application.....	204
3.2.1.1.	‘Contractual Obligations’.....	206
3.2.2	Exclusions.....	207
3.2.3	Universal Application .....	211
3.2.4	Freedom of Choice .....	211
3.2.5	Protected Categories .....	214
3.2.6	Applicable Law in the Absence of Choice.....	217
3.2.6.1	Characterisation of the Contract.....	219
3.2.6.2	Habitual Residence.....	219
3.2.6.3	The Characteristic Performance Test .....	221
3.2.6.4	Manifestly Closer Connection .....	221
3.2.6.5	The Ultimate Option: Closest Connection.....	221
3.2.7	Formal Validity, Consent and Capacity .....	221
3.2.7.1	Incapacity.....	223
3.2.7.2	Formal Validity .....	224
3.2.8	Mandatory Law, and Public Order.....	224
3.2.8.1	Purely Domestic Contracts: Article 3(3).....	225
3.2.8.2	Mandatory EU Law: Article 3(4) .....	225
3.2.8.3	‘Overriding’ Mandatory Law: Article 9 .....	228
3.2.8.4	Public Policy: Article 21 .....	235
3.2.9	The Relationship with Other Conventions.....	235
4.	The Core of European Private International Law: Applicable Law—Tort .....	237
4.1	Introduction .....	237
4.2	General Principles .....	239
4.3	Scope of Application .....	240
4.3.1	‘Situations Involving a Conflict of Laws’ .....	240
4.3.2	Only Courts and Tribunals? Application to Arbitration Tribunals.....	241
4.3.3	‘Non-Contractual Obligations’ .....	244
4.3.4	Excluded Matters .....	245
4.3.4.1	Non-Contractual Obligations Arising out of Family or Similar Relationships.....	246
4.3.4.2	Non-Contractual Obligations Arising out of Matrimonial Property Regimes, Property Regimes of Relationships Deemed by the Law Applicable to such Relationships to have Comparable Effects to Marriage, and Wills and Succession.....	247
4.3.4.3	Non-Contractual Obligations Arising Under Bills of Exchange, Cheques and Promissory Notes and Other Negotiable Instruments to the Extent that the Obligations Under such Other Negotiable Instruments Arise out of their Negotiable Character.....	247
4.3.4.4	The lex Societatis Exception .....	247

4.3.4.5	Violations of Privacy and Rights Relating to Personality, Including Defamation .....	248
4.3.4.6	Other Exclusions .....	251
4.3.5	Civil and Commercial Matters .....	251
4.4	Applicable Law—General Rule: <i>Lex Loci Damni</i> .....	251
4.5	One General Exception to the General Rule and One Escape Clause .....	253
4.5.1	General Exception: Parties Habitually Resident in the Same Country .....	253
4.5.2	Escape Clause: Case Manifestly More Closely Connected with Other Country .....	255
4.6	Specific Choice of Law Rules for Specific Torts—No Specific Rules for ‘Protected Categories’ .....	256
4.6.1	Product Liability .....	257
4.6.2	Unfair Competition and Acts Restricting Free Competition .....	261
4.6.3	Environmental Damage.....	263
4.6.4	Damage Caused by Infringement of Intellectual Property Rights .....	265
4.6.5	Damage Caused by Industrial Action .....	266
4.7	Freedom to Choose Applicable Law .....	268
4.8	Scope of the Law Applicable .....	269
4.9	Contract-Related Tort Claims.....	272
4.10	‘Overriding’ Mandatory Law and Public Order .....	272
5.	The Insolvency Regulation.....	274
5.1	The Overall Nature of and Core Approaches to Insolvency and Private International Law .....	274
5.2	Genesis of the Insolvency Regulation.....	275
5.3	General Context of the 2015 Amendments .....	277
5.4	Scope of Application, Dovetailing with the Brussels I Recast and Overall Aim .....	281
5.4.1	The So-called ‘Bankruptcy’ Exception Under the Jurisdiction Regulation.....	281
5.4.2	The Definition of Insolvency Proceedings .....	285
5.4.3	Four Cumulative Conditions .....	288
5.4.3.1	Collective Proceedings .....	289
5.4.3.2	Based on the Debtor’s Insolvency.....	289
5.4.3.3	Which Entail the Partial or Total Divestment of a Debtor.....	289
5.4.3.4	Which Entail the Appointment of a ‘Liquidator’, Now Called an ‘Insolvency Practitioner .....	289
5.4.4	Opening by a ‘Court’ or Judicial Authority? .....	290
5.4.5	Relation with the Judgments Regulation (Brussels I Recast): Dovetail or Not?.....	291
5.4.6	Core Aim of the Regulation .....	293
5.5	The International Impact of the Regulation.....	295
5.6	The Jurisdictional Model: Universal Jurisdiction Based on COMI, Alongside Limited Territorial Procedures.....	296

5.6.1	Main Insolvency Proceeding: Centre of Main Interest (COMI) .....	297
5.6.1.1	‘COMI’ as (Un)Defined by the Regulation .....	297
5.6.1.2	European and National Case-Law on COMI .....	298
5.6.1.3	Universality of the Proceedings Opened in the COMI Member State .....	310
5.6.1.4	When is an Insolvency Procedure ‘Opened’ within the Meaning of the Regulation? .....	311
5.6.2	Secondary and Territorial Insolvency Proceedings .....	312
5.6.2.1	Territorial Insolvency Proceedings .....	313
5.6.2.2	Secondary Insolvency Proceedings .....	314
5.7	Applicable Law .....	315
5.7.1	Exceptions .....	316
5.8	Recognition and Enforcement of Insolvency Proceedings .....	321
5.8.1	Judgments Concerning the Opening of Insolvency Proceedings .....	322
5.8.2	Other Judgments in the Course of Insolvency Proceedings .....	323
5.8.3	Defences Against Recognition and Enforcement .....	323
5.9	Powers of the Liquidator/Insolvency Practitioner .....	324
6.	The European Succession Regulation .....	325
6.1	Introduction .....	325
6.2	The Regulation Broadly Introduced .....	327
6.2.1	The Notion of ‘Courts’ and the Position of the Office of Notary .....	327
6.2.2	Scope of Application .....	328
6.2.2.1	Ratione Materiae .....	328
6.2.2.2	Ratione Loci .....	329
6.2.2.3	Ratione Tempore .....	329
6.2.3	Harmonisation of the Rules on Jurisdiction and Applicable Law .....	330
6.2.3.1	Complete Harmonisation—No Residual Private International Law Concerning Succession Law? .....	330
6.2.3.2	Jurisdiction .....	330
6.2.3.3	Applicable Law .....	333
6.2.3.4	The Concept of ‘Habitual Residence’ .....	336
6.2.4	The European Certificate of Succession .....	338
6.2.5	Dispositions of Property upon Death .....	339
6.2.6	The Administrator of the Estate .....	339
6.2.7	Bottlenecks/Obstacles/Problems .....	339
7.	Free Movement of Establishment, <i>Lex Societatis</i> and Private International Law .....	342
7.1	<i>Daily Mail</i> .....	346
7.2	<i>Centros</i> .....	347
7.3	<i>Überseering</i> .....	349
7.4	<i>Inspire Art</i> .....	350
7.5	<i>Cartesio</i> —and its Mirror Image: <i>Vale</i> .....	351
7.6	<i>Grid Indus</i> .....	354

8. Private International Law, Corporate Social Responsibility and Extraterritoriality .....	357
8.1 The Role of Private International Law in Operationalising Corporate Social Responsibility .....	357
8.2 The United States: Litigation Based on the Alien Tort Statute.....	359
8.2.1 The Discovery of ATS by the CSR Community .....	359
8.2.2 Corporate Liability Under ATS and the Setback Under <i>Kiobel</i> .....	360
8.2.3 The ‘Touch and Concern’ Test of the US Supreme Court in <i>Kiobel</i> .....	361
8.2.4 Post- <i>Kiobel</i> Case-Law.....	363
8.2.5 Summary on the US .....	366
8.3 The European Union.....	366
8.3.1 Jurisdiction.....	367
8.3.1.1 General Jurisdictional Rule: Article 4 of the Brussels I Recast Regulation.....	367
8.3.1.2 Special Jurisdictional Rule: Article 7(5) Brussels I Recast Regulation—Operations Arising out of a Branch .....	368
8.3.1.3 Special Jurisdictional Rule: Article 7(2) Brussels I Recast—Tort .....	368
8.3.1.4 Special Jurisdictional Rule: Article 7(4) Jurisdiction Regulation .....	369
8.3.1.5 Review of the Jurisdiction Regulation—The ‘International Dimension’ of the Regulation.....	369
8.3.2 Applicable Law .....	369
8.4 Piercing of the Corporate Veil and Compliance Strategies.....	371
8.4.1 Inspiration from Competition Law?.....	371
8.4.2 Outside of Competition Law.....	372
8.5 Conclusion.....	374
Annexes.....	375
Regulation 1215/2012, the Brussels I Recast Regulation.....	377
Rome I.....	409
Rome II.....	420
Regulation 2015/848, the Insolvency Recast Regulation.....	430
Regulation 650/2012, the Succession Regulation .....	484
<i>Index</i> .....	513