

# Contents

Preface	<i>page</i> xix
Tables of cases	xxi
Table of statutes, SIs, European Legislation and Treaties and Conventions	xlvi
<b>1 Introduction</b>	<b>1</b>
1. The subject matter	1
2. The name	3
3. Geographical considerations	4
4. Glossary	5
<b>2 Characteristics of the English conflict of laws</b>	<b>6</b>
1. Late development	6
2. Legislation: the increasing role of the EU	8
<b>3 Domicile and habitual residence</b>	<b>11</b>
1. Introduction: personal connecting factor for choice of law and jurisdiction	11
2. Meaning of domicile	12
3. Domicile of origin	14
4. Domicile of choice	14
a. Differences from domicile of origin	14
b. Acquisition	15
c. Burden and standard of proof	19
d. Evidence of intention	21
e. Domicile as a social bond	21
f. Motive and freedom of choice	22
g. Abandonment of domicile of choice/dependence	23

5. Domicile of dependence	23
a. Married women	23
b. Minors	24
c. Mental patients	26
6. Criticism and reform	27
a. General	27
b. Law Commission's proposals (1987)	30
7. Ordinary residence	31
8. Habitual residence	32
9. Habitual residence in EU legislation	36
10. Corporations	37
a. Status and domicile	37
b. Residence	38
<b>4 Selected aspects of procedure of the English court</b>	<b>40</b>
1. Introduction	40
2. Outline of a case	41
a. Issue of claim form	41
b. Service of claim form	42
c. Case management	42
d. Interlocutory hearing on jurisdiction	43
e. Disclosure	44
f. Trial: a substantive hearing on merits	45
g. Enforcement of judgments	45
h. <i>Res judicata</i> : the binding effect of a judgment	46
3. Pleading and proof of foreign law	46
a. Foreign law as fact	46
b. Method of proof	48
c. Duty of the English court	48
d. Party autonomy	49
<b>5 Jurisdiction of the English courts</b>	<b>52</b>
1. Introduction	52
2. Preliminary matters: a good arguable case and a serious issue to be tried	55
3. Brussels I Regulation	56
a. History	56
b. Interpretation and purpose	57
c. Scope	59
i. Excluded matters generally	61
ii. Expressed exclusions	62
d. Outline	68



e. General rule: defendant's domicile	70
i. Definition: domicile of natural persons	71
ii. Definition: domicile of legal persons	73
iii. Domicile of trusts	75
f. Special rules of jurisdiction: generally	76
g. Article 5(1) contract	76
i. 'Matters relating to a contract' has an autonomous meaning	77
ii. Disputes about the existence of a contract	78
iii. Structure of Article 5(1)	79
iv. Sale of goods contracts	79
v. Provision of services contracts	81
vi. Article 5(1)(a) contracts	82
h. Special rules: Article 5(2) maintenance	86
i. Special rules: Article 5(3) tort	87
i. Autonomous definition of tort	87
ii. Threatened wrongs	89
iii. Concurrent actions in tort and contract	89
iv. Place where the harmful event occurred	90
j. Special rules: Article 5(4) criminal proceedings	94
k. Special rules: Article 5(5) branches	94
i. Definition of branch, etc.	94
ii. Operations of the branch, etc.	95
l. Special rules: Article 5(6) trusts	96
m. Special rules: Article 6 co-defendants, third parties and counterclaims	97
i. Article 6(1) co-defendants	97
ii. Article 6(2) third parties	99
iii. Article 6(3) counterclaims	100
n. Special rules: Articles 8–14 insurers	100
o. Special rules: Articles 15–17 consumers	101
p. Special rules: Articles 18–21 employees	103
q. Exclusive jurisdiction: Article 22	105
i. Rights <i>in rem</i> in immovable property	105
ii. Corporations and legal persons	107
iii. Entries in public registers	109
iv. Registration or validity of intellectual property rights	109
r. Jurisdiction agreements: Article 23	111
i. Article 23(1)	112
ii. Validity of agreement: consensus and form	113
iii. Article 23(3)	117
iv. Interpretation of jurisdiction agreements	117
v. Limitations on Article 23	118
s. Submission – (Article 24)	118



---

t. Examination of jurisdiction	119
u. <i>Lis pendens</i> – (Articles 27 and 28)	120
i. Article 27: same cause of action and same parties	122
ii. Article 28: related causes of action	129
v. Provisional measures	132
w. Brussels I Regulation (recast)	133
i. Extending jurisdiction to defendants domiciled in third states	134
ii. Parallel proceedings in other Member States	135
iii. Parallel proceedings in third states	136
iv. Arbitration	138
v. Jurisdiction agreements	138
vi. Examination of a court’s jurisdiction	138
<b>6 National rules of jurisdiction</b>	<b>139</b>
1. Jurisdiction under national law (including staying of proceedings)	139
a. Introduction	139
b. Service on defendant present within the jurisdiction	142
i. Natural persons	142
ii. Legal persons	143
c. Service on agent of defendant	146
d. Submission of defendant	146
i. Defendant argues merits of case or counterclaims	146
ii. Providing an address for service within the jurisdiction	147
e. Service on defendant out of the jurisdiction	147
i. Gateways	149
1. Defendant domiciled within the jurisdiction	149
2. Claim for an injunction ordering the defendant to do or refrain from doing something within the jurisdiction	149
3. Claims against necessary and proper parties and third parties	150
4. Claims for interim remedies	151
5. Claims over contracts	152
6. Claims in tort	158
7. Enforcement	160
8. Property	160
9. Trusts and restitution	161
ii. Procedure	162
iii. Possible alternative claims	163
iv. Effecting service abroad	163
f. Defendant’s challenge to jurisdiction	164
i. Stays of proceedings on <i>forum non conveniens</i> grounds	164
ii. Challenges to permission to serve out	164



g. Natural or proper forum: <i>forum conveniens</i>	165
i. Most real and substantial connection	165
ii. Particular factors	168
1. Applicable law	168
2. <i>Lis pendens</i>	169
3. Consolidating actions	170
4. Jurisdiction and arbitration agreements	171
5. Practical advantage	171
iii. Treatment of advantages	172
h. Second stage: the test of substantial justice	174
i. Criticism of <i>forum conveniens</i>	177
j. Jurisdiction and arbitration agreements	178
i. Validity	179
ii. Interpretation	181
iii. Effect	182
1. English jurisdiction agreements	183
2. Foreign jurisdiction agreements	185
2. Hague Convention on Choice of Court Agreements	186
3. Relationship between Brussels I Regulation and national rules of jurisdiction	188
a. Criticism of <i>Owusu</i>	190
b. Outstanding questions	190
c. Proposals for alterations to the Brussels I Regulation after <i>Owusu</i>	193
4. Restraining foreign proceedings (anti-suit injunctions)	194
a. Introduction	194
b. Basis for injunction	195
i. Jurisdiction over respondent	195
ii. A 'sufficient interest' in the dispute	197
iii. Injustice	198
1. Proceedings in breach of a jurisdiction or arbitration agreement	198
2. Unconscionable conduct	200
3. Vexation or oppression of the applicant	200
c. Article 6 of the European Convention on Human Rights	202
d. Restraining proceedings in another Member State	203
<b>7 Provisional measures</b>	<b>206</b>
1. Introduction	206
2. Freezing injunctions	207
a. Introduction	207
b. Foreign proceedings: jurisdiction over the respondent	210
i. National law	211
ii. Brussels I Regulation	211



---

c. Exercise of discretion in support of foreign proceedings	212
d. Worldwide freezing injunctions	213
e. Worldwide freezing injunctions: foreign proceedings	214
f. Protection of respondents and third parties: provisos	215
g. Concerns over human rights	215
<b>8 Foreign judgments</b>	<b>217</b>
1. Introduction	217
2. Theories of recognition and enforcement	219
3. Recognition and enforcement under the Brussels I Regulation	221
a. Judgments falling within the Brussels I Regulation	221
i. Scope of the Brussels I Regulation	221
ii. Meaning of judgment	223
b. Recognition	223
c. Enforcement	223
d. Effect	224
e. Defences	225
i. Manifestly contrary to public policy	225
ii. Natural justice	229
iii. Irreconcilable with an English judgment	231
iv. Irreconcilable with a judgment of another Member State or of a third state	232
v. Conflicts with sections 3, 4, or 6 or Article 72	232
vi. No review of jurisdiction or substance	233
vii. Appeals	234
f. Reform of the Brussels I Regulation	234
i. Abolition of <i>exequatur</i>	235
ii. Reduction of defences	235
iii. Arbitration	235
4. Other European procedures	236
5. Recognition and enforcement under national law rules	236
a. Jurisdiction of the foreign court	237
i. Natural persons as judgment debtors	239
ii. Legal persons as judgment debtors	240
iii. Submission to the foreign court	244
1. By voluntary appearance	244
2. By agreement	247
iv. No other basis of jurisdiction	248
b. Enforceable judgment	249
i. Final and conclusive	249
ii. Fixed sum	250



---

iii. Taxes, penalties or other public law judgments	250
iv. Multiple damages: Protection of Trading Interests Act 1980	251
v. Sovereign immunity	252
c. Effect of foreign judgments	252
d. Defences	253
i. Public policy	253
ii. Fraud	254
iii. Judgments contrary to natural justice	256
1. Notice of the proceedings	257
2. Right to be heard	257
3. ‘Substantial justice’	258
iv. Article 6 of the European Convention on Human Rights	259
v. Conflicting English or foreign judgment	260
e. Civil Jurisdiction and Judgments Act 1982, s. 32	260
6. Hague Convention on Choice of Court Agreements	261
<b>9 Choice of law rules</b>	<b>264</b>
1. Introduction	264
2. Analysis	264
3. Connecting factors	266
4. Characterisation	267
a. The <i>lex fori</i> theory	269
b. The <i>lex causae</i> theory	270
c. Analytical jurisprudence and comparative law	270
d. Falconbridge’s views	271
e. English courts and characterisation	271
f. A special case: substance and procedure	275
g. Limitation of actions	276
5. The incidental question	277
6. <i>Renvoi</i>	280
a. Meaning	280
b. Arguments against <i>renvoi</i>	284
c. Arguments in favour of <i>renvoi</i>	286
d. Summary	287
e. Areas of application	287
7. Time factor	288
<b>10 Contractual obligations</b>	<b>291</b>
1. Introduction	291
2. Background to Rome I Regulation	294



3. Temporal scope and interpretation	294
4. Material scope and exceptions	295
5. Effect of applicable law	297
6. General rules	300
a. Introduction	300
b. <i>Renvoi</i> is excluded	301
c. Method to follow in matters of contract	301
d. Parties' choice of law	302
i. Express choice	302
ii. Inferred choice	304
iii. <i>Dépeçage</i>	306
iv. Limitations on parties' choice	306
e. Absence of choice: Article 4	307
i. Specific contracts	307
ii. Residual rule for other contracts	309
iii. Habitual residence	309
iv. Exceptional rule: close connection	311
v. Deconstructing Article 4	311
vi. Manifestly more close connection	315
7. Special rules	317
a. Contracts of carriage of goods	317
b. Carriage of passengers	317
c. Consumer contracts	318
d. Insurance contracts	318
e. Individual employment contracts	319
8. Formal validity	319
9. Capacity	320
10. Exceptions to the applicable law	321
11. Public policy and mandatory rules	323
a. Article 9	323
b. Article 21	326
12. Effect of illegality on a contract	329
13. Unilateral rules	333
14. Liability in both contract and tort	333
<b>11 Non-contractual obligations</b>	<b>335</b>
1. Introduction	335
2. Universal application and interpretation	337
3. Temporal scope	338
4. 'Non-contractual obligation'	339



a. Non-contractual or contractual obligation?	339
b. Non-contractual obligation or property?	340
c. Excluded matters	340
5. Exclusion of <i>renvoi</i>	342
6. Habitual residence	342
7. Damage	343
8. Effect of the applicable law	343
9. Applicable law of non-contractual obligations arising out of a tort/delict	346
a. General rule: Article 4	347
i. <i>Lex loci damni</i>	347
ii. Common habitual residence	350
b. Displacement	351
10. Rules of safety and conduct	355
11. Particular non-contractual obligations	355
a. Product liability	355
b. Unfair competition and restricting free competition	356
c. Environmental damage	357
d. Infringements of intellectual property rights	358
e. Industrial action	359
f. Unjust enrichment	359
g. <i>Negotiorum gestio</i>	361
h. <i>Culpa in contrahendo</i>	361
12. Parties' choice of law	362
13. Liability in both contract and tort	363
14. Effect of a contract limiting liability	364
15. Mandatory rules and public policy	365
16. Defamation, etc. (the common law rule of double actionability)	366
17. Trusts	369
a. Application of the Hague Convention	369
b. Choice of law rules: the governing law	370
c. Recognition of trusts	372
d. Restrictions: mandatory rules and public policy	373
e. Variation of trusts	374
<b>12 Property</b>	<b>377</b>
1. Introduction	377
2. Characterisation	377
a. Contract, tort or property?	377
b. Voluntary or involuntary?	378



c. Immovable or movable?	379
d. Tangible or intangible?	379
3. Immovables	380
a. Jurisdiction	380
b. Choice of law	383
4. Tangible movables	385
a. Jurisdiction	385
b. General rule: <i>lex situs</i>	386
c. Security interests, conditional sales, reservations of title, etc.	389
d. Exceptions	392
i. Goods in transit	392
ii. Public policy, mandatory rules and fraud	393
iii. Insolvency and succession	393
iv. Cultural heritage	393
e. <i>Renvoi</i>	395
5. Intangible property	396
a. Assignment of debts	396
i. Introduction	396
ii. Possible applicable laws to determine property issues	398
1. <i>Situs</i> of intangible property	398
2. Law of the contract of assignment	399
3. Law of the contract between the debtor and creditor	400
iii. Capacity to assign or take an assignment	400
iv. Article 14 of the Rome I Regulation	401
1. Application: contract or property?	401
2. Article 14(1)	402
3. Article 14(2)	403
v. Priority and security interests	404
vi. Set off	405
b. Reform	405
6. Involuntary transfers	405
a. Nationalisation or requisition of tangible property	405
i. Where the property is in England	405
ii. Where the property is in the foreign country	406
b. Expropriation of intangible property	408
c. Third party debt orders	409
<b>13 Avoiding the results of the choice of law process</b>	<b>412</b>
1. Introduction	412
2. Substance and procedure	412
a. Evidence	413
b. Limitation of actions	416



---

c. Remedies	417
d. Damages	418
e. Interest on damages and currency of damages	420
f. Priorities and set-off	421
g. Parties	422
3. <i>Renvoi</i>	423
4. Public policy	424
a. Penal laws	425
b. Revenue laws	428
c. Public laws	429
d. Laws which grossly infringe human rights	431
e. Laws which fundamentally breach public international law	431
f. Laws which infringe basic principles of justice or morality	432
g. Contracts contrary to public policy	432
5. Unilateral choice of law rules	433
6. Mandatory rules	434
<i>Index</i>	435