

1

Introduction and Scheme

I. Introduction	1.01
II. Advance conclusions	1.12
III. Terms and elements	1.13
IV. A snapshot from 2007	1.29
V. Scheme	1.32

I. INTRODUCTION

The purpose of this book is not to challenge, question, or contradict the rules of English private international law, but to look at the way they work in support of the simple principle that it is good for parties to make contracts, good for parties to perform contracts, and good for courts to enforce contracts. To this end, we will explore the role of consent, common intention, and agreement, within the individual rules of private international law. **1.01**

Where one can show the parties' common, or mutual, intention, it is natural to suppose that it should guide the judge in the application of the rules of private international law: a judge should generally interpret the rules of private international law to give effect to what was shown to have been the common intention of the parties. The common law principles of private international law accepted the force of the intention of the parties as a reason for the law, for legal certainty and respect for expressions of adult autonomy are values which deserve support. And although the private international law of the European Union expresses its aims in its own idiom, legal certainty and predictability of the outcome of potential litigation are prominent among its ambitions, the better to secure the legal protection of those established within the community and to help complete the internal market. Giving effect to the demonstrable intention of the parties is, therefore, part of the underpinning of the statutory framework of the private international law of the European Union; and the more securely the intentions of the parties are given decisive force, the more deeply legal certainty will take root in the community as a whole. **1.02**

- 1.03** Intention is one thing, but it may be understood as a joint appeal, subscribed to today, to be put before tomorrow's judge. If one of the parties subsequently resiles from it, and behaves in a way which contradicts it, the other may say that 'this is not what we intended should happen'. That may resonate with the judge, whose law may direct him to respond to the intention which existed, and to disregard the fact that someone has now turned his back on it. But that may be the limit of it. If a litigant has changed his mind, a court may decide to focus on the position which obtained before the mind was changed and say, in effect, that the change of heart came too late for it to have any effect in law. A change of mind may fail to free the party from the consequences which would have followed if he had not changed his mind. But a common intention is just that, neither imposing nor seeking to impose any additional constraint. Repudiation of a common intention may have no consequence bar the risk of ineffectiveness. A change of heart may not work, but it invites no more serious a sanction than to be ignored.
- 1.04** To give it an extra dimension, the parties may fortify their common intention with an agreement that each will adhere to it and will not depart from it. The scenery is instantly transformed; an examination of this phenomenon forms the core of this book. Where the parties make agreements about the jurisdiction of courts it may now be said, against the party who has changed his mind, that he has broken his promise, broken his contract, and crossed an important line. It changes everything, allowing the party who wishes to hold the other to their common intention to invoke a distinct juristic basis for doing so. A party who breaks his contract should expect a number of consequences. One is that his departure from the agreement will bring him no benefit. Another is that his breach of contract itself forms the basis for a separate legal claim, with a distinct set of legal remedies. This will guard the innocent party from the adverse consequences of breach, but will also provide the incentive for keeping the contracting parties to what they agreed.
- 1.05** The more pervasive or persistent the contractual analysis, and the more effective the contractual remedies available to the victim of a breach, the greater is the likelihood that certainty will be encouraged, predictability will be enhanced, and the costs of litigation, in the long run, reduced. We may now be in a transitional phase, with the contractualization of the conflict of laws being increasingly recognized for what it is, and the values which underpin the common law of contract making themselves available to support the common law principles of private international law. A question for debate is whether promises made in the sphere of private international law are as susceptible to enforcement as ordinary contractual promises, with some remedies being available as of right, while

others lie in the discretion of the court. The more certain the enforcement, the more likely it is that parties will abide by their promises. This inveterate truth of the common law is not confined to certain areas while being played down in or excluded from some others.

By way of balance, some may apprehend that too blunt an application of the values of the general common law will come at the expense of the special, particular, common law principles of private international law, and that one should temper the impact of promise-based morality upon private international law. There are, as this approach would maintain, competing legal values, more important than personal agreements between private parties; some questions on which the judge must decide for himself, rather than simply applying the rubber stamp to what the parties agreed as between themselves; some issues on which the legitimate interest of another legal system cannot be treated as lying outside the contract and therefore as irrelevant. **1.06**

Private international law may wrestle with its contractual soul, but the law of commercial arbitration underwent a development which had the potential to reach very far indeed. The courts have long accepted that agreements to proceed to arbitration rather than adjudication were agreements which ought to be enforced, and which would be enforced by staying contradictory legal proceedings as well as by damages actions. But there was also a sense in which the parties' right to exercise their autonomy was limited by the right of the court, if asked, to take certain questions out of the hands of the arbitrator and decide them itself. But a series of international conventions and model laws, and domestic legislation implementing the former and inspired by the latter, has cut back the role of the courts to its irreducible minimum, and accepted that where the parties had made an agreement, or appeared to have made an agreement, to proceed by way of arbitration, that agreement¹ would be enforced without much further ado. Not every judgment, and not every judge, seems to have felt wholly comfortable abdicating primary responsibility for the adjudication, but on the whole, parties to a plausible agreement to arbitrate who brought legal proceedings designed to undermine the integrity and primacy of that agreement receive increasingly short shrift and a nasty costs order to boot.² Moreover, parties who make an agreement to arbitrate have a choice of tribunal, place, and procedure, which is entirely in their hands. They can generally design their own rules for choice of law, **1.07**

¹ Or that maybe agreement.

² For an illustrative example, see *A v B* [2006] EWHC 2006 (Comm), [2007] 1 Lloyd's Rep 237 (stay); *A v B (No 2)* [2007] EWHC 54 (Comm), [2007] 1 Lloyd's Rep 358 (costs).

or authorize the arbitrators to devise their own; and the law will generally enforce their right to have done so. Now this is not without its problems. If all arbitration is fundamentally contractual, someone has to decide whether the contract was valid; and someone has to take the decision about who will decide whether the contract was valid. Contractual autonomy is all very well until it is questioned, at which point a robust methodology is needed. Autonomy may be recognized, may be granted; but autonomy cannot vouch for its own validity or exercise. The law of commercial arbitration tries to provide simple answers, not always successfully; it is unsurprising that the law on judicial adjudication runs into similar difficulty.

- 1.08** But arbitration also shows us that whatever one may conclude about the substantive obligations which the parties undertook, with forethought or by accident or otherwise, they may write their own rulebook for the settlement of disputes. It is not a question of ticking a box for standard-form arbitration. The parties may devise their own agreement, which may be very detailed indeed, or adopt a standard form. The parties may choose the law to be applied by the tribunal to assess the validity or invalidity of the claim and defence. The extent to which a court will respect this exercise of adult freedom is a separate question, but the answer is increasingly that it will. The result is that the agreement for dispute resolution is contractual in nature; is enforced as though it were a contract which is fit for summary enforcement; and treats the autonomy of the parties as the highest of legal values.
- 1.09** Now if parties may exercise this freedom in relation to dispute resolution by an arbitral tribunal, one may ask what sensible justification exists for taking a different view when they agree, in terms otherwise the same, on dispute resolution by a judicial, rather than an arbitral, body. One response may be immediately mentioned. It is sometimes said that if parties want a particular kind of dispute resolution, tailored to their individual needs, they are free to have it, but are required to take it in the form of arbitration, and cannot expect it in the form of judicial determination. Judicial determination, it is said, comes in a standard, plain vanilla, form, which is not obligatory (because arbitration is an option) but which must be taken more or less as it is given. Judges cannot be made the mere servants of parties who have devised their own procedures and rules of law. The rigour of adjudication, and the dignity of the whole process of adjudication,³ requires its own hierarchy and judges, not private parties, to be at the top of it. There is sense in this, but it does not follow that the private

³ Which will be dignified by references to Her Majesty.

international law rules of the common law should not take and assimilate from the law of arbitration that which it is good and convenient to take and assimilate. This may involve further recognition of the right to make choices in the form of agreements, and enforcement of choices made in the form of agreements. After all, if a court is bound to trust tribunals to enforce the parties' agreement, there is little obvious justification for trusting the judges any less.

So the question is how far the conflict of laws has become contractualized, or been rendered liable to being restated in contractual terms. If nothing else, we may find that private international law and its organization might be made clearer and more rational if it drew a preliminary distinction between (on the one hand) issues of jurisdiction and choice of law which are covered by agreement because the parties have exercised their autonomy, and (on the other) the issues of jurisdiction and choice of law where the right to exercise autonomy went unexercised. This is not the first time writers have pondered aspects of the broad issue. Some years ago, Dr North delivered a significant and most important paper entitled 'Choice in Choice of Law',⁴ which prompted an early version of some of the arguments in a paper entitled 'Choice of Choice of Law'.⁵ Around the same time, Dr Nygh was converting his 1995 Hague Lectures, given under the title 'The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and Tort'⁶ into his book *Autonomy in International Contracts*.⁷ These looked, in various ways, at the extent to which the parties come to a common intention which the courts would honour. Less attention was directed to whether it would make any difference for this common intention to be fortified by a promise, an agreement, not to depart from it; and even less was devoted to whether such an agreement could or should be reinforced by causes of action and remedies for breach or wrongdoing. These are the directions which now need to be explored. Accordingly this book will seek to examine the role of agreement in private international law. Its principal source material is agreements on jurisdiction and on choice of law, always acknowledging the contribution provided by the law of arbitration. It does not aim to offer a comprehensive manual containing all the jurisprudence available on a particular point: in a world in which nothing goes unreported any more, individual writers must now make the editorial decisions which the law reporters once did. There are other books which perform the encyclopaedia function, **1.10**

⁴ Most conveniently published in North, *Essays in Private International Law* (1993).

⁵ Briggs, [2003] LMCLQ 12.

⁶ Hague Recueil (1995) Vol 251, 269–400.

⁷ (1999).

and which are more than sufficient for that task.⁸ Instead, it does ask why the law is as the law appears to be, and whether its current state is rational.

- 1.11** In reflecting the evolution of the law this book will aim to point out where we have come from, where we are, and how the law should develop further. It cannot ignore developments taking place in legislation, most of this being European in origin and genetically alien to the structure of the common law. The European material is directly authoritative only where the organs of the European Union have authority, but so long as it is properly understood, it does offer a valuable and alternative insight into common contemporary problems in international commercial litigation. Perhaps the most pressing issue for practitioners (in both senses) of private international law is to work at the interface of these distinct schemes. If it is true, as this book will seek to show, that the basis of the common law principles of private international law is as different from that of the European legislation as it appears to be, issues of mixed parentage will be liable to look a little unplanned. But in the Europe of the twenty-first century, this is taken as given; and it is certainly not true that it is always a curse.

II. ADVANCE CONCLUSIONS

- 1.12** To anticipate conclusions is dangerous, but to ask a reader to trust that after several hundred pages he or she will see the point is arrogant. Two broad themes will emerge from this account. The first is that rules of private international law may be organized or reorganized to draw a more systematic distinction between agreements and non-agreements, in jurisdiction as well as in choice of law, and that much may be understood by

⁸ One may see the broad treatment in Dicey Morris & Collins, *The Conflict of Laws* (14th edn, 2006; hereafter 'Dicey'), Briggs & Rees, *Civil Jurisdiction & Judgments* (4th edn, 2005), and Hill, *International Commercial Disputes in English Courts* (3rd edn, 2005). More particular treatment of what is now Article 23 of the Brussels I Regulation may be found in Newton, *The Uniform Interpretation of the Brussels and Lugano Conventions* (2002), and in Layton & Mercer, *European Civil Practice* (2nd edn, 2005), which deals generally with the Brussels regime. On jurisdiction and arbitration agreements, see Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (2005). Bell, *Forum Shopping and Venue in Transnational Litigation* (2003) is written from a slightly broader perspective and is excellent, not least for being less encyclopaedic and more reflective. Davies (ed), *Jurisdiction and Forum Selection in International Maritime Law: Essays in Honour of Robert Force* (2005) is particularly valuable in its specialist context. On arbitration, nothing comes close to Mustill & Boyd, *Commercial Arbitration* (2nd edn, 1989, and Companion Volume, 2001), and this book does not try.

treating jurisdiction and choice of law by agreement as coherent, and as separate from jurisdiction and choice of law where agreement is absent. This would make it easier to see the contribution which may, and should, be made to private international law by private commercial law reasoning. The second is that agreements on jurisdiction and on choice of law, are, along with arbitration agreements, components of a more or less comprehensive agreement for the resolution of disputes. This is ancillary to but distinct from the substantive legal relations in which the parties may also stand. We are accustomed to accept arbitration agreements as separable from the substantive contracts to which they relate. We accept that the subject matter of the arbitration agreement is distinct from the subject matter of the relationship which may have brought the parties to the point of dispute. The idea of separability is also making some headway as a useful tool in the law of jurisdiction agreements. Its application to choice of law has yet to be established, but there is a plain sense in which parties, when they choose a law to govern a relationship, are in fact nominating the law to be applied by a court or tribunal if ever it comes to the resolution of disputes. The organizational consequence of this is that the entire agreement upon how the parties will conduct themselves if a dispute breaks out is a separate and distinct agreement. It is intended to be given effect in the first resort by the promised observance of the parties; in the second resort, by order for its specific enforcement by a court; and in the last resort by an order for monetary compensation. The world has become accustomed, with remarkable uniformity,⁹ to accept that this is how arbitration agreements work. There is no reason to suppose that these values—that agreements should be enforced, that courts should reinforce them where they can, that adults may exercise freedom to decide how their disputes will be resolved, that the instances in which the intention of the parties may be overridden should be few and well understood as questions over which individuals do not enjoy autonomy—should be taken less seriously when parties agree to bring their disputes before a court. To be sure, courts are not tribunals, and on occasion this will necessitate a difference in approach. But the expectation surely ought to be that where parties make an agreement for the resolution of disputes, that agreement should be respected where possible and reinforced where necessary. This is the sense in which the conflict of laws is becoming contractualized. It will also enable a number of loose ends to be tied: the application of terms despite the rescission or termination of a contract; the (non-)relationship between the proper law of a contract and the place of dispute resolution; the rules for

⁹ Though the acceptance that breach of an arbitration agreement gives rise to a claim for damages is the least well established element.

incorporation from one contract to another, and so forth. It will aim to put the law on dispute resolution in private international law on a clearer footing than that which it currently has, the better to see how it works alongside the new European regulation of the same issues.

III. TERMS AND ELEMENTS

It may be useful to identify some specific issues with which this book will be concerned.

Agreements on jurisdiction; agreements on choice of law; and agreements

- 1.13** The law on jurisdiction agreements and agreements on choice of law ought to be simple, but increasingly it shows itself to be more complex than one might expect. Both the case-law and the doctrinal writing have minor shares in the blame; but it is apparent that the increasing activity of legislators in London and Brussels, and the inventiveness of counsel, have all contributed to the complexity which has come to pass. The pervasive question is whether it is appropriate, or possible, or dangerous, or misconceived, to treat these agreements as ordinary private contractual undertakings which give rise to ordinary civil contractual consequences. The common law, at any rate as practised in commercial cases, appears increasingly to say so, though it is not always clear that the magnitude of the development is appreciated. By contrast, the intellectual tradition of private international law has been to be more wary of appeals to plain contractual reasoning, on the footing that the international element in conflicts cases calls for special attention and different sensitivity. From time to time a clash of legal cultures will result, even if this happens gradually and unwittingly.

Jurisdiction agreements and their validity

- 1.14** Questions concerning the scope, validity and enforceability of jurisdiction agreements usually arise early in the litigation, commonly in the context of applications for jurisdictional relief. A mature system of international commercial litigation will aim to provide a speedy and efficient determination of such challenges;¹⁰ a court will sometimes be attracted to a path

¹⁰ This is not to say that a system must necessarily dispose of the jurisdictional question before any step is taken in relation to the merits of the proceedings, even though this is the effect of CPR, Part 11.

of reasoning which avoids complications. For example, a jurisdictional application may be disposed of by finding there to be a 'good arguable case' that an agreement on jurisdiction was valid or invalid. If that is all that is required, some of the potential analytical difficulties may be side-stepped by finding that the claimant's arguments are good enough to justify the court in accepting jurisdiction. But once jurisdiction has been dealt with, if the claimant then relies on the jurisdiction agreement to contend that he has a legal right not to be sued in a foreign court, applying for a final injunction to prevent the defendant from suing overseas, he will not obtain the relief he seeks simply by showing a good arguable case that he has a right to the relief he seeks. What may appear to be a single question—was there a valid and binding agreement on jurisdiction?—will be answered differently, according to the context.

Where the parties to litigation admit that they are bound by a jurisdiction agreement, but dispute the legal consequences which follow from the fact, the framework within which the issues are to be debated is straightforward. Where the parties to litigation accept that they are contractually bound but dispute whether the contract contained or was accompanied by an agreement on jurisdiction, the bounds of the analysis may still be drawn with some reasonable degree of certainty. But where one party to litigation denies being party to a contract, still less one which contained an agreement on jurisdiction, it is more challenging to devise a robust structure for the analysis. On the one hand, a court should avoid taking either litigant's side on the very issue in dispute. On the other, a judge must resist being drawn into a trial of the merits: a court should not try the question whether there is a contract containing a jurisdiction agreement by which the parties are bound in order to decide whether to exercise jurisdiction to decide whether there is a contract by which the parties are bound. It is no surprise that the courts find themselves pulled in several directions at once; and when it comes to analysis, constant vigilance is needed to prevent the best becoming the enemy of the good. **1.15**

What jurisdiction agreements mean

It is now clear that jurisdiction clauses may themselves be more complex organisms. True, the principal question is whether they are successful in prorogating or derogating the jurisdiction of courts. But the question of how they are to be enforced has raised its profile as parties to agreements on jurisdiction who fail to obtain an order for specific enforcement of the agreement turn their attention to pecuniary relief by way of substitute enforcement. Nothing is more fundamental to the common law than the fact that breach of contract gives rise to a *right* to damages: that *pacta sunt* **1.16**

servanda, contracts are to be performed, and that damages for breach are a matter of right and entitlement.

- 1.17** This development, which arrived in private international law rather late in the day, invites reflection on the nature of a contractual term which specifies the jurisdiction of a court. It may be regarded as a part of procedural or public law, on the basis that whether a court has jurisdiction is always a matter of public law which lies beyond the direct control or autonomy of the parties. If it is, the extent to which the agreement can be enforced at the behest of a claimant is limited by matters which lie beyond his power or control. It may be said that where legislators have established jurisdictional rules for a court, it is not for the parties as individuals to make private agreements which assert priority over that public law. But from another vantage point the agreement is promissory, made between individuals who have bargained for undertakings about whether and where each will issue or accept service of process. Even if such agreements do not tie the hands of a judge, for whether there is jurisdiction is the business of the legislator who laid down the law, they still embody private compacts as to mutual behaviour and for the enforcement of which either party may look to the court. If this is correct, one must ask whether there are any particular rules, affecting the enforcement of such agreements by an order made under the inherent jurisdiction of the court, or by an order granting equitable relief, or by an order for the payment of money. How does the nature of the contractual promise bear on the relief which may be claimed when it is shown to have been breached? Does the common law acknowledge that there are contractual promises which do not give rise to a secondary obligation to pay compensatory damages when they are broken? The answer to these and other questions requires proper examination of the legal nature of an agreement on choice of court.
- 1.18** Agreements on jurisdiction have provoked some creative thinking. The law governing their enforcement by specific order has become more complicated, and in some respects, more restrictive, and this may have provoked the party denied specific enforcement to fight back. The fact that these questions are now arising in relation to jurisdiction agreements makes unavoidable a parallel enquiry into the nature of an agreement on choice of law.

Agreements on choice of law

- 1.19** Hitherto there has been little interest in a parallel investigation of agreements on choice of law. However, if an agreement on choice of law may be or may contain a promissory obligation, according to which each party to the contract agrees that he will accept the application of the chosen law to