CHAPTER 1

INTRODUCTION

A. THE IMPORTANCE OF PRIVATE INTERNATIONAL LAW QUESTIONS IN (RE)INSURANCE DISPUTES

1.1 Questions of private international law loom large in reinsurance and insurance disputes, as witnessed by the sheer volume of reported cases concerning conflicts of law and (re)insurance. In the first place, this is because many (re)insurance risks — particularly those involving the London market and London (re)insurers — are complex, high value and, above all, international in nature. Secondly, it is often the case that the contracts setting out the terms on which such risks are (re)insured are not as clear as they might be on such questions. Thirdly, in large value disputes, one or more of the parties involved will be inclined, because of actual or perceived advantages in the litigation they are involved in, to seek to take private international law questions in the course of such proceedings. The prevalence of arbitration clauses may go some way to diminish but does not prevent this tendency.

1.2 These questions of private international law can broadly be characterised under two heads: jurisdictional questions — dealt with in Part II of this book — and choice of law questions — dealt with in Part III. Generally speaking, jurisdictional questions will arise and be determined before the hearing of any substantive dispute, whereas choice of law questions tend to form a part of such disputes, and indeed play a significant role in determining the substantive issues which arise for decision. Of course, this is not to deny that choice of law can be very relevant to jurisdiction issues, but the order of discussion flows from these considerations.

B. THE COMMON LAW APPROACH

1.3 The essential characteristics of the common law approach to jurisdictional disputes may be said to be, firstly, that jurisdiction was available on the ground of the presence of the defendant within the jurisdiction and other broad or exorbitant grounds which might be expected to give some sort of connection between the dispute and the jurisdiction; but, secondly, that potential excesses of jurisdiction were tempered by the principle of forum non conveniens under which the court would decline jurisdiction in favour of another clearly more appropriate forum. Choice of law was based on the express, implied or imputed choice of the parties.

1.4 Although (re)insurance disputes involved their own particular "spin" on such questions, the fundamental private international law tests were the same, whether the dispute was a (re)insurance dispute or some other civil or commercial piece of litigation. In other words, private international law questions in (re)insurance disputes tended to involve the application of common and widely understood principles, albeit that the application of such principles involved factors specific to (re)insurance, for instance, the mode of contracting and administering which is often different from that in other areas, and the situus of the risk (re)insured.

C. THE EVOLUTION OF EUROPEAN PRIVATE INTERNATIONAL LAW

1.5 Time was when these jurisdiction and choice of law questions were the more-or-less exclusive province of the common law. This is certainly now no longer the case. The past two decades have seen a progressive displacement of these common law principles in favour of European laws (either incorporated into English law by Act of Parliament or delegated legislation, or else "directly applicable" rules requiring no incorporating Act). Thus, as regards jurisdictional questions, the
process began with the Brussels Convention of 1968, incorporated into English law (in a form amended in the light of the UK's accession to the EEC as it was then known) by the Civil Jurisdiction and Judgments Act 1982. This 1982 Act is, itself, now a dead letter, and the Brussels Convention has for most purposes been re-born as an EU Regulation, comprehensively entitled "Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters" and referred to herein as "the Brussels Regulation".

1.6 The common law test for choice of law questions has similarly been displaced, chiefly by the Rome Convention of 1980, incorporated into English law by the Contracts (Applicable Law) Act 1990. Before this decade is out, it is likely that the Rome Convention (and implementing legislation such as the Contracts (Applicable Law) Act 1990), will have gone the way of the Brussels Convention, and have been incorporated into a directly applicable and directly effective Regulation.

1.7 As will be seen, the Rome Convention does not apply to most contracts of insurance, whereas it is applicable to contracts of reinsurance. Insurance questions tend to be dealt with by the so-called insurance directives.

1.8 Even this brief overview shows that the history of European law involvement in private international law questions is a long one. It is also complicated and the final chapter of this history has by no means yet been written. The evolution of this corpus of European law is important not just in historical, but also in legal terms. Thus, for instance, it is this historical evolution which explains which countries are party to what convention (the Brussels Regulation has variants on its theme). This, in turn, affects not merely the specific provisions applicable to private international law questions, but also the extent of the involvement of the European Court of Justice in the determination of such questions. For this reason, the historical development of European law in this area is described in Chapter 2.

**D. CHARACTERISTICS OF EUROPEAN RULES OF PRIVATE INTERNATIONAL LAW**

1.9 European rules of private international law have a number of characteristics which it is important to note at the outset. These relate to:

1. The essential nature of the rules. As will be seen, the fundamental nature of the European rules is in marked contrast to the common law principles that European law has displaced.

2. An overlay of social engineering in the rules. Certain contracts — generally those perceived to involve individuals requiring protection under the law — tend to be singled out for special treatment under European law. Thus, it is no longer the case that one regime fits all, with special factors forming, if anything, a subsidiary matter to be considered under the umbrella of generally formulated principles. Rather, the rules applicable to a given contract tend to vary according to the nature of the contract.

3. The need for a common interpretative approach. The fundamental raison d'être of the European private international law rules is to provide consistent jurisdictional and choice of law rules across the EU. That implies an application of a common European approach to such rules, as opposed to a narrow national approach.

These characteristics are considered in turn below.

1. The essential nature of the rules

1.10 In distinct contrast to the rules of common law that they have largely displaced, the European
rules seek to minimise the exercise of judicial discretion or judgment and maximise certainty of outcome by creating a whole raft of very specific rules, designed to cater for and to provide an ostensibly clear answer to the wide range of different jurisdictional and choice of law questions which may arise in the course of civil litigation. Such a rule-based approach is, of course, in large part a question of legal policy and/or a reflection of the different legal traditions represented in the European Union. What can be said is that the European rules will seem very alien to anyone brought up on the common law approach to jurisdiction and choice of law. The common law tended to evolve principles capable of extremely brief articulation, but which were deceptive in their brevity and simplicity, because of their broad brush and (particularly as regards jurisdiction) discretionary nature. By discretionary, we do not, of course, seek to suggest that the rules are in any way arbitrary. It was simply that the common law approach involved the weighing of a number of potentially countervailing factors, often requiring evidence, and certainly involving a fundamental exercise of judgement as regards such factors.

1.11 The European rules are by contrast tightly formulated to deal with specific issues or questions. Of critical importance is the characterisation of the relevant question or issue, as this will determine which rules will resolve that issue. Thus, for instance, the determination whether a contract is one of reinsurance or insurance (and, if the latter, whether the insurance relates to risks situated within the EU) is critical as to whether the Rome Convention or the insurance directives apply. Of course, no set of rules is ever likely to be completely comprehensive or completely certain, and it may fairly be said of many European law provisions that the difficult questions that are overtly discussed as "judgemental" questions under the common law regime arise in hidden form when seeking to delimit the scope of application of one or other rule of European law.

2. An overlay of social engineering in the rules: consumer protection, etc

1.12 The Brussels Regulation contains a series of provisions dealing specifically with certain types of contract. Examples are consumer contracts and employment contracts and — important for present purposes — contracts of insurance. Similarly, the Rome Convention tends to apply only to reinsurance contracts, with insurance contracts (at least those involving risks situated in the EU) being regulated by the insurance directives.

1.13 This differentiation between different types of contract reflects a public policy agenda on the part of the European law-makers. The respective positions of the participants — or perceived participants — to specific contracts are deemed to require special treatment. This special treatment is not a reflection of the different legal approaches of the Member States of the EU. Its source is very different — public policy — which, of course, also finds expression in UK national legislation. For present purposes, the importance of this public policy overlay is that the rule-based nature of European law is accentuated. It becomes necessary — more-or-less at the outset of any legal inquiry — to distinguish between different types of contract: as a direct result, contracts of insurance are (to an extent) separated from other forms of contract; and contracts of insurance and reinsurance need to be distinguished. Although, of course, it is wrong to say that insurance and reinsurance contracts are governed by wholly different and separate regimes — they are not — it is necessary to bear in mind that some of the rules applicable to such contracts are unique to them.

3. The need for a common interpretative approach

1.14 The fundamental raison d'etre of the European private international law rules is to provide consistent jurisdictional and choice of law rules across the EU. Thus, the aim of the jurisdictional rules is that whichever national court is confronted with a piece of international litigation, that court will apply the same principles in order to determine whether or not it has jurisdiction. Equally, where a national court is seised of dispute, the approach of that court to the choice of law questions before it should be common to the EU.
1.15 Obviously, this implies a common approach to the difficult questions of construction that arise out of the European private international law rules, and to the application of those rules. This is dealt with in two related ways. In the first place, national courts are injunctioned to eschew narrow, national approaches to construction; a broad, "Community" approach needs to be adopted. Secondly, and reinforcing this, questions of construction can (to varying degrees) be referred to the European Court of Justice for an authoritative, EU-wide, determination. Questions of interpretation are considered in Chapter 3.

E. APPROACH AND STRUCTURE OF THIS BOOK

1.16 The nature of the European private international law rules largely determines the structure of this book. Part I deals with matters of common interest to both the rules on jurisdiction and the rules on choice of law — namely, the history of the development of these rules (Chapter 2) and the manner in which these rules are to be interpreted in order to facilitate a common, EU-wide, approach (Chapter 3).

1.17 The division of the rest of the book into two parts — jurisdiction (Part II) and choice of law (Part III) — reflects the essential division (both in European law, and in the common law) between these two areas. Within each Part, the approach is similar. First, and critically given the regimented European approach, the various different potentially applicable regimes are described and the tests for determining which regime is applicable in any given case stated. This involves differentiating between:

(1) The various different applicable European regimes. In particular, it has been necessary to distinguish between the regimes applicable to contracts of reinsurance and contracts of insurance;
(2) The extent to which the common law still has a role; and
(3) Arbitration proceedings.

The different jurisdicitional regimes are described in Chapter 4. The different choice of law regimes are described in Chapter 9.

1.18 In the following chapters — Chapters 5-8 and 10-13 respectively — the different regimes are themselves described. The relationship between the European rules, the rules of common law and the rules applicable in arbitration proceedings are dealt with in this order. Clearly, given the priority of the European rules over the rules of common law (which have a limited application, whether by virtue of the terms of the European rules or outside them), the European rules need to be dealt with first. So far as the rules applicable in arbitration proceedings are concerned, these are expressly not derived from the Brussels Regulation nor the Rome Convention, but are self-standing. Their treatment last is simply a reflection of the fact that they are coloured by the European and common law rules, whose analysis precedes them.

1.19 Within the analysis of the European rules, contracts of reinsurance have been considered before contracts of insurance. Within the choice of law context, this approach was informed by the need to consider the Rome Convention first, and the insurance directives second — this because the insurance directives in many cases refer implicitly, or sometimes explicitly, back to provisions in the Rome Convention. The Rome Convention, as has been described, excludes from its scope the insurance of risks situated within the EU.

1.20 So far as the European jurisdictional rules are concerned, the same approach was taken: reinsurance first, insurance thereafter. The analytical need to do so was not so compelling as with the choice of law rules; but in terms of consistency, this approach was preferred. It also enabled the "pure" diet of Brussels to be considered first, without the specific provisions applicable to insurance (but not reinsurance) contracts.
F. TERMINOLOGY

1.21 It is apparent that there are a number of relevant treaties, conventions and instruments. In this book, we refer to:

1. The Brussels Regulation 44/2001. This is headed "Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters", and this is how it is referred to in subsequent Commission regulations. It is simply called "the Regulation" in the Civil Jurisdiction Judgments Order 2001, SI No. 3929. There are other regulations to which reference will be made so we will use the shorthand "the Brussels Regulation".

2. Those states which are bound by the Brussels Regulation are referred to in the Regulation as "Member States" (Article 1(3)) and we adopt this usage although it has the disadvantage that it always has to be remembered that the Member States do not include Denmark which is a Member State of the EU.

3. The Brussels Convention refers to whichever version of the convention is relevant to the discussion. The Lugano Convention has never been substantially amended (although Poland became a party to it) so that the problem does not arise. Parties to the Brussels and Lugano Conventions are referred to as "Contracting States" in accordance with the terms of those treaties.

4. The Rome Convention is referred to as such.

5. The Financial Services and Markets Act 2000 (Law Applicable to Contracts of Insurance) Regulations 2001 bring into force under English law the choice of law rules in various insurance directives which apply to insurance contracts and are referred to as "the Insurance Regulations".

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2. Reference is also often made to the "Brussels I Regulation" to distinguish it from the Brussels II Regulation which deals with jurisdiction in matrimonial matters and which is not relevant for our purposes.
3. Sometimes the Member States, i.e. not including Denmark, are referred to as "the Regulation States". As we will see, in accordance with Article 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union, Denmark is not bound by the provisions of the Brussels Regulation. However, the Commission has negotiated an agreement between the European Community and Denmark extending the provisions of the Regulation to Denmark and this decision was approved by the Council on 27 April 2006 (2006/325/EC OJ L 120/22). See para. 2.72 below.