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BOOK REVIEWS

International Commercial Litigation BY RICHARD FENTIMAN [New York: Oxford University Press, 2010. lxiii + 575 pp. Hardcover: US$350.00]

With the growing number of economies opening up to the world in the last few decades, it has become increasingly common for lawyers to be engaged in transactions involving elements from more than one country. No matter how complex a deal may be, the crux of the matter at the end of the day is whether the rights of the parties can be satisfactorily enforced. For cross-border commercial disputes, this question often depends on the forum in which they are resolved than on the substantive law governing the transactions. It is therefore essential for lawyers to have a good grasp of the issues involved in international commercial litigation in order to appropriately advise their clients of the legal risks involved in their transnational transactions. However, it is difficult to find in the market a readable and erudite book on a subject largely governed by procedural rules and commercial considerations. Nonetheless, Richard Fentiman has shown that it is possible to produce a scholarly work which is not only of a high quality, but at the same time palatable to practitioners.

Unlike most textbooks on conflict of laws which are organized doctrinally with distinct chapters on choice of law, jurisdiction and enforcement of foreign judgments *etc.*, Fentiman presents the subject matter "as the courts and practitioners view them" (at p. 44). His focus is on the *legal risks* involved in multistate transactions. According to Fentiman, there are two forms of legal risks, namely, transaction risks (*i.e.* how far the parties' legitimate expectations may be upheld or defeated by unforeseen legal principles in the event of litigation) and litigation risks (*i.e.* risks that arise in the course of litigation such as the inability to secure a favourable forum or to enforce a foreign judgment). The book is thus structured along the line of addressing those risks. In this way, Fentiman hopes to provide a comprehensive roadmap for the readers to navigate through the legal minefield of cross-border litigation.

There are altogether six parts in the book. Part I, consisting of Chapter 1, sets out the basic framework. It also explains the concepts and the legal landscape in cross-border litigation, particularly from the perspective of the English courts. For English lawyers, the law in this area is particularly complex because of the co-existence of two regimes—the national law and the European Community (EC) regime, each embodying different assumptions and objectives. Part II explains how the legal risks in multistate transactions may be contractually managed, with Chapter 2 looking at litigation risks and Chapter 3 at transaction risks. Chapter 2 shows that the two main litigation risks, venue risk and enforcement risk, can be reduced or minimised

with well-crafted agreements governing jurisdiction and enforcement (although its effectiveness is somewhat curtailed by the rules in the Brussels I Regulations (EC, *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, [2001] O.J. L 12/1 [*Regulation 44/2001*])). Chapter 3 examines the various aspects of transaction risk and the considerations taken into account by the English courts when balancing public policy and law.

Part III, which comprises of Chapters 4, 5 and 6, maps out the conceptual framework of cross-border commercial litigation. Chapter 4 discusses how the English court would determine the appropriate laws governing contractual rights and proprietary rights, whilst Chapter 5 delves deeper to examine the dynamics involved in the choice of law process, such as characterization and *renvoi*. Chapter 6 looks at the situation where foreign law is applicable—how the content of the foreign law may be established in an English court. This is an important issue as such content will determine the rights and obligations of the parties involved and identify the *forum conveniens*.

The rest of the book traces the different stages in an international commercial litigation, namely, commencing proceedings (Part IV – Chapters 7 to 9), preventing proceedings (Part V – Chapters 10 to 15), and recovery and enforcement (Part VI – Chapters 16 to 18), and extensively explains the practical considerations governing the actions of the parties at each point. Chapters 7, 8 and 9 look at the issues involved and the strategic choices facing litigants when commencing a multistate litigation. Chapter 7 outlines the principles and the legal framework of forum selection. Chapter 8 gives a detailed insight into how the English courts handle the two regimes—the English national conflict of laws principles and the EC community rules of jurisdiction, *i.e*. *Regulation 44/2001*. This is followed by Chapter 9 which describes the ways in which a defendant can be exposed to an English court's jurisdiction.

Chapters 10 to 15 show that a plaintiff may be prevented to bring proceedings against the defendant in a number of ways: by being excluded (Chapter 10); denied of jurisdiction under the *Regulation 44/2001* (Chapter 11) or under the English law's residual rules (Chapter 12); rejected on procedural grounds such as abuse of process; or when an English court exercises its case-management powers (Chapter 13); or precluded because of prior proceedings in another court (Chapter 14). A foreign claim can also be restrained by injunction (Chapter 15).

The issues of recovery and enforcement are covered in the final group of chapters. Chapter 16 examines the various methods whereby transaction loss may be recovered and Chapter 17 looks at how judgment assets may be preserved. Finally, Chapter 18 describes how a foreign judgment may be enforced or denied enforcement by the English courts.

The book contains a thorough review of the relevant English and European Court of Justice cases throughout, with extensive footnote references to secondary and academic materials, including foreign judgments. It is interesting to see important non-English cases such as *Kartika Ratna Thahir v. PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 S.L.R. 257 (C.A.), *Neilson v. Overseas Projects Corp of Victoria Ltd.* [2005] 223 C.L.R. 331 (H.C.A.) and *The Adhiguna Meranti* [1988] 1 Lloyd's L.R. 384 (Hong Kong C.A.), being cited and referred to at several places in the text. In addition, it is clear that Fentiman intends his book to be

more than a textbook for law students. In areas where the law remains unclear, after stating the present state of the law, Fentiman goes on to postulate on how the law may pan out for the English court in future. An example of this is seen in his treatment of the situation where the plaintiff fails to establish foreign law (see paras. 6.102 *et seq.* on his discussion of the landmark English Court of Appeal case of *Shaker v. Al-Bedrawi* [2003] Ch. 350 (C.A.)).

Another feature of the book is that although the chapters are interlinked, Fentiman ensures that each chapter is a comprehensive monograph on its own by thoughtfully teasing out the relevant portions of the law and discussing them separately under discrete headings. The advantage of this approach is that every chapter is complete by itself. The drawback is that one will have to plough through many different chapters to get a full picture of how a certain species of international commercial transaction is affected by the rules of private international law. That said, it is undeniable that Fentiman has successfully produced an original and in-depth, yet concise and highly focused mastery exposition on the legal pitfalls of international commercial litigation as seen through the lens of an experienced practitioner-scholar.

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