BOOK REVIEW

BENJAMIN GEVA AND SAGI PEARI, *INTERNATIONAL NEGOTIABLE INSTRUMENTS* (OXFORD PRIVATE INTERNATIONAL LAW SERIES, OXFORD UNIVERSITY PRESS, 2020)

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Books on conflict of laws range widely in scope, from general treatises such as the magisterial two-volume *Dicey and Morris*[1] and many other texts, classical and modern, to individual studies of particular aspects of the subject such as jurisdiction, contracts, and torts. Well represented also are theoretical studies of the choice of law process, with one of the present authors having already provided a recent addition to this notable corpus of scholarship.[2] The present work, however, is devoted to a sub-category of one of the major choice of law categories; it is the first study of the conflict of laws relating to negotiable instruments since the work of Ernest Lorenzen over a hundred years ago.[3] As such, it is a notable addition to the scholarly literature on conflict of laws.

However, the book is far from being simply a study of the relevant choice of law rules. It is avowedly reformist in character. The authors take the view that the current rules in England, Australia, the United States and elsewhere have become isolated from the general trend of developments in the rules governing contracts and movable property generally: they have remained ossified as a result of codification by legislation such as Chalmers' *Bills of Exchange Act 1882* in the United Kingdom and its equivalents in Australia and Canada, the *Restatement of the Conflict of Laws* and the *Uniform Commercial Code* in the United States, and various international conventions. This legislation commonly distinguishes between different issues such as formal validity, extrinsic validity and interpretation, and the various stages through which a bill or other negotiable instrument passes following creation, such as indorsement, negotiation and delivery. The connecting factors applied by the

* Emeritus Professor, University of Western Australia Law School. While the book under review was published in 2020, the 2025 release of several updated chapters attests to the significance of its contribution: see <https://academic.oup.com/oxford-law-pro/book/57030/chapter/ 523022753>.

[1] Lord Collins of Mapesbury and Jonathan Harris (gen eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 16th ed, 2022).

[2] Sagi Peari, *The Foundation of Choice of Law: Choice and Equality* (Oxford University Press, 2018).

[3] Ernest Lorenzen, *The Conflict of Laws Relating to Bills and Notes* (Yale University Press, 1919).

various rules usually point to a territorial location, such as the place of making or the place of acceptance, rather than personal connecting factors associated with the parties, such as their residence or place of business.

The core argument in this work is that the existing rules should largely be abandoned in favour of reuniting the choice of law rules relating to negotiable instruments with those relating to contracts generally, and the closely related area of movable property. The authors trace the important development forward from the work of Beale and the *First Restatement*,[4] adopting principles that choice of law rules in the area of contract should be fixed, certain, and independent of any element of party choice, to the *Second Restatement*,[5] which abandoned Beale's approach in favour of a general principle of party autonomy, supported by reference to the most significant relationship ('MSR') principle in the absence of party choice, with various presumptions to assist this process. The same trend can be seen at work in Anglo-Australian conflicts law, with most matters now being referred to the proper law of the contract, which the parties are free to choose, or the law of closest connection if they fail to do so.

The case for this change in approach is convincingly argued in Chapters V and VI, and the book ends with a 'suggested framework' after the manner of a summary of recommendations in a law reform commission report. However, all the chapters contribute to the argument being advanced. Chapter I introduces readers (many of whom may not be overly familiar with the law relating to negotiable instruments) to core concepts such as negotiability, together with a brief history of the codification of the law relating to the principal negotiable instruments — bills, notes and cheques — in England, the United States, and elsewhere. This chapter reveals the breadth of the comparative approach adopted by the authors, which ranges over not only all the major common law systems but also the civil law world, dominated by the Geneva Conventions and the various Rome treaties of the European Union. Chapter II provides a learned historical perspective, outlining the story of bills, notes, and cheques from their origins in the ancient world, through the Jewish Talmud, Islamic law, and Roman law, to medieval Europe and their reception in England — on the way demolishing the 'myth' that there was once a commonly accepted body of rules sourced from the 'law merchant'. This historical perspective is extremely valuable in its own right, but is far from being just an add-on bonus to a work devoted to conflict

[4] American Law Institute, *Restatement of Conflict of Laws* (1934); Joseph H Beale, *A Treatise on the Conflict of Laws* (Baker, Voorhis & Co, 1935).
[5] American Law Institute, *Restatement (Second) of Conflict of Laws* (1971).

of laws principles: historical considerations become important planks in the argument at various points, for example in para [5.49].

Chapter III provides background of another kind by setting out the general principles relating to choice of law, both generally and in the context of contract, adopting the same wide comparative approach. The authors give prominence to the process already referred to, by which Beale's vested rights theory that dominated the original Restatement was replaced by a more flexible approach giving rein to party autonomy and the MSR principle. Chapter IV then outlines the existing choice of law rules applicable to negotiable instruments, again considered comparatively.

Chapters V and VI, as noted, contain the core of the authors' argument for a new approach to choice of law in this field. This approach brings negotiable instruments into line with the choice of law rules now followed for contracts generally and movable property, and makes it possible for the parties to choose the law by which the transaction is to be governed, in the absence of such a choice looking to the law of the MSR. Chapter V also contains another significant proposal: that the orthodox precondition that opens the door to the application of conflicts principles — that the case should be one which involves a foreign element — should be relaxed or eliminated in this context. The authors argue convincingly that the distinction drawn between 'inland' and 'foreign' bills by legislation such as s 72 of the *Bills of Exchange Act* is now outmoded. This section of Chapter V, allied with the earlier discussion in Chapter III, shows that the authors are clearly in sympathy with those who have argued that conflict of laws should perhaps not be reserved simply for cases involving a foreign element, but may have a wider role to play, explaining which laws apply even in purely 'domestic' cases.[6]

Chapter VII supports the principal recommendations by dealing with a number of more detailed matters. It challenges the idea (found in the existing choice of law rules for contract) that the general approach should be modified in relation to particular issues, such as capacity or formal validity, in order to provide other avenues by which contracts may be validated in difficult cases. It confirms that the proposed reforms should have a wide scope, applying to most issues involving negotiable instruments, including property aspects, and questions involving remedies and limitation periods. And it argues that the rules should be applied not only to traditional negotiable instruments but also to documents of title to goods such as bills of lading, and securities such as shares and bonds, on the ground that they share some of the characteristics of negotiable instruments, such as

[6] See, eg, Josef Unger, 'The Unknown Province of the Conflict of Laws' (1957) 43 *Transactions of the Grotius Society* 87.

negotiability. The interesting discussion in this chapter is then followed by an equally interesting argument in Chapter VIII that the authors' proposed approach is entirely capable of being applied to negotiable instruments in the electronic age, even though there is no longer any paper document to be created, signed, and delivered in the traditional manner.

The authors have provided a stimulating and original approach to a long-neglected topic. Their proposals deserve serious consideration by bodies such as the Law Commission of England and Wales, which, during the time conflict of laws scholar Peter North was a member, reformed and modernised many areas of this subject. The book is a worthy addition to the Oxford Private International Law Series, an allegiance confirmed by the handsome hard cover binding. It is not perfect; there are a number of typographical and language errors and some strange missing case references, all of which could have been eliminated in the editing process, but none of which distract the reader from the important arguments being put forward. The book shows that it is still possible — in conflict of laws at any rate — for scholars to survey the broad field of the common law, rather than concentrating on a single jurisdiction. The authors are particularly well qualified for this task, having each received their early legal education in Israel, one now being an established scholar in Canada, the other having moved on from Canada to Australia, and both having published widely including in United States journals: to complete the picture, this book has been published by a leading English publisher. Fortunately, it is not necessary to apply the MSR principle to this work; it deserves to be read widely throughout the common law world.