BOOK REVIEWS

Conflict of Laws – Commentary and Materials by **Martin Davies, Sam Ricketson and Geoffrey Lindell** [Sydney, Butterworths, 1997, liii + 814 pages, ISBN 0 409 30759 9]

This is a bold venture. It is sometime since Australia was presented with a casebook on the Conflict of Laws. The last one I am aware of was the second edition of Sykes and Pryles' *Casebook on International and Interstate Conflict of Laws* published by Law Book Company in 1981. Since then, the market for casebooks in this field has markedly declined. As the authors state in their Preface, "student enrolments are generally modest" in the subject after it was abolished as a core subject in almost all law schools.[1] As one who championed the cause of making Conflicts an elective subject in the 1970s, I do not regret that move. Lecturing in a subject to students whose interests were essentially confined to "practical" subjects such as taxation and conveyancing, was at times dispiriting.

Today, the classes taking the subject are relatively small and frequently attract the "better" student, namely, not merely those with an academic bent but others who see the relevance of the subject in commercial and international practice. Indeed, after commencing the course, the student often appreciates that a subject, perhaps chosen initially for its academic and speculative appeal, has great practical utility. There may, admittedly, not be a great market in skills acquired in handling concepts such as classification and *renvoi,* but even the pragmatic oriented have to concede that issues of jurisdiction (and connected therewith, such question as where a tort occurred) arise very frequently in practice. Because of the decline in student numbers, it has been received wisdom to concentrate on writing texts that appeal to practitioners as well as students. The authors are to be complimented on preparing this text primarily for students, although the spread of the materials used and the commentary which interconnect the materials will be useful for practitioners also.

In reading through the materials, one is struck how fast the field of Conflict of Laws is moving nowadays. Whereas High Court pronouncements on the subject were once relatively rare, they now come thick and fast. We have

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[1] At ix.

seen the High Court change course from the initial revolution of *Breavington v Godleman*,[2] to a return to orthodoxy in *McKain v RW Miller & Co (SA) Pty Ltd*,[3] and possibly a return "to the future" of the late 1800s in *Stevens v Head*,[4] as explained by Dawson J in *Gardner v Wallace*.[5]

As the book went to press, the High Court in its equally divided decision of *Gould v Brown*[6] served notice that Australia's great invention, cross-vested jurisdiction, might only have a short time to live. Even the parliaments have bestirred themselves. In the early 1990s, the venerable (Cth) 1901 Service and Execution of Process Act was replaced with a radical new version in what is commonly called SEPA '92. The patchwork of state and territorial adaptations of the (UK) 1933 Foreign Judgments Act is now found in the (Cth) 1991 Foreign Judgments Act. If current discussions in The Hague bear fruit, the new century may see a similar unification of state and territorial rules on jurisdiction over overseas defendants in Australia. It is much to the credit of the authors that they have managed to remain abreast of all these developments.

The text proceeds in classical fashion. It starts by explaining the sources and history of the conflict of laws and this reviewer was touched to see his very first published venture in this field included among the offerings. The various theories are outlined, including the current American ones, and the Chapter concludes sensibly with the recommendation of the Australian Law Reform Commission in its *Report on Choice of Law* in 1992 to stick with the traditional jurisdiction-selecting approach in the framing of its rules. Federal Issues take up the second chapter, including the sad and sorry tale of Full Faith and Credit. Thereafter, as do most university courses, the subject of Jurisdiction is approached, followed by Recognition and Choice of Law techniques. As in most university courses, the treatment of actual choice of law rules comes at the end and is a bit of an anti-climax. After so much introduction in what civil lawyers would call "the general

[2] (1988) 169 Commonwealth Law Reports 41.

[3] (1991) 174 Commonwealth Law Reports 1.

[4] (1993) 176 Commonwealth Law Reports 433.

[5] (1996) 184 Commonwealth Law Reports 95.

[6] (1998) 151 Australian Law Reports 395.

part", the actual rules with the notable exception of torts are rather pedestrian.

As mentioned before, the authors do not satisfy themselves with a mere reproduction of the case and statutory materials. Thus, it is rightly pointed out in paragraph 4.1.13 that despite the apparent conflict between the English *Spiliada* test and the Australian *Voth* principle, a fact situation such as occurred in *Goliath Portland Cement Co Ltd v Bengtell*[7] would probably have had the same outcome in both jurisdictions: see, for instance, *Connolly v RTZ Corpn Plc*.[8] At the same time, much to the reviewer's relief, the authors leave some questions to the established treatises for answer. From time to time, they set questions to the reader. Thus, at page 478, they pose what might once have been called the "$64 question": "Should (or could) an Australian forum apply the a-national *lex mercatoria* to a contract if that is what the parties have chosen as the governing "law?" The student who can answer this will surely know what choice of law in contract means!

The text is very useful and will be a delight to teach from. The only hesitation one has is its extensiveness. No doubt it is desirable to err on the side of inclusion rather than exclusion, but for the cost of the text for students. No teacher could hope to utilise more than half of the material used while teaching an effective course without overloading the students. Although the exercise would have been agonizing, a pruning knife could have been used with good effect. Some materials from the United States, the United Kingdom and Canada could have simply been referred to for comparison in areas such as torts, where the High Court has struck its own distinct course. As regards choice of law, many courses do not go much beyond contracts and torts. It would be a pity if this excellent work had priced itself out of the market, but I will be delighted to be told otherwise.

Subject to this reservation, I strongly commend the work and congratulate its authors.

Hon Dr Peter Nygh

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[7] (1994) 33 New South Wales Law Reports 414.

[8] [1997] 3 Weekly Law Reports 373.