

## BOOK REVIEWS

*SHARES AND OTHER SECURITIES IN THE CONFLICT OF LAWS* BY MAISIE OOI (OXFORD, UK: OXFORD UNIVERSITY PRESS, 2003) 394 PAGES. PRICE £85.00 (HARDCOVER) ISBN 0199256136.

Justice Windeyer of the High Court of Australia once described the progress of the law relating to emotional harm as '[I]aw, marching with medicine but in the rear and limping a little'.<sup>1</sup> This metaphor is apt for the law of electronic communications too, and in the particular area covered by Dr Maisie Ooi's new book,<sup>2</sup> the law until recently did not even limp along — it stood placidly, much where it was in the 19<sup>th</sup> century, as technology sped away.

The central problem for the law relating to shares and securities seems simple enough, but it raises questions of remarkable difficulty and complexity. These issues are explained with laudable clarity by Ooi. Traditionally, the choice of law rule for shares and other securities chose the *lex situs*, the law of the place where the shares are situated.<sup>3</sup> This rule inevitably raised the question of how to determine the *situs* of a share — Should it be the place where the company is incorporated? The place where the company's share register is kept? The place where the share certificate itself (if there is one) is to be found? — but at least it made some sense at a time when companies issued share certificates and kept their own share registers.

Today, however, the simple *lex situs* rule makes little or no sense because shares and other securities are held and traded through an indirect holding system with two key features: immobilisation and dematerialisation. That system breaks the link between the issuer of the security and the investor,<sup>4</sup> enabling transactions to be effected at great speed (usually electronically) without the creation or delivery of share certificates.<sup>5</sup> 'Immobilisation' refers to the fact that an intermediary or clearing house holds all of the shares, either in its own name or in the name of a nominee, and simply records transactions in relation to those shares. 'Dematerialisation' refers to the fact that paper share certificates are no longer necessary, because transfers are made simply by the intermediary changing its records, which are usually held electronically. As a result of these features of the system, the investor is, strictly speaking, no longer a 'shareholder' because he or she never owns the shares and thus has no entitlement against the issuing company.<sup>6</sup>

Obviously, the *lex situs* rule is profoundly ill-suited to an indirect holding system because the *situs* of the share no longer has central significance in

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<sup>1</sup> *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383, 395. The law has come closer to catching up with medicine since the decision of the High Court in *Tame v New South Wales; Annetts v Australian Stations Pty Ltd* (2002) 211 CLR 317.

<sup>2</sup> The book is a reworking of the author's doctoral thesis at the University of Oxford: Maisie Ooi, *Shares and Other Securities in the Conflict of Laws* (2003) viii.

<sup>3</sup> *Ibid* xxix, fn 3.

<sup>4</sup> *Ibid* 48.

<sup>5</sup> *Ibid* 95–6.

<sup>6</sup> *Ibid* 94.

practice. Nevertheless, the English Court of Appeal reaffirmed the rule in *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)*,<sup>7</sup> although, as Ooi notes,

[t]he judgments of the three Lords Justices of Appeal ... disclosed such divergent approaches to the *situs* rule as to make it difficult to discern the true basis and justification for applying the rule to shares, and the scope and manner of its application.<sup>8</sup>

Not surprisingly, recent years have seen several attempts to fashion a new choice of law rule that is more consistent with the practical operation of the indirect holding system. Ooi's book describes and criticises many of the alternatives offered by legislators and academics, before suggesting a rather different solution.

Most reform proposals prefer a rule that focuses on the role of the intermediary, rather than the company issuing the share. This is in recognition of the fact that the key relationship is now that between the security owner and the security intermediary, rather than the security owner and the company issuing the security. Perhaps the simplest example of this approach is the rule dubbed 'PRIMA' — the 'place of the relevant intermediary approach'.<sup>9</sup> Revised Arts 8 and 9 of the United States Uniform Commercial Code ('UCC') contain a choice of law rule that selects 'the local law of the securities intermediary's jurisdiction'.<sup>10</sup> A slightly more elaborate version is to be found in the proposed Convention on the Law Applicable to Certain Rights in respect of Securities Held with an Intermediary,<sup>11</sup> which proposes a rule that chooses the law identified by the investor (referred to as the 'account holder') and the intermediary, provided that the country whose law applies is one where the intermediary has an office where activities relating to maintaining securities accounts are conducted.<sup>12</sup>

Ooi argues convincingly that the basic problem is more fundamental than the reformers realise — it is essentially one of characterisation.<sup>13</sup> The key point is not (or not only) that the law needs to be changed to keep up to date with recent technological developments, but that those recent developments help us to see that the traditional *lex situs* rule was never an appropriate or coherent solution for all situations.<sup>14</sup> It is not, and never has been, appropriate to expect to resolve all potential problems by applying a single rule derived from the nature of shares as intangible property. Ooi argues that it is possible to apply a single choice of law rule, the *lex creationis* (the law under which the thing was created), but only if one realises that the 'thing' in question (the *res*) differs according to the nature of

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<sup>7</sup> [1996] 1 All ER 585, 602 (Stoughton LJ); 608, 610 (Auld LJ); 620–1 (Aldous LJ).

<sup>8</sup> Ooi, above n 2, xxix.

<sup>9</sup> *Ibid* 126.

<sup>10</sup> UCC § 8-110(b), 9-305(a). See Ooi, above n 2, 219.

<sup>11</sup> Hague Conference on Private International Law, *Convention on the Law Applicable to Certain Rights in respect of Securities Held with an Intermediary*, Convention 36, 13 December 2002 (not yet in force) ('proposed Hague Convention'). See generally Ooi, above n 2, ch 13.

<sup>12</sup> Proposed Hague Convention, above n 11, art 4. See Ooi, above n 2, 284–7.

<sup>13</sup> Ooi, above n 2, ch 5.

<sup>14</sup> See generally *ibid* xxx, 102–4, 321–4.

the particular share-related question being considered.<sup>15</sup> ‘The crucial question in each case is: What is the *res* claimed?’<sup>16</sup> Ooi says:

The share *is* a contract, albeit of a very special kind. It is constituted by a unique set of rights and obligations which govern the relationship between the company and the shareholder and the shareholders amongst themselves. These rights and obligations are in the nature of contractual and statutory terms, the proper law of which can only be the law under which the thing was created (*lex creationis*), being the law under which the issuer is incorporated. ... The rights and obligations form an indivisible whole. It follows that, unlike other contracts, the rights under this contract are technically incapable of assignment.<sup>17</sup>

However, Ooi further notes:

The *res* that is held by an investor and transacted through the system is ... not the share but ... a chose against the operator (or the immediate intermediary, as the case may be) for the economic and corporate rights arising from the share.<sup>18</sup>

Because the *res* is different for different aspects of share dealings, the *lex creationis* rule may choose different laws in different cases in relation to the same share or security. Thus, questions about the title to shares should be governed by the law under which the issuing company was created (the company’s *lex creationis*), which is the law by which the issuing company is controlled in its actions regarding its shares.<sup>19</sup> The transfer of rights from investor to investor that takes place on a stock exchange should be governed by ‘the proper law of the trading transaction pursuant to which the right arose, ie its *lex creationis*, which is the law regulating the stock exchange’.<sup>20</sup> Questions of entitlement under the indirect holding system — the investor’s right to be regarded as the ‘owner’ of the security — should be governed by ‘the proper law of the chose against the operator’, which is the *lex creationis* of the relevant *res*, the investor’s right to have the operator recognise its entitlement.<sup>21</sup> In all, Ooi explores no fewer than six different aspects of transactions affecting shares and other securities.<sup>22</sup> In her view, the only situation that cannot be resolved by a *lex creationis* rule (by recognising the appropriate *res*) is the relatively old-fashioned sale of a share ‘effected by the delivery of the certificate and endorsed transfer’.<sup>23</sup> Ooi concludes that the *lex situs* rule should govern that situation, and that situation alone.

It is impossible in this compressed account to do justice to the sophistication of Ooi’s treatment of these questions. The book is remarkably successful at wrestling some prodigiously complex material into comprehensible shape, ranging with apparent ease between securities law, corporations law and conflict of laws. Ooi treats all of the following matters (and more) with the same careful

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<sup>15</sup> Ibid 325.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid 324 (emphasis in original).

<sup>18</sup> Ibid 325.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid 326 (citation omitted).

<sup>21</sup> Ibid. This is the solution adopted by the UCC and the proposed Hague Convention, but justified in a different way.

<sup>22</sup> Ibid 325–7.

<sup>23</sup> Ibid 325.

accuracy: the shortcomings of the various choice of law rules that have been applied to shares; fundamental questions about the nature of a share and the nature of transfers or assignments of shares; the operation of the indirect holding system; choice of law approaches suggested for that system; and legislative treatments of the choice of law questions raised by shares and securities. Her thesis about choice of law could not be understood unless accompanied by an explanation of the arcane workings of the indirect holding system for readers like this reviewer, sadly ignorant of this ‘holding labyrinth’.<sup>24</sup> In Ooi’s words, that labyrinth has a ‘fractal dimension’ because the same structures are repeated over and over as more intermediaries are interposed between issuer and ultimate investor.<sup>25</sup> She succeeds on all fronts, descriptive and analytical. This is a remarkable piece of work.

The book does have a fundamental flaw, but it is not one of Ooi’s making. It is the long-recognised and paradoxical weakness that underlies any inquiry into choice of law rules, namely that unless all countries have the same rules, the end result is that international transactions are beset by a second order choice of law problem of choosing between choice of law rules. Ooi has assimilated the disarmingly magisterial Oxford tone, which implies that her views should be preferred not merely because they are best suited to the particular conditions prevailing in any one country but because ... well, because they are *correct* given the nature of immobilised securities in an indirect trading system.<sup>26</sup> The various legislative solutions considered in Part III of Ooi’s book — Revised Arts 8 and 9 of the UCC, the various European Directives,<sup>27</sup> and the proposed Hague Convention — all adopt much the same choice of law rule, the law of the relevant intermediary. Ooi observes that those regimes do not match one another completely,<sup>28</sup> and her comparative analysis leads her to the conclusion that all of the regimes are flawed by irresolvable uncertainty about *which* intermediary’s law should be adopted.<sup>29</sup> She says that ‘a consistent and theoretically sound approach’ to that question can only be found by following her suggestions, focusing on the law under which the relevant thing was created (the *lex creationis*).<sup>30</sup> She concedes that this approach may not be completely perfect but it is logical and theoretically coherent.<sup>31</sup> Even if that modicum of selfdoubt is unjustified, Ooi’s proposed solution would still only exist as some kind of Platonic ideal — the perfect and unvarying choice of law rule for all situations everywhere, never entirely reproduced in the messy and imperfect circumstances prevailing in the various countries of the world.

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<sup>24</sup> Ibid 89–90.

<sup>25</sup> Ibid 94.

<sup>26</sup> To take just one example of this tone, see *ibid* 111: ‘This approach [a mixed contractual and property approach suggested by Guynn and Marchand] is clearly theoretically more correct than the earlier approach. It is, however, manifestly impractical’. So there.

<sup>27</sup> *Directive 98/26/EC on the Settlement Finality in Payment and Securities Settlement Systems* [1998] OJ L 166/45; *Council Regulation (EC) No 1346/2000 on Insolvency Proceedings* [2000] OJ L 160/1; *Directive 2001/24/EC on the Reorganisation and Winding Up of Credit Institutions* [2001] OJ L 125/15; *Directive 2002/47/EC on Financial Collateral Arrangements* [2002] OJ L 168/43.

<sup>28</sup> Ooi, *above n 2*, 309.

<sup>29</sup> *Ibid* 319.

<sup>30</sup> *Ibid*.

<sup>31</sup> *Ibid* 329.

In short, Ooi's book effectively employs a version of Savigny's 'scientific method', which aimed (to use Cheshire's description of it) 'to discover for every legal relation that local law to which in its proper nature it belongs ... its natural seat in a particular local law ... which must be applied when it differs from the law of the forum'.<sup>32</sup> Savigny fell out of fashion because his 'one right answer' view was plainly inconsistent with the manifest differences between systems of law in the real world, which characterise the same human relationships in profoundly different ways. Perhaps Ooi is right; perhaps it is time for Savigny to make a limited comeback. Perhaps the global homogeneity created by developments such as Internet commerce and electronic trading on international securities markets does indeed mean that there can be one right answer, always and everywhere.

Of course, the book cannot be counted a failure simply because Realpolitik is likely to ensure that its proposed solution will not be implemented in practice. That would be a heresy too awful for any professional academic to utter. Many an academic career has been based entirely on stern theoretical rectitude never translated into practical results (it is tempting, but would be mischievous, to give examples). It is not clear whether Maisie Ooi wishes to have an academic career,<sup>33</sup> but in this book, she has certainly done all that could fairly be asked of an academic work: she has made comprehensible something that would otherwise be incomprehensible. That is no small achievement.

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<sup>32</sup> P M North and J J Fawcett, *Cheshire and North's Private International Law* (first published 1935, 12<sup>th</sup> ed, 1992) 22. The section entitled 'General Historical Development', from which this quotation was taken, has been expunged from the 13<sup>th</sup> edition, published in 1999. Apparently the period of history from the Roman Empire to the late 19<sup>th</sup> century no longer has any influence on English conflict of laws.

<sup>33</sup> Ooi was employed as an Associate at Freshfields Bruckhaus Deringer at the time her book was published, but was a Visiting Associate Professor at the Law Faculty of the National University of Singapore when this review was written.

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