New book on International Negotiable Instruments by Benjamin Geva & Sagi Peari

(published by Oxford University Press, 2020)

The authors kindly provided the following summary:

The book marries two fields of law: negotiable instruments and choice-of-law. Bills of exchange, cheques and promissory notes are the main classical negotiable instruments. For centuries, these instruments have played a vital role in the smooth operation of domestic and international commerce, including in transactions between distantly located parties. Through their evolution, fusion, and sophistication, they have remained one of the primary tools for everyday commercial activity, serving as one of the primary methods of payment and credit and one of the cornerstones of the contemporary bank-centred system. The rapid technological progress of payment mechanisms has embraced the traditional institution of negotiable instruments leading to their further adaptation and sophistication in order to meet the challenges of the contemporary reality of frequent mobility of people, goods, and high daily volumes of cross-border transactions and international commerce.

The cross-disciplinary partnership between the authors, one specializing in negotiable instruments and the other in choice-of-law, aims to offer a comprehensive and thorough analysis of the choice-of-law rules applicable to negotiable instruments. The internal structure of negotiable instruments' law is complex, which has given rise to a popular view favouring the mythological 'law merchant',[1] the exclusion of negotiable instruments from the scope of general contract and property law doctrines, and their subsequent exclusion from ordinary choice-of-law analysis.

The central thesis of the book is to challenge this common view. Indeed, the complex structure of negotiable instruments creates a significant challenge for traditional contract and property doctrine and the choice-of-law analysis applicable to them. Yet, in contrast to the common view, the authors argue that the complex case of international negotiable instruments should be analyzed

through the lens of traditional contract & property choice-of-law doctrines rather than by crafting new specially designed rules for negotiable instruments.

In order to illustrate this point, consider the – well-known in choice-of-law literature – *Giuliano & Lagarde* Report ('The Report'),[2] which has served as a basis for contemporary European Rome Regulations[3] on the question of applicable law. The Report excludes negotiable instruments law from the scope of ordinary choice-of-law analysis.[4]However, one can reassess the three rationales mentioned in the Report to justify negotiable instruments' law exclusion. *First*, it makes a point that a negotiable instrument is not a contract.[5] In this book, the authors argue the opposite – from their very origin to their present-day doctrinal analysis, negotiable instruments are very much contracts and carefully follow the essentials of contract law doctrine, alongside the basic elements of tangible property law.[6]

Second, the Report characterizes a negotiable instrument as a 'complex contract'.[7] Indeed, in their study the authors provide a precise demarcation of the special nature of the negotiable instrument as a 'special' contract to delineate its divergence from the 'ordinary' contract; its relation to basic elements of tangible property transfer; and how this divergence affects (if at all) the choice-of- law rules of negotiable instruments, comparatively to choice-of-law rules of 'ordinary' contracts and tangible property. While throughout their book the authors show that negotiable instruments present 'complicated special rules' that should be analyzed, modified and distinguished from 'ordinary' contract law/property law rules, they are very much based on them.

Finally, the Report makes a reference to the existing harmonization processes.[8] In this book, the authors provide a detailed comparative analysis of the various rules in diverse legal systems and they show that they are far from uniform.[9] The authors discuss the various harmonization processes of negotiable instruments,[10] and make some suggestions for possible reforms within the process of international harmonization of the choice-of-law rules,[11] which would capture the challenges of the digital age.[12] In contrast to the Report, the authors argue that the traditional choice-of-law rules in the areas of contract law and tangible property can serve as a model for such reform of choice-of-law rules of negotiable instruments.

In effect, authors' call for a redesign of the present choice-of-law rules relating to

negotiable instruments finds traces in contemporary literature. The commentators of one of the leading textbooks in the field have framed the need for a reconsideration of the choice-of-law rules of negotiable instruments in the following terms:

…it must be noted that the Bills of Exchange Act 1882 and much of the case referred to in the following paragraphs is now more than a century old. In that time, the role and significance of bills of exchange in commercial intercourse and the approach of the conflict of laws to freely incurred obligations such as these has changed radically. As the following commentary makes clear, the rules contained in the 1882 Act are neither comprehensive nor easy to understand and apply. A radical overhaul of the law in this area, whether by legislation or international convention, seems long overdue.[13]

In this book, the authors are indeed willing to take up the challenge of a 'radical overhaul'. In line with the above-stated quotation, they suggest a radical reorientation of choice-of-law rules. They argue that choice-of-law rules in the area of international negotiable instruments need to be dramatically amended and harmonized.

The contemporary choice-of-law rules within this area of law have originated from flawed premises about the nature of the subject. Further, contemporary rules have left behind the modern development of choice-of-law doctrine. Relying on the foundation of negotiable instruments' law within the traditional ordinary doctrines of contract and movable property and invoking developments within modern choice-of-law thought, the authors endeavour to challenge the traditional orthodoxy and offer a complete re-examination of the choice-of-law rules of negotiable instruments.

[1] See Chapter II.

[2] Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I, Official Journal C 282, 31/10/1980 P. 0001 – 0050.

[3] Commission Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome

I), 2008 O.J. (L 177) 6 (EU); Commission Regulation 864/2007, on the Law Applicable to Non-Contractual Obligations (Rome II), 2007 O.J. (L 199) 40 (EC)

[4] *Giuliano & Lagarde* Report, sec. 4.

[5] Ibid.

[6] See Chapter I & Chapter II.

[7] Report, sec. 4.

[8] Ibid.

[9] See Chapter I.

[10] See Chapter I & Chapter III.

[11] See Chapters V-VII.

[12] See Chapter VIII.

[13] Lawrence Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws* (15th edn Sweet & Maxwell 2012) 2077.