

*The Transfer of Property in the Conflict of Laws: Choice of Law Rules in Inter Vivos Transfers of Property* BY JANEEN M. CARRUTHERS [Oxford: Oxford University Press, 2005. xxxvii + 347 pp. Hardcover: £75]

According to the Oxford University Press website, *The Transfer of Property in the Conflict of Laws* is intended for commercial practitioners, particularly those with a cross-border practice, academics and scholars of the conflict of laws, postgraduate/advanced students of the subject, and legal reference libraries. From a practitioner's perspective, however, *The Transfer of Property in the Conflict of Laws* will likely prove a less useful source of reference than the more practical *International Sale of Goods in the Conflict of Laws* (reviewed elsewhere in this same volume at page 383), which covers some of the same grounds in its Chapter 18. Practitioners are also less likely to appreciate the reform agenda of Dr. Carruthers who painstakingly examines choice of law methodology as well as the historical development of the *lex situs* rule. Academics, scholars and postgraduate/advanced students of the subject, on the other hand, will find *The Transfer of Property in the Conflict of Laws* a rich source of ideas on what, at first sight, appears to be a sterile subject.

An unusual feature of the subject, at least from an English perspective, is that unlike choice of law rules for other subjects or other private international rules, choice of law rules for the transfer of property are still largely untouched by either Parliament or Europe. It has also remained unusually committed to the application of the law of the *lex situs*, so much so that Dr. Carruthers describes the *lex situs* rule as "the monolith" (see, e.g., at 194). Although the book can be used simply as a reference for the choice of law rules on the transfer of property, that would be tantamount to simply piloting an airplane on land. The purpose of the book is to critically examine the present role of the *lex situs* and to determine if it should give way to a more efficient and fairer choice of law rule. To that end, Dr. Carruthers examines choice of law methodology, historical development of the rule as well as writings and case law from England, Scotland, the United States and other common law jurisdictions, as well as from elsewhere in Europe. The result is a thoroughly well-researched and thought-provoking thesis proposing the liberation of the choice of

law rules for the transfer of property from the stranglehold of the *lex situs*.

The book opens with an introduction to choice of law methodology followed by an examination of the distinction between movable and immovable property in Chapter 1. The next six chapters are dedicated to an examination of the choice of law rules as they apply to particular types of property or to particular issues. Chapter 2 deals with immovable property whilst Chapter 3 addresses tangible movable property. Chapter 4 focuses on the border between contract and conveyance. Chapter 5 discusses the rules as they apply to the context of cultural property. Chapter 6 addresses intangible movable property generally, while securities held by an intermediary are the subject of Chapter 7. Chapter 8 summarises the arguments for and against the *situs* rule. Chapter 9 proposes the framework for an alternative choice of law rule. Two models are proposed, one for a draft international instrument and a more modest model intended to be a draft national measure for the United Kingdom.

One drawback of the structure of the book, where the debate (discussion) is disconnected from the conclusion (proposals), is that some aspects of Dr. Carruthers's proposals do not appear to be supported by her previous discussions. For example, in cases where there has been a wrongful dispossession of property in one jurisdiction (the *lex loci originis*) followed by a sale of the same property in the forum (or possibly another jurisdiction prior to relocation to the forum), Dr. Carruthers proposes a key role for the *lex loci originis*. This effectively reverses the rule that the *lex situs* at the point of transfer is the applicable law. The difficulty with accepting this proposal is that, while it is true that applying the *lex situs* is unfair to the original owner who did not consent to the removal of the property to a different jurisdiction, the same criticism is capable of being leveled against the *lex loci originis*. Why should the purchaser be subject to the *lex loci originis* even when he is not aware that the property has been wrongfully removed from the *locus originis*? Dr. Carruthers does not explain why the *lex loci originis* is to be favoured under such circumstances.

Overall, although Dr. Carruthers' thesis provides for interesting reflection, this reviewer cannot help but get the impression that she pushes her case a little too hard. For example, although the book is, at least according to its title, concerned with *inter vivos* transfers of property, Dr. Carruthers moots the abandonment of the *situs*

rule in the law of intestate succession to immovable property as an example of creating a crack in the monolith. It would be extremely technical to criticise Dr. Carruthers on the basis that a rule on intestate succession is clearly not within the scope of her chosen topic of *inter vivos* transfers. However, the *situs* rule in that context has less to do with whether immovable property has been effectively transferred, which is the subject of the book, than with who should be entitled to the property upon intestacy, which is a completely unrelated point. The distinction is akin to the contract/conveyance distinction that Dr. Carruthers supports and which she criticises *Bank of Africa Ltd v Cohen* [1909] 2 Ch 129 for failing to draw.

Chapter 8 summarises the arguments for and against the *situs* rule. A simple glance through the chapter suggests that the *situs* rule has outlived its usefulness. A mere 7 pages are dedicated to the arguments in favour of the *situs* rule whereas Dr. Carruthers spends 27 pages tearing down the *situs* rule. However, a closer examination of some of the supposed arguments leveled against the *situs* rule demonstrates that some of them are not truly arguments against the *situs* rule at all. For example, Dr. Carruthers sets up as arguments against the *situs* rule four of the five exceptions to the *situs* rule. However, anyone familiar with the conflict of laws will realise that, of the four, two exceptions (public policy and mandatory statute of the forum) are general exceptions to *all* choice of law rules. No one would suggest, for example, that the proper rule for choice of law in contract must be reconsidered in the light of these exceptions.

Some other arguments are also less convincing than they appear. For example, Dr. Carruthers suggests that there is as much uncertainty in applying a *situs* rule as there would be in applying a flexible proper law rule and that uniformity simply requires that the same connecting factor be applied to all cases decided in the same forum (at 8.23–8.25). It is however arguable that this argument simply involves a play on words. The *situs* rule, as a single connecting factor rule, is clearly more certain than a proper law rule, which involves a judicial balancing of multiple connecting factors, possibly pulling in different directions in the sense that, once the facts have come to light, the applicable law is more easily ascertained. Furthermore, it is disingenuous to look only at the case of the litigant whose goods have been stolen from him and sold abroad to determine if the *situs* rule is any more certain than

a proper law rule. Many cases of transfer will not involve theft and inasmuch as both transferor and transferee typically are aware of where the property is physically located, a *situs* rule will be clearer than a proper law rule. Applying a *situs* rule, it would not matter whether a sale of property in Utopia was between two Utopian residents or between two Ruritanian residents whereas the adoption of a proper law rule may carry with it some uncertainty as to whether Utopian or Ruritanian law applied in the latter sale. In the case of theft, although there is no greater certainty from the perspective of the original owner prior to discovery of the facts of the subsequent sale, there is certainly greater certainty from the perspective of the purchaser. Even from the perspective of the original owner, once the facts of the subsequent sale are ascertained, the *situs* rule provides greater certainty as to the applicable law than a proper law approach. Applying a proper law approach, who is to say what law is to apply where a Spanish thief stole a painting from an Englishman's French chateau and sold it in Germany to a Swiss merchant?

Although some of her points are, indeed, sound, this reviewer does not share Dr. Carruthers's conclusion that the arguments in favour of the *situs* rule are "shallow" (at 8.77). It is somewhat telling that, despite this conclusion, the *lex situs* continues to play a key role in her proposed reforms. The most important aspect of Dr. Carruthers's proposal is the surrender of the *situs* rule to a flexible proper law approach to the issue of choice of law, but with the *lex situs* as a presumptive proper law to control the uncertainty that is inherent in a proper law approach. The problem with this approach is that the theory of the proper law has not managed to capture the judicial mind beyond the realm of contract, and it is not difficult to guess why this is so. The problem with (and advantage of) employing a proper law rule is that it requires the court to consider multiple connecting factors and determine which is the most appropriate law in the particular circumstances. One of the reasons why the proper law rule thrives in contract is because much of its uncertainty is diminished by the recognition of party autonomy for contract. Outside contract, the courts have yet to recognise party autonomy in choice of law, making it very difficult for the proper law rule to take hold. It is relevant to note that whereas English choice of law for tort has continued to embrace the flexible exception akin to a proper law rule in section 12 of the *Private International*

*Law (Miscellaneous Provisions) Act 1995*, the High Court of Australia has, in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 and *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, rejected such a flexible exception. In *Pfeiffer*, the High Court specifically disapproved of the proper law theory for tort on the grounds that it generates too much uncertainty.

Apart from favouring a more flexible approach to choice of law, Dr. Carruthers has also suggested, at least so far as bilateral disputes involving tangible movables between the parties to the transfer are concerned, that party autonomy be recognised. Interestingly enough, this has also been suggested by the authors of *International Sale of Goods in the Conflict of Laws*. This proposal suggests that whereas a bilateral choice of law ought not to affect third parties (in cases of trilateral property disputes involving disputes as to title), there is no objection to party autonomy where the dispute is purely bilateral. Where both parties are solvent, this would be true but inconsequential since the contractual choice of law would govern the contract in any event, and since both parties are solvent, contractual remedies would be sufficient to address any dispute. Party autonomy in bilateral disputes is therefore only significant where one party is insolvent. Yet, once insolvency becomes an issue, third parties in the form of creditors are automatically implicated. This reviewer is not

convinced that third parties in the form of creditors are obviously less worthy of protection from a choice of law perspective compared to third parties in the form of subsequent purchasers.

Although not ostensibly the subject of the book, Dr. Carruthers also addresses the infamous *Moçambique* rule on jurisdiction over immovable property. According to Dr. Carruthers, this is because the *situs* rule, unlike other choice of law rules, controls both jurisdiction and choice of law and the traditional rule of jurisdiction over immovable property has influenced English choice of law rules on the transfer of property. Much of Chapter 2 is therefore concerned with toppling the jurisdictional *situs* monolith. Although the criticism leveled against the jurisdictional land taboo is sound, it is questionable if this, as Dr. Carruthers suggests, weakens the arguments in favour of the *lex situs* as a choice of law rule.

*The Transfer of Property in the Conflict of Laws* provides much food for thought. Although this reviewer disagrees with the main proposals set forth by Dr. Carruthers, her monograph does expose the failings of many aspects of the common law's obsession with the *situs*, from the jurisdictional *Moçambique* rule to the curious need to assign an artificial *situs* to intangible property.

*reviewed by* KELVIN F.K. LOW