*Policy and Pragmatism in the Conflict of Laws* by Michael J Whincop and Mary Keyes (Aldershot: Ashgate/Dartmouth Publishing, 2001) pages i–xviii, 1–228. Price £50.00 (hardcover). ISBN 1 84014 753 9.

> [P]rivate international law has substantially preserved choice for citizens and firms, so serving liberal and economic objectives. ... Scholars however have not done half as well, preferring conceptualism to pragmatism ... If the conflict of laws has a future, much of its scholarship does not.[1]

It is not immediately clear how a jurist should react to a work that describes their field of scholarship as having no future. Is the picture as bleak as is suggested? Or is this an observation designed to prepare readers for yet another theoretical joust with that notoriously slippery monster, the conflict of laws? Fortunately, in the recent illuminating work by Michael J Whincop and Mary Keyes, there are many riches to be savoured.

Conflict of laws (or private international law) has long been a popular subject for scholars. The difficulty in developing principles of domestic law to deal with cases involving foreign elements has spawned much writing, often of a highly theoretical nature.

One of the earliest and most influential theories was the vested rights doctrine. According to this theory, a domestic court had to recognise and enforce 'rights' granted under the laws of other countries. In enforcing such rights, a series of single-contact territorial rules were developed (for example, in a contracts case, the law of the place of contracting was applied;[2] in the case of torts, the law of the place of the tort[3]). The aim of the vested rights doctrine was that every national court would select the same law to apply to a given set of facts and thus uniformity of outcome between different legal systems would be achieved. This theory placed an emphasis on systemic consistency rather than the needs of the individual case.

While common law conflict of laws rules were for a time strongly influenced by the vested rights doctrine, by the middle of the 20th century its influence began to wane as individual judges sought more discretion in deciding cases involving cross-border elements. In the United States this movement away from strict territorial rules was most pronounced, with the rise of the interest analysis school. According to this theory, it was the duty of a court to analyse the governmental interests behind the competing laws and to apply the law of the state whose interests would be most advanced.[4] The Anglo-Australian conflicts

[1] Michael J Whincop and Mary Keyes, *Policy and Pragmatism in the Conflict of Laws* (2001) 198.

[2] See, eg, *Chartered Mercantile Bank of India, London and China v Netherlands India Steam Navigation Co Ltd* (1883) 10 QBD 521; *Jacobs, Marcus & Co v Crédit Lyonnais* (1884) 12 QBD 589.

[3] See, eg, *Slater v Mexican National Railroad Co*, 194 US 120 (1904); *American Banana Co v United Fruit Co*, 213 US 347, 356 (1909) (Holmes J).

[4] See Whincop and Keyes, above n 1, 2, 17–19.

doctrine never formally embraced the American interest approach but instead, by a process of pragmatic development, courts introduced greater flexibility and discretion into the choice of law process.

It is this unsatisfactory dichotomy in the common law of conflicts that spurred Whincop and Keyes into action.[5] On the one hand, they applaud the American jurists for their willingness to examine the policy bases of the conflict of laws, but reject the policies advocated. On the other hand, they attack the Anglo-Australian scholars and judges who continue to endorse a blind, formalistic model that eschews policy altogether.[6]

As the authors state, a fresh theoretical appraisal of the subject that is both pragmatic but sensitive to the key underlying policies is, therefore, timely.[7] In their view, it is the law and economics school that offers the best model, both descriptive and prescriptive, for analysing the conflict of laws. The approach of Whincop and Keyes rests on three basic pillars: (i) that the policies underlying the substantive private law areas should also be applied to private international law rules; (ii) that primary emphasis should be placed on the interests of parties as opposed to sovereign states; and (iii) that a 'transaction' view of the subject should be adopted.[8] In adopting such an approach, the authors suggest, greater attention will be paid to the economic consequences of the application of legal rules in a conflicts context. The authors then consider the application of their theory in a number of key substantive and procedural law areas including contracts, mandatory rules, torts, property, jurisdiction and corporations.

Before considering substantive matters, it should be pointed out that the work is written in an extremely clear and accessible style with great lengths taken to explain the various terminology used. For persons such as the present reviewer, with limited knowledge of economic theory, this clarity is most welcome.

The reviewer agrees with Whincop and Keyes that the current Anglo-Australian approach to conflict of laws is excessively formalistic and could be more sensitive to policy issues.[9] Similarly, the American interest approach suffers from a number of serious flaws, including the difficulty of discerning and evaluating the relevant interests and the scope for uncertainty and forum bias. The question is, however, does the law and economics approach as articulated by Whincop and Keyes offer any fresh insights into the law of conflicts?

In this reviewer's opinion, the strength of the book lies in its identification and examination of hitherto unexplored economic forces at work in typical conflicts situations. The authors go to considerable lengths not merely to expose the relevant underlying policies but also to assess the utility of the existing legal rules. Consequently, the outcome of the authors' policy analysis is in some cases the proposal of new rules, while in others it is the reaffirmation of existing rules. For example, in the area of contracts, the authors note that the existing judicial approach of enforcing choice of law and choice of jurisdiction clauses based on

[5] Ibid 3.
[6] Ibid 2.
[7] Ibid.
[8] Ibid 3–6.
[9] See ibid 1–2.

the idea of party autonomy is harmonious with the law and economics objectives of private ordering and the advancement of party interests.[10]

It is certainly hard to disagree with the authors' contention that, in the area of contracts, party interests should generally be respected.[11] But how far does this proposition go? The limitations of a purely law and economics approach are perhaps more obvious when the role and significance of mandatory rules is considered.[12] A mandatory rule is an express or implied statutory restriction on choice of law or jurisdiction. It is true that, from an efficiency perspective, mandatory rules are a relatively 'blunt instrument' and that their application does undermine contractual certainty. However, such legislation continues to be a popular device for governments to further certain social and political policy objectives (for example, the protection of those whose bargaining position is perceived to be weak, such as employees and consumers).

There are always likely to be interest groups seeking protective legislation and governments willing to provide such protection, supported by courts who see their role (in part) as implementing legislative purpose rather than merely applying literal words. It is therefore likely that the scope and volume of mandatory rules will become more, rather than less, expansive in years to come, despite the authors' plea for a more restrictive approach to be taken.

Whincop and Keyes' discussion of market torts in chapter 5 is thoughtful and provocative. For too long, Anglo-Australian conflict of laws doctrine has accepted the common law division between tort and contract as a basis for assigning separate choice of law rules to each category. As the authors demonstrate, this is a formalistic fiction when it is clear that many commercial torts have more in common with contracts than, say, personal injury claims.[13] Furthermore, the reviewer welcomes the creation of new choice of law rules in the area of commercial torts that reflect the close connection with contract. The authors propose two such rules: the law of the place of sale for product liability cases;[14] and the law of the place of incorporation for investor claims.[15] Both suggestions appear to be significant improvements over the existing options, namely the law of the place of the tort and the rule in *Phillips v Eyre*,[16] and may inspire the proposal of further new rules.

The authors' discussion of non-market torts, in chapter 6, and the proposed further division between 'discrete' and 'relational' torts based on the identity and relationship of the parties, with separate choice of law rules for each, is logical

[10] See generally ibid ch 3.

[11] See, eg, ibid 6.

[12] See generally ibid ch 4.

[13] Ibid 71–2.

[14] Ibid 81–4.

[15] Ibid 84–6.

[16] (1870) 6 LR QB 1. The rule 'referred the tort not to one law, but two. The wrong alleged must be "actionable" had it been committed in the forum, and must not have been "justifiable" by the law of the place of the wrong (*lex loci delicti*)': ibid 73. Note that the rule in *Phillips v Eyre* has been rejected by the High Court of Australia, with respect to international torts (see *Regie National des Usines Renault SA v Zhang* [2002] HCA 10 (Unreported, Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ, 14 March 2002)) and intranational torts (see *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503).

and persuasive.[17] The reviewer does, however, query whether the *Phillips v Eyre* rule should be retained in any form whatsoever, despite the authors' plea for its application to discrete international torts.[18] The authors argue that the rule should be preferred to the law of the place of the tort because it may operate to minimise the scope for judicial error that arises from a judge applying foreign law.[19] However, given the need under the second stage of the rule in *Phillips v Eyre* to establish civil liability under the law of the place of the tort, it hardly seems a great step to apply the law of the place of the tort directly.

Chapter 8, on jurisdiction and procedure, has much useful analysis and comment. Whincop and Keyes commence their treatment of this topic by emphasising that party interests should prevail over state interests in jurisdictional dispute resolution and by noting that courts have generally endorsed this view.[20] Efficiency concerns, particularly in evaluating the relative cost burdens of parties having to litigate in one forum over another, also appear to have loomed large in judicial decision-making in this area.[21] The increasing scope for what the authors identify as 'jurisdictional trade', that is, the capacity for parties to make cooperative decisions on the place of the suit based on efficiency considerations, is also an important observation.[22]

Whincop and Keyes proceed to argue that the concept of 'justice' should be given a limited role in the area of jurisdiction.[23] However, it appears that most common law countries in their various tests on *forum non conveniens* continue to accord the principle great weight. This may explain the generous interpretation given to the concept of plaintiff 'juridical advantage' evident in both the English case of *Spiliada Maritime Corporation v Cansulex Ltd*[24] and the Australian cases applying *Voth v Manildra Flour Mills Pty Ltd*.[25] Given the wide discretion granted to courts in resolving jurisdictional conflicts, at least in common law countries, the reviewer doubts whether this trend will dissipate. However, the reviewer does agree with the authors that if excessive weight is given to such plaintiff advantages, the result will be increasingly inefficient fora of litigation and also incentives for forum-shopping.[26]

Moreover, the reviewer wonders whether the authors too quickly dismiss the notion of comity as a factor in jurisdictional conflict resolution. It is true that comity, in the sense of recognition of foreign state interests, seems but a recy-

[17] Whincop and Keyes, above n 1, 90. See generally ch 6.
[18] Ibid 95–7.
[19] Ibid 96–7.
[20] Ibid 128–9.
[21] Ibid 129–36.
[22] Ibid 136–9.
[23] See ibid 151.
[24] [1987] 1 AC 460.
[25] (1990) 171 CLR 538. Since adopting the test, the High Court has applied the test in four cases, upholding a grant of a stay in three of them: *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 (stay granted); *Henry v Henry* (1996) 185 CLR 571 (stay granted); *Akai Pty Ltd v People's Insurance Company Ltd* (1996) 188 CLR 418 (stay not granted); *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 345 (stay granted): see Whincop and Keyes, above n 1, 145. For a fuller discussion, see Richard Garnett, 'Stay of Proceedings in Australia: A "Clearly Inappropriate" Test?' (1999) 23 *Melbourne University Law Review* 30.
[26] See Whincop and Keyes, above n 1, 151, 153–4.

cling of governmental interest analysis and may be rejected for that reason. However, in recent years other scholars have identified another form of comity at work in jurisdictional decision-making known as 'judicial comity'.[27] The essence of this attitude is an increased respect for foreign tribunals and their capacity to resolve disputes and a 'recognition that courts in different nations are entitled to their fair share of disputes'.[28] There is increasing evidence in judicial decisions that courts see themselves as part of a global network of adjudication rather than simply domestic functionaries of individual nation states. The subject of recognition and enforcement of foreign judgments is another area where this trend is likely to be evident.

Overall, the reviewer finds much of the authors' argument on jurisdiction to be persuasive, particularly in its endorsement of a system of rules that tries to site litigation in not only the most efficient forum but one that is fairest to both parties. This is perhaps another example of where efficiency aims coincide with other important objectives.

In conclusion, Whincop and Keyes are to be commended for having produced an insightful and rigorous work of scholarship that will inspire much debate. Further exposure of the policy choices open to courts in conflict of laws cases can only be helpful given that much of the writing and judicial decisions appears to accept rules without considering their logical or analytical bases. The reviewer found much in the thinking of law and economics to enlighten and enrich his understanding of conflicts issues. Perhaps there is a future for conflicts scholarship after all.

RICHARD GARNETT*

[27] See, eg, Anne-Marie Slaughter. 'Court to Court' (1998) 92 *American Journal of International Law* 708.

[28] Ibid 709.

* BA, LLB (UNSW), LLM (Harv); Senior Lecturer in Law, The University of Melbourne; Co-Director, Institute for Comparative and International Law, The University of Melbourne.