

accounting standards demonstrates the considerable overlap between conventional (i.e. non-Islamic) and Islamic finance, whilst giving due weight to the differences between those standards, and to the pervasive issue of shari'a risk. The chapter also touches upon the efforts of HM Treasury, and tax changes promulgated in relevant Finance Acts. The value of this chapter is not restricted to accountants but to any counsel offering advice to clients on Islamic financial products.

This volume begins with two general chapters. The first, the "Status of the Global Islamic Finance Industry" is largely material re-printed from Ibrahim Warde's book *Islamic Finance in the Global Economy*. It serves as a synoptic introduction to the field, giving an abbreviated history of its origins and the motivations of faith that were its early impetus. Unfortunately the chapter scarcely considers the more recent extension or growth of the industry in the UK, Europe, or the US. Like the six middle chapters on the chief contracts in Islamic financial operations, Warde focuses his attention mainly on the wealthiest of the Gulf Cooperation Council (GCC) countries, with some additional reference to Malaysia. Given the audience for which this book was evidently intended, facts and figures regarding Islamic finance outside the cradle of its birth, and in the new terrain into which its adolescence and early adulthood have taken it, were regrettably elided. On a positive note, Warde poses (and sensibly answers) the fraught question of how Islamic finance, as compared with conventional finance, has fared during and after the global economic crisis.

David M. Eisenberg's chapter titled "Sources and Principles of Islamic Law" covers a great deal of ground concisely and serves as a reliable primer to newcomers to the study of Islamic law. It is a treatment that is aptly pointed to address the most relevant Islamic legal concepts of contract and those concerning interest (*riba*) or speculation (*gharar*, *jahl*, *maysir*), and legal fictions (*hiyal*). Considering the brevity of the account, which is supplemented more fully than any other in the appendix, this is actually a rather learned treatment of the most relevant sources and principles of Islamic law, tailored to the needs and constraints of UK-based (and other) practitioners.

A great deal of the literature and contemporary public discourse on Islamic finance and banking is, to be frank, little more than marketing. And when works written on the subject are not marketing, all too often they are coloured by opinion; therefore they lack the dispassionate understanding upon which a professional can (or should be able to) rely. Under these circumstances it is therefore most fortunate to find a book such as this that improves upon the status quo, and goes some distance in affording this as yet novel and (as ever) evolving industry the considered judgment and awareness that it deserves.

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*The Restatement Third: Restitution and Unjust Enrichment*. Edited by CHARLES MITCHELL and WILLIAM SWADLING. [Oxford: Hart Publishing. 2013. 309 pp. Hardback £65. ISBN 978-1-84946-408-6.]

In the film *Shakespeare in Love* the actor playing Mercutio says in response to the speech of another performer, and with some disdain, "Are you going to do

it like that?" On a number of occasions in this collection of essays, which reflect on the American Law Institute's *Restatement Third: Restitution and Unjust Enrichment* ("R3RUE"), there is a real sense of surprise, but no hint of disdain, that the Americans have decided "to do it like that". Whilst typically the English and US laws of restitution share similar concepts, and may often produce similar results, there are fundamental differences in methodology and also in the interpretation of common rules and remedies. Whilst each of the 12 essays in this collection provides, with varying degrees of success, a commentary on different aspects of the Restatement, and a number of them make significant contributions to restitution scholarship more generally, the collection as a whole is just as important in revealing the stark divide between American and Anglo-Commonwealth (and European and Hong Kong) approaches to private law jurisprudence.

The first *Restatement of the Law of Restitution, Quasi-Contracts and Constructive Trusts* appeared in 1937. It undoubtedly had a dramatic effect on the development of the law of restitution in England and beyond, influencing both commentators, particularly Goff and Jones (who acknowledge the influence explicitly in the preface to the first edition of *The Law of Restitution*, published in 1966), and judges who immediately used the language of restitution and unjust enrichment (especially Lord Wright in his article '*Sinclair v Brougham*' (1938) 6 C.L.J. 305 and subsequently in his judgment in *Fibrosa* [1943] A.C. 32). The second Restatement was abandoned, so the publication of *Restatement Third* in 2011 constitutes the most important survey of the US law of restitution for over 70 years. But, judged by this collection of essays, the influence of *Restatement Third* on Anglo-Commonwealth law and scholarship is likely to be much less significant than the first Restatement, with many essays finding fault with the Restatement and, in some cases, failing to be inspired by it, with the authors preferring to develop specific theses of relevance to English unjust enrichment law despite, rather than because of, what is said in R3RUE.

The publication of R3RUE prompted a symposium in Oxford in 2012 for which the essays in this volume were prepared. That symposium was attended by Professor Andrew Kull, the Reporter for R3RUE, although, unfortunately, no contribution from him appears in this volume. That is a shame; it would have been useful to have a US perspective on both the individual papers and also the approach to private law scholarship which is adopted by many of the authors. This difference of approach might in part be influenced by the peculiar nature of the American Law Institute in drafting and adopting Restatements, involving the participation of potentially hundreds of people, most of whom are practising lawyers. Had a similar approach to drafting been adopted in England, we would probably have ended up with a Restatement similar in construction, content and length to that of R3RUE. What we have instead is Andrew Burrows' *Restatement of the English Law of Unjust Enrichment* (Hart, 2012). Whilst Burrows was assisted in the drafting of that Restatement by a small panel of academics, practitioners and judges, it was ultimately the responsibility of Burrows himself. It is far shorter than the R3RUE, but it is also much more rigorously conceptual and taxonomic. R3RUE, on the other hand, is essentially contextual and pragmatic in approach. It is for that reason that R3RUE does not attempt to engage with any of the big doctrinal and theoretical debates in contemporary restitution scholarship; as Stephen Smith observes, it was not written "to resolve theoretical puzzles". There is no definition of enrichment, or of 'at the claimant's expense' or analysis of whether it is necessary to ground unjust enrichment claims on recognised grounds of

restitution or if an absence of justificatory basis suffices. It is this lack of doctrinal rigour which elicits the most significant criticism from the authors (especially McFarlane who regards it as representative of US legal culture), and which many of them seek to supply in their own essay.

Surprisingly, there is only an occasional reference throughout the book to one of the most obvious but significant differences between *Restatement First* and *Third*, concerning the change of title. Whilst the deletion of 'quasi-contract' was inevitable, and 'constructive trust' is only removed from the title and not from the text or commentary, 'unjust enrichment' is now mentioned explicitly and 'restitution' remains. In England the law of restitution is considered by some to be dead, but in the US it is alive and well. Consequently this Restatement encompasses core unjust enrichment liabilities, but also proprietary restitution and restitution for wrongs, albeit that in both cases unjust enrichment is considered to underpin the claim. There is much to be gained from this holistic treatment of the law of restitution, albeit with unjust enrichment at its heart.

Some of the essays are focused specifically on particular aspects of the Restatement. Some of these are unashamedly descriptive, such as Häcker's careful identification of various rules scattered haphazardly throughout the Restatement where a third party is involved in the conferral or receipt of a benefit. Others are more critical of a particular rule or approach adopted. For example, Wilmot-Smith in a tightly argued essay criticises the Restatement's failure to recognise the doctrine of failure of consideration, which he considers results in "conceptual impurity". McBride criticises the Restatement's analysis of remedies for wrongs, redrafts the relevant rules and, in doing so, provides insight for the benefit of English lawyers as to when and why disgorgement and so-called 'licence fee damages' should be awarded.

Other essays use the Restatement as a springboard for the development of a particular idea, which is just as, and sometimes much more, relevant to English restitution scholarship. Goudkamp and Mitchell provide a significant analysis of the vital distinction between denials of an element of the claim and defences. They criticise the failure of the Restatement to make this distinction clearly and then proceed descriptively to consider how particular rules in R3RUE are characterised, often concluding that it is unclear. If only they had engaged more rigorously with normative questions about appropriate characterisation this would have provided greater assistance to the proper identification of defences in the law of unjust enrichment, this being one of the outstanding issues of controversy in the modern law. Burrows, in his essay on good consideration, shows how normative analysis of the distinction between denials and defences can be applied to provide a better understanding of a particular rule. Whilst the Restatement treats good consideration as a defence, Burrows argues persuasively that it is in fact a 'denial'. A consequence of this is that whether an enrichment was legally owed by the claimant is a matter relating to the identification of prima facie liability. Smith, in a particularly rigorous essay, latches on to the use of the word "liability" in the Restatement to distinguish between liability and obligation models of unjust enrichment, convincingly showing that the former model should be adopted. Whilst this may have little practical effect on the result in a given case, and so would be of little interest to those drafting R3RUE, it can be used to explain key features of the law of restitution, such as why damages are not available for failing to make restitution because there is no obligation to do so. Swadling focuses on undue influence from an English perspective, having concluded that the Restatement

provides no assistance in resolving confusions as regards the definition and function of the doctrine.

Other papers engage with the role of Equity in the Restatement, a matter of particular concern because of the American focus on equitable discretionary remedialism. From a doctrinal perspective R3Rue is found wanting in various respects. McFarlane criticises the Restatement's focus on ends rather than means, particularly as regards its treatment of the constructive trust which he considers is treated as a statement of conclusion rather than a formal concept as in England. The constructive trust is also considered by Ho and Mason, with the former seeking to expand the role of the resulting trust as a proprietary response to unjust enrichment at the expense of the constructive trust, and the latter considering the taxonomy of the constructive trust as a remedy in the Restatement as compared with its different roles in England and Australia.

Finally, two papers adopt an explicitly comparativist approach, with du Plessis considering the meaning of duress in the Restatement and in English and German law, and Danneman providing a short but helpful overview of Book VII of the *Draft Common Frame of Reference* and then considering how that compares with the Restatement in various respects.

It is unclear who this book is aimed at. The editors suggest that they were seeking to stimulate American scholars, judges and practitioners to direct more attention to the law of restitution and unjust enrichment. It is unlikely that this collection of essays will do that, since there is little here that will be of immediate interest to American lawyers. But there are lessons for them to learn, as well as for lawyers in this country too, one of them being that, whilst the US and England might be separated by a common language, we might also be considered to be separated by a common law of restitution.

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*Positive Obligations in Criminal Law.* by ANDREW ASHWORTH. [Oxford: Hart. 2013. 221 pp. Hardback £45. ISBN 978-1-84946-505-2.]

THROUGHOUT his distinguished career, Andrew Ashworth has been concerned with two aspects of what might be termed "positive obligations" in criminal law. First, there is the question of what positive obligations can be imposed legitimately on citizens, and enforced through the criminal law. Criminal offences that can be committed by omission fall into this category, but there are other examples, such as the duty of citizens to know the criminal law. Secondly, there is the matter of what positive obligations the State owes to its citizens if the criminal law is to be applied justly. For instance, how detailed must the drafting of criminal laws be, and how widely must they be publicised? In this characteristically well-argued and clear book, Ashworth collects together six previously published works (original dates of publication follow the chapter titles in the discussion below) that engage with the tension between these obligations, and supplements them with two new essays and an epilogue. It is useful to have Ashworth's work in this area collected together in one place, and remarkably – despite being almost entirely unedited from their original versions – the chapters fit together well enough. Accordingly, this book has much