

Banker/Customer Relationship & Bankers' Duties

CONCEPTS

Banking (banker/customer) relationships

Debtor/Creditor Relationship

- (1) "Money, when paid into a bank ceases altogether to be the money of the customer; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it." - *Foley v Hill* (1848) 2 HLC 28, 36
- (2) "The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours." - *Joachimson v Swiss Bank* (1921) 3 KB 110, 127
- (3) "Although property in currency generally passes with its possession, this is not necessarily so and the principle must remain that property in currency passes when it is intended by the parties that it shall pass." - *Balmoral v Bank of NZ* (1974) 2 NZLR 155, 158

Other Banking Relationships

- (1) Creditor/debtor
- (2) Mortgagor/Mortgagee
- (3) Bailee/Bailor
- (4) Agent/Principal
- (5) Trustee/Beneficiary

Normal incidents of a banker/customer relationship

- (1) *Essential Banking Law and Practice* by Elisabeth Wentworth
- (2) Right of combination

Identification of the terms of the contract

- (1) Implied terms,
- (2) Express terms (written documents), e.g. Product Disclosure Statements (PDSs),
- (3) Statutory obligations, e.g. *Financial Services Reform Act 2001 (Cth)*,
- (4) Industry codes, e.g. *Australian Bankers Association Code of Banking Practice*

Bankers' duties

Common law doctrines

- (1) Contract - unconscionable conduct, undue influence
- (2) Fraudulent misrepresentation (the tort of fraud/deceit)
- (3) Statutory misleading or deceptive conduct
- (4) Duty of care in tort (negligent misstatement)
 - Duty to warn customer of risks
- (5) Fiduciary duty (http://www.unistudyguides.com/wiki/Fiduciary_Relationships)
- (6) (Fiduciary) duty in syndicated loans

Negotiable Instruments and Bills of Exchange

CONCEPTS

Concept of negotiability

“To be negotiable, an instrument must be “transferrable by any person holding it, so as by delivery thereof to give a good title to ‘any person honestly acquiring it.’” - London & County Banking v London and River Plate Bank (1888) 20 QBD 232, 238

~ Conversion (usual property rule) “in a manner repugnant to the immediate right of possession of the person who has the property or special property in the chattel” - Penfolds Wines Pty Ltd v Elliott (1946) CLR 204, 209

Nemo dat quod non habet: “no person can acquire title, either to a chose in action or any other property, from one who has himself no title to it” - Crouch v Credit Foncier of England (1872-73) LR 8 QB 374

Reproduce from Australian Merchant Bankers Association 1983 Annual Report.

Place of Payment	Date of Drawing	Amount in figures	Date payable
ACCEPTED PAYABLE ON 30 June 1978 AT Trading Bank of Australia Limited 100 Collins Street, Sydney	00003302 DATE 2 January 1978	AMOUNT \$A 100,000	DUE DATE 30 June 1978
ON THE 30 June 1978, FIXED, PAY TO THE ORDER OF HEAVY UATE INDUSTRIES LTD. THE SUM OF One hundred thousand dollars			
FOR AND ON BEHALF OF The Merchant Bank Ltd. <i>A. D. Do</i> <i>J. Knight</i>	TO The Merchant Bank Ltd. 1 Collins Street, Sydney	FOR AND ON BEHALF OF HEAVY UATE INDUSTRIES LTD. <i>Antony Christou</i> <i>G. Christou</i>	
Authorized signatories The Acceptor	Payee	Amount in words	Drawer Authorized signatories

Bill of exchange

Definition of a bill of exchange

International Banking and Letters of Credit

CONCEPTS

Major methods of financing international trade

- (1) Cash payment before shipping
- (2) Cash payment after delivery
- (3) Trade bills
- (4) Trade documents, e.g. letters of credit, performance bonds, and guarantees

Letters of credit

- (1) Definition
- (2) Characteristics and functions: substitution of a promise to pay, not a negotiable instrument, and risk allocation
- (3) Contractual relationships: four autonomous though interconnected contractual relationships involved, being (1) the underlying contract for the sale of goods, (2) the contract between the buyer and the issuing bank, (3) the contract between the issuing bank and the confirming bank, and (4) the contract between the confirming bank and the seller
- (4) Source of law: legally sanctioned mercantile custom and UCP 600
- (5) Parties: issuer, applicant, beneficiary, advising/confirming/nominated bank
- (6) Duties of: confirming/advising/issuing bank
- (7) Liabilities (obligations) of: issuing and confirming bank
- (8) Waiver of discrepancies

Independence (Autonomy) Rule

- (1) Independent relationship between banker & exporter
- (2) Banks deal with documents not the G&S to which the document relate
- (3) Exceptions to the independence rule: fraud, unconscionability and illegality

Strict Compliance (Conformity) Rule

- (1) Issuing banks must consider whether documents presented are in conformity with documents specified in letters of credit and then determine on documents alone whether to refuse or accept.
- (2) Although the UCP 600 does not require strict conformity, it is required at common law, in which documents which are “almost identical” will not be sufficient to satisfy the conformity rule.

UCP 600

Issuing bank undertaking under article 7

Confirming bank undertaking under article 8

Autonomy principle under article 4 and 5

Correspondent Banking

CONCEPTS

What is a correspondent bank?

What services are typically settled through correspondent bank accounts?

Significance of correspondent banking regulation

Why regulate correspondent bank accounts?

STATUTES

PATRIOT Act 2001 (USA)

- Subpoena power under s. 319
- Impact, e.g. conflicting legal obligations for banks, Correspondent Banking Due Diligence Policies being enacted by Australian banks

International Emergency Economic Powers Act 1977 (USA)

- It is a criminal offence for a 'US person' to wilfully violate any regulation issued under the Act, e.g. exporting of services from the US to Iran.

Anti-Money Laundering and Counter-Terrorism (AML/CTF) Act 2006 (Cth)

- Carry out a preliminary risk and due diligence assessment
- Senior officer of the bank must approve correspondent banking relationship
- Carry out regulator risk assessments of the 'potential for the relationship to involve or facilitate' money laundering or terrorism financing

Chapter 3 of AML/CTF Rules Instrument 2007 (No. 1)

LEADING CASES

Lloyds TSB sanctions (extraterritorial application of US sanctions laws)

Facts: Between the mid 1970s to about January 2007, Lloyds TSB systematically violated US law by 'stripping' information from US dollar payment messages that involved countries, banks or persons that were subject to US sanctions. By removing material payment information, such as customer names, bank names and addresses, from its SWIFT messages that would identify that the payment sources were Iran, Sudan and/or Libya, Lloyds TSB was able to assist sanctioned financial institutions from detection by filters employed by Lloyd's US correspondent banks.

Decision: In February 2007, Lloyds TSB Bank agreed to pay a \$350 million fine to the US under a deferred prosecution agreement in connection with violations of the *International Emergency Economic Powers Act (IEEPA)* 1977.

Rationale: Under the IEEPA, it is a criminal offence for a 'US person' to wilfully violate any regulation issued under the Act, for example, exporting of services from the US to Iran.