CUSTODY OF INVESTMENTS

LAW AND PRACTICE

A. O. AUSTEN-PETERS

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CUSTODY OF INVESTMENTS: LAW AND PRACTICE

by
A. O. AUSTEN-PETERS

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PREFACE

This book is a revision of my DPhil thesis, 'Legal Aspects of the Custody of Assets under Investment Management', for the Faculty of Law, University of Oxford (1998). Whilst some additional material has been included in this work up until December 1999, the principal focus of the revision has been to make the book one that is more relevant to practitioners than the academic treatise it started out in life as.

I first became interested in this topic whilst preparing legal opinions, primarily for US law firms and financial institutions, on custody whilst practising in Lagos, Nigeria. At the time I commenced my research (1994), although practitioners had no doubt been grappling with the legal issues raised by the custody of investments for some time, little attention had been paid by academics in England to the complex legal questions raised by the custody of investments. There were few articles in journals and no single volume dedicated to this issue. As such, there existed a serious dearth of academic or practice-oriented literature in England on an area of law which is of major importance in international banking and securities dealing.

Nevertheless, listed in the bibliography are some works that had previously considered many of the issues I have addressed, including: Roy Goode's article on ownership and obligations in commercial transactions; Joanna Benjamin's article on an English analysis of custody; Philip Wood's books on the law and practice of international finance; and Joanna Benjamin's *The Law of Global Custody* (Butterworths, 1996). Joanna Benjamin's book, also the result of practice (as a Solicitor in London) and research for a doctorate at King's College, University of London, is the first book that I am aware of exclusively dedicated to the legal aspects of global custody from the perspective of English law. I was also able to benefit from much valuable work which had already been done in the United States on the legal and practical implications of intermediation in the capital markets. Of note are the works of James Rogers and Charles W Mooney Jr, as well as the records of the process of, and commentary generated by, the redrafting of Article 8 of the Uniform Commercial Code (concluded in 1994), which deals with investment securities.

This book does not attempt to examine specific instances of custody—there are a myriad possible custodial scenarios. Reference is only made to specific forms of custody by way of example. My aim, rather, is to provide an analysis and identify principles by which the highly technical legal problems raised by the custody of investments may be resolved.

I address the nature of legal relationships that arise when investment securities are transferred into custody. The operational practices of modern custody are considered and an assessment undertaken of the impact of these on the nature of the investor's interest, particularly on the insolvency of the custodian. The analysis in Chapters 2 to 5 suggests that, except when custodians are employed to safeguard certificates to registrable securities, where securities are transferred into custody, investors' rights against issuers are replaced by rights exercisable through their custodian. The thing to which investors' rights attach depends on the method of holding and the number of tiers of custody. With non-intermediary or single-tier intermediary custody, investors' rights may attach to the securities in custody. With tiers of intermediary custody, investors' rights may only attach to the custodian's own rights in the custodial structure. In Chapter 3, the case is made for the proposition that fungible holdings are not incompatible with the retention by investors of proprietary rights.

Chapter 6 considers how custody assets may be used for security and suggests that tiers of intermediated custody may be significant for the ordering of priorities. Chapters 7 and 8 examine the duties of custodians and investors' remedies upon breach; and Chapter 9 examines the regulatory response to custody business. In Chapter 10 the impact of foreign law on custody is considered. It is suggested that where foreign securities are held, the rights of investors against their English custodian will ordinarily be governed by English law; whilst the investor or English custodian's rights in relation to foreign intermediaries and assets may be governed by foreign law.

My debts of gratitude to all of those who have helped me in one way or another are too numerous to mention in full. However, I would wish to single out the staff at the Bodleian law library for their courtesy and efficiency in dealing with all my requests whilst writing the doctoral dissertation. My thanks also go to the staff of the Law Society of Namibia and librarians at the University of Namibia for affording me access to their facilities whilst I was visiting Namibia during part of the process of revision.

I am grateful too, to Roy Goode of St John's College, Oxford and Philip Wood of Allen & Overy who examined my doctoral dissertation. They read the text with careful and critical eyes and their thoughtful and perceptive comments were much appreciated and contributed to the sharpening of my arguments. Dan Prentice was also kind enough to read and comment on early drafts of parts of the thesis. For the revision of the thesis into a practitioner-oriented book, Guy Morton of Freshfields and Richard Potok of Davis, Polk & Wardwell were kind enough to discuss with me issues of particular concern to practitioners.

My thanks also go to Chris Rycroft, Becky Allen and the rest of the team at OUP responsible for piloting this work through the various stages leading to final publication. I am grateful to them for their accommodation, hard work and patience in bringing this project to fruition.

Finally, my greatest debt is to Fidelis Oditah, initially my thesis supervisor and then my friend. Whilst I was writing the doctoral dissertation, he provided guidance and encouragement, and was a constant source of inspiration. His understanding of my work, and unwavering intellectual support for it, has over the years played an invaluable part in both the production of this book and the development and working out of my own ideas. My debts to him, both intellectual and personal, are enormous.

Notwithstanding the kindness of the above-mentioned, I am of course responsible for any defects that remain in this work.

TIMI AUSTEN-PETERS
Lagos, Nigeria
April 2000

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