

LAW OF BANK PAYMENTS

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SWEET & MAXWELL

LAW OF BANK PAYMENTS

FOURTH EDITION

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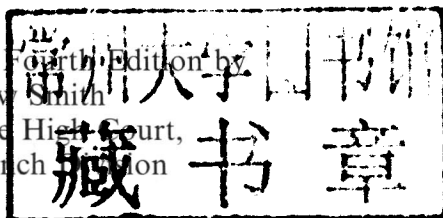
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Foreword to the First Edition by

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Master of the Rolls



First Edition 1996
Second Edition 1999
Third Edition 2004
Fourth Edition 2010

Published in 2010 by Thomson Reuters (Legal) Limited (Registered in England & Wales, Company No 1679046. Registered Office and address for service. 100 Avenue Road, London NW3 3PF) trading as Sweet & Maxwell.

Typeset by YHT Ltd, London.

Printed and bound in Great Britain by TJ International, Padstow, Cornwall.

For further information on our products and services,
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ISBN 9781847035516

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LAW OF BANK PAYMENTS

FOREWORD TO THE FOURTH EDITION

Law of Bank Payments is about an area of commercial law of legal complexity, but the importance to business of the questions that it covers could hardly be overstated. Much can depend upon when and where a payment obligation is fulfilled, whether a payment effectively discharges a debt and whether it is made in accordance with the duties owed by the payer to the recipient or to others or to both.

This work has come to be acknowledged as a lucid and authoritative guide by businessmen, practitioners and the courts. Banking methods have so developed since the third edition was published in 2004 that this new edition will be widely welcomed. It says much for the care and foresight with which the book was planned that, despite the changes in banking practice and the regulatory regimes, the essential structure of the book has been maintained and remains robust.

Payment generally involves the transfer of personalty pursuant to contracts, and the interplay between property and contract is tricky legal territory. Payment often involves more than one bank or other financial institution as an intermediary or agent or sub-agent for the payer or recipient. It often involves international transfers and a variety of currencies. It is perhaps not surprising that, even where a long-established manner of payment is used, questions of genuine uncertainty still come before the courts for resolution. Innovative payment systems present old problems in new guises and bring different questions of their own.

The authors of this book deal with all methods of making payments through banks, old and new, and provide a coherent exposition of the legal principles that govern them all. The clarity of the explanation of electronic payment and other developments is invaluable: it is founded upon admirable insight into how the new systems operate. The authors are not daunted by difficult and novel questions, and engage with them armed with rigorous analysis and a precise grasp of legal principles. They have produced a work which will both command respect for its scholarship and provide practical assistance for which lawyers and others will be grateful.

Andrew Smith
Justice of the High Court, Queen's Bench Division
October 2010

FOREWORD TO THE THIRD EDITION

When this impressive work first appeared in 1996, its emphasis upon methods of payment by and through banks and its analysis of the practical and legal problems to which they give rise represented an approach to Banking Law which was both timely and welcome. The second edition appeared after only three years and covered the rapid developments taking place in the world of electronic funds transfers, the regulation of funds agencies and the jurisdictional problems associated with Internet payments. The previous edition was both fine-tuned and expanded into an indispensable work upon the principles and practice of Banking Law.

The Law of Bank Payments has the advantage of being written by a team from a well-known chambers in The Temple, which no doubt accounts for its practical approach. It is however grounded in legal scholarship and does not hesitate to engage in helpful speculation as to appropriate legal solutions in unsettled areas of the law created by the technological advances which it so comprehensively describes. Thus, for example, it has been updated to provide a useful commentary upon the Consumer Protection (Distance Selling) Regulations which implement Directive 97/7/EC and the section on Electronic Banking has been re-written to take account of the Electronic Communication Act 2000, the latest advances in Internet banking, and the awaited commercial availability of electronic cheques. At the same time, there are helpful critical discussions of recent judicial decisions in more traditional areas, such as the extent of the fraud exception in the field of Documentary Credits (chapter 8) and the location of the obligation of payment under a letter of guarantee (chapter 5).

In my view, the authors have produced a book which has no rival as a practitioner's guide and work of reference in the confusing and rapidly changing world of modern banking. It is a world in which lawyers and the courts will increasingly require to be both active and pro-active in the adaptation and expansion of traditional banking concepts, judicial remedies and jurisdictional constraints if they are to keep pace with modern commercial developments. They will be much assisted by this book.

Mark Potter
Lord Justice of Appeal

FOREWORD TO THE SECOND EDITION

In the field of commercial law, there is an increasingly close and healthy relationship between practitioners and academics. I am therefore particularly pleased to provide this foreword to a book which, written entirely by members of Fountain Court Chambers, naturally examines issues raised at the cutting-edge of practice but which also displays the high standards of clarity, rigour, and scholarly analysis that characterise the best academic texts.

The book's subject-matter lies at the heart of commercial transactions. Yet the manifold varieties of payments involving banks—and their respective legal advantages and disadvantages—have rarely before been coherently examined. The overall picture to emerge is one of old and new techniques combining to serve a wide range of commercial demands. One is struck by the complexity of legal analysis that underpins some of these techniques and by the large number of fascinating legal problems that remain unresolved.

Not least of the problems are those emerging from recent “European” developments (for example, the euro) and, especially, from modern technological developments (for example, internet payments). These are fully explored in this new edition which, like the first edition, will prove invaluable to all those interested in commercial law, whether practitioners, judges, or academics.

Andrew Burrows
Norton Rose Professor of Commercial Law
University of Oxford October 1999

FOREWORD TO THE FIRST EDITION

This is a book about the making of payments by and through banks. Since almost all commercial payments are so made, it would be hard to think of a subject more central to the conduct of business both at home and abroad.

Some of the payment methods discussed—bills of exchange, cheques and documentary credits—have been in use for man years. They are, in part, regulated by statute or by an internationally accepted code, and they have given rise to an abundant case law. But problems continue to arise and reach the courts, almost always problems of considerable difficulty.

Other payment methods discussed, such as the use of plastic money, are of much more recent origin. Relatively few cases have as yet reached the courts; and the Consumer Credit Act 1974 does not offer easy answers to many of the questions which arise. More recent still is the making of payments by transfer of funds between bank accounts. This is the futuristic world of BACS and CHAPS and CHIPS and SWIFT and APACS, in which bankers and businessmen have responded to the technological change by developing entirely new payment mechanisms, as yet scarcely touched by court decision. The challenge here is to ensure that the law, when declared by the courts, reflects the reasonable commercial expectations of bankers and businessmen, underpinning good international practice and not throwing outdated obstacles in its way.

Michael Brindle, Raymond Cox and their very able team of collaborators have performed an invaluable service, by illuminating the older topics explored in the book and enabling the newer to be clearly understood and correctly analysed. All who have the responsibility of advising on or resolving the knotty and intricate problems which arise in this field will be grateful for the lucid and scholarly exposition which is here provided.

T.H. Bingham
Master of the Rolls
May 30, 1996

PREFACE

Much has changed since the last edition in 2004.

In the UK, the Faster Payments system has been introduced to enable electronic credits to be made within a few hours of sending. The service is gaining market share at the expense of the familiar, but slower, BACS system. The CHAPS euro system has been terminated in the face of the development of other systems for euro transfers. TARGET2 has replaced TARGET as the principal system for larger cross border euro transfers. TARGET2 retains a role for national central banks in settlement, but significantly introduces a single shared platform to facilitate settlement between the central banks. EBA Clearing has added STEP2 for bulk same day credit and direct debit electronic payments to its other systems for Europe wide euro transfers. Its systems are based on a solution under German law allowing only one payment obligation to all other members at any time (the single obligation structure).

SEPA (the Single Euro Payments Area), had been launched by the European Payments Council, the idea being that it should be as easy to send a euro credit or debit to any other SEPA country as within the same country, and no more expensive. Essentially, SEPA consists of core standards; the hope is that competing infrastructures will be developed to implement it.

Since the financial crisis of late 2008 there has been a natural focus on the robustness of payment systems. The Banking Act 2009 has formalised the role of the Bank of England as responsible for the stability of payment systems. Self regulation of conduct of business under the Banking Codes has been swept away. Now occupying the field is detailed regulation by the FSA under the Payment Services Regulation 2009 and the FSA rulebook, with more to come with the implementation in 2011 of the Electronic Money Directive. The Treasury has recently proposed the replacement of the FSA by, in part, a more consumer-focused body, the Consumer Protection and Markets Authority.

The demise of cheques has long been foretold, but only recently has a date been put upon it. October 2018 has been announced as the intended date for closure of the clearing system by the new Payment Council, though it remains to be seen whether or not alternatives will be developed and accepted in time. The new 2-4-6 timetable, developed by the payment industry, for interest, value and fate in the clearing of cheques, has clarified some long-standing uncertainties.

Among the more notable recent cases we have considered are *Barlow Clowes International Ltd (In Liquidation) v Eurotrust International Ltd.*; *Abou-Rahmah v Abacha* and *Uzinterimpex JSC v Standard Bank Plc* on constructive trusts; *Architects of Wine Ltd v Barclays Bank Plc* on negligence; *Grosvenor Casinos Ltd v National Bank of Abu Dhabi* on misrepresentation; *Jones v Churcher* on mistake; and *Office of Fair Trading v Lloyds TSB Bank Plc* on consumer credit.

The commitments of Professor Richard Hooley in Cambridge and at King's College, London, have not allowed him to contribute to this edition. Richard, originally as a member of Fountain Court, co-wrote the chapter on Funds Transfers since the first edition in 1996. We are glad to welcome James McClelland and Richard Power to the editorial team.

As before, we have had help from various individuals. In particular, Roger Jones has given most valuable assistance in relation to funds transfers. It is a fast moving area in which it is particularly difficult to obtain up to date, accurate information. Roger is an acknowledged expert, and we warmly thank him. Any errors are our own. Lloyds Banking Group has kindly allowed us to reproduce standard forms for documentary credits. We are very grateful to Mr Justice Andrew Smith for writing the Foreword to this edition. The team at Sweet and Maxwell has been patient and a pleasure to work with.

Michael Brindle and Raymond Cox
Fountain Court, Temple
London
October 2010

ACKNOWLEDGEMENTS

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ICC Uniform Customs and Practice for Documentary Credits - 1993 Revision

ICC Publication No.500—ISBN 92.842.1155.7

Published in its official English version by the International Chamber of Commerce

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ICC Uniform Customs and Practice for Documentary Credits

ICC Publication No.600 – ISBN 92.842.1257.X / 978.92.842.1257.6

Published in its official English version by the International Chamber of Commerce

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