

PRINCIPLES OF INTERNATIONAL FINANCIAL LAW

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INTRODUCTION

When I first visited ... Washington some three years ago accompanied only by my secretary, the boys in your Treasury curiously inquired of him – where is your lawyer? When it was explained that I had none – ‘Who then does your thinking for you?’ was the rejoinder.

John Maynard Keynes¹

Lord Keynes did not like lawyers. His words are heavy with irony. However, many a true word is spoken in jest, and in modern financial markets it often falls to the lawyers to do the thinking about the nature and consequences of the structures and products that their clients have invented. The purpose of this book is to help the lawyers who advise clients on financial law in this task of analysis. **1.01**

It might be thought that the same aim could be made for any legal textbook, with the substitution of the relevant area of law for the reference to the law of financial transactions. However, financial law, in its current stage of development, is different from many other areas of legal practice in some important ways. The cumulative effect of these differences is to make it important that practitioners have a clear understanding of the concepts and principles which underlie the applicable legal rules, in addition to a knowledge of the detailed rules themselves. **1.02**

The Special Position of Financial Law

Legal advice in financial markets

The first characteristic which distinguishes the legal advice given in financial markets from that given in most other areas concerns the objectives of clients in asking **1.03**

¹ Speech made to the US delegation to the Bretton Woods Conference, recorded by Sir Roy Harrod in *The Life of John Maynard Keynes*.

for legal advice. Litigation lawyers, asked to advise a client in relation to a dispute which has already arisen with another party, or with a regulator or other public authority, have two questions to address:

1. What facts will the court decide are relevant?
2. How will the court apply the law to those facts?

The first question has nothing to do with the law or legal principles. The second looks to the lawyer's evaluation of the relevant rules of law. This evaluation, however, is heavily influenced by the lawyer's knowledge of the particular court which will hear the case and of the prevailing judicial and social attitudes. Deciding what the law is, and predicting what a particular court will do, are not necessarily the same exercise. The skill of the litigator lies as much in the organization and presentation of facts and in the understanding of judicial thinking and attitudes as it does in a detailed knowledge of the law.

- 1.04** Financial lawyers operate in a different climate. Their advice is usually sought in connection with the structuring of financial transactions or the documenting of agreed proposals. The client is looking for a way to set up arrangements so that disputes will not arise or, if they do, there should be as little doubt as possible that they will be resolved in favour of the client.
- 1.05** In some respects, the task of the financial lawyer is much simpler than that of the litigator: he or she does not need to deal with any vagaries of evidence or other factual matters; nor are the sensitivities of particular courts or judges relevant. The question facing a legal advisor dealing with a financial transaction is simpler, but also wider: 'If something goes wrong with the operation of this transaction, and the matter comes before a court for decision, what will the judge do?'
- 1.06** The financial lawyer need not be concerned with the need to prove or disprove allegations of fact, nor with the attitudes of particular judges. However, he or she cannot avoid facing the much wider questions which arise from the possibility that all sorts of things might go wrong, the nature of which cannot be foreseen, and that any resulting dispute might come to be considered by one or more courts in different places. The nature of financial law is now transnational and any document which is drafted on the basis that it is to be governed by the law of England and Wales (or that of any other country) might, in the event, fall to be interpreted and enforced by a court where the judge has no qualification or experience in the chosen governing law.

Legal developments and economic change

- 1.07** The common law develops in response to changes in behaviour which produce new situations and disputes. In the commercial sphere, developments in the law have normally been preceded by changes in technology, which have, in turn, brought about changes in trading patterns. Perhaps the best known example follows the invention of the marine steam engine. With the introduction in the mid-nineteenth