



THE LEGAL ASPECT OF MONEY

With special reference to

Comparative Private and Public

International Law

BY

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PREFACE TO THE FIFTH EDITION

'Writing a book is an adventure. To begin with, it is a toy, and an amusement; then it becomes a mistress, and then it becomes a master, and then a tyrant. The last phase is that just as you are about to be reconciled to your servitude, you kill the monster, and fling him about to the public.'

Sir Winston Churchill, 2 November 1949, as quoted in 'Never Despair', p. 494, by Martin Gilbert (1988)

When late in 1937 or early in 1938, without any introduction or recommendation, the manuscript of what became the first edition of this book was submitted to the Clarendon Press and in due course accepted by the remarkable Mr. Kenneth Sisam, the thought that almost 55 years later a fifth edition would become possible and necessary, would for many different reasons have seemed fanciful. Yet there was a fourth edition in 1982 and so much has occurred since then that, although the general character of the book as defined in the earlier Prefaces has been maintained, a new edition, stating the law as at 30 June 1991, is required to take care of new developments, and to make many revisions, some of them minor, some far-reaching, some dull, others fascinating.

Thus the Exchange Control Act 1979 was at last repealed in 1987, so that its analysis had to be removed from the text; but similar legislation is believed to be still in force in some parts of the Commonwealth and elsewhere. It seemed right, therefore, to print the former Chapter XIII in Appendix IV. A second point of great consequence arose from the publication of important general works on the law of money in Germany, Italy and Switzerland, and of a number of monographs on more limited topics in these and other countries; they had to be carefully studied, but in writing a book primarily on English law and destined for lawyers in the Anglo-Saxon world it had constantly to be borne in mind that foreign academic material (as opposed to decisions) had to be strictly weeded in order to eliminate contributions of mainly local or theoretical interest. Whether the selection was successful time only will tell,—that views will differ, is a fact which an author will have to accept with resignation. A third and very special difficulty arose from the existence of no less than five, partly inconsistent decisions of the House of Lords which have played havoc with the problem of the character and structure of monetary obligations in English law; whether pp. 69-72 succeed in reconciling the irreconcilable and in suggesting practicable categories remains to be seen; a return to a single, uniform and logical

approach can now be achieved only by legislation. A fourth major problem is due to the current efforts to create what is variously called a monetary union or a single currency or a central bank in Europe, efforts which are still (and, as some hope, may perhaps remain) in a state of political discussion and aspirations. These discussions are unfortunately characterized by poorly defined and frequently impractical generalities. They are completely ignored in this book except that in Chapter XVIII a section now deals with what lawyers understand or should understand by a monetary union. It remains to be seen whether these political efforts will lead to practical results; their precise nature. their prerequisites as well as their economic and political consequences are truly fundamental, but at present unfortunately widely ignored, misunderstood and also concealed by what a lawyer can only describe as lack of realism. Lastly it is necessary to express regret that Chapter XIII dealing with Article VIII(2)(b) of the International Monetary Fund's Articles of Agreement requires a disproportionate and ever increasing amount of space in order to explain a single provision consisting of a few, largely obscure words. Although correctly understood they are of very limited scope, for more than 40 years they have bedevilled international legal practice and in most countries, including the United Kingdom, led to unsatisfactory results. It is suggested that the United Kingdom should follow the example of Australia, Sweden and Mexico and eliminate the provision from its municipal law. It ought to have no place in the law of a modern State intent upon upholding international commercial practice. By a stroke of the pen the legislator could abolish a whole library of doubtful value.

This is definitely the last edition the author will complete. On a day which is as memorable as it is traditional, he cannot help concluding his valedictory remarks with a word of appreciation for the unfailing help and courtesy which his publishers have at all times extended to him.

London 12 October 1991 F. A. M.

(Dr F. A. Mann wrote this Preface before his death on 16 September 1991. As was his custom he dated the Preface 12 October. The checking of the proofs and the compilation of the index and tables was completed by the Publisher.)

PREFACE TO THE FOURTH EDITION

Studeamus ergo nec desidiae nostrae praetendamus alienam. Sunt qui audiant, sunt qui legant, nos modo dignum aliquid auribus dignum chartis elaboremus.—Pliny iv.16.

So let us pursue our studies rather than make the idleness of others the pretext for our own. There are always those who listen and those who read. It is for us to labour towards what is worth being heard or printed.

SINCE the publication of the third edition in 1971 radical changes have transformed the law of money: inflation which resulted in a depreciation of the pound's internal purchasing power by more than 70 per cent between the beginning of 1971 and 1981 and rendered it necessary to reorganize and enlarge the first part of this book; the increase of comparative material, largely due to the universal existence of inflation, during the ten years mentioned the purchasing power of the U.S. dollar fell by more than 50 per cent and that of the Deutsche Mark by about 65 per cent; the failure of monetary economists to agree on the causes of or a remedy for our economic ills or even to describe the problems in terms of acceptable simplicity such as is required by Sir Winston Churchill's wise and prescient words which served as the motto to the Preface to the third edition; the collapse of the International Monetary Fund's par value system in 1971, the consequent floating of currencies, including sterling, and the absence of an effective international monetary system; the demonetization of gold, the commercial price of which at times increased about twenty times; the creation of the European Monetary System; the emergence of basket clauses such as the ECU and the Special Drawing Right (though, in another sense, the former is being used as a unit of account and the latter also has the different function of providing intergovernmental credit facilities); the vast expansion of 'Euro currencies'; the much delayed lifting of exchange control in Britain thirty-five years after the end of the war,—since it was effected by a general consent rather than abrogation of the legislation, it seemed advisable to retain Chapter XIII, particularly since it still appears to be the only available attempt at a rational and systematic analysis of the Act; the sensational decision of the House of Lords in Miliangos v. George Frank (Textiles) Ltd., [1976] A.C. 443, provoked by an equally sensational, but in the Preface of 1970 hoped for, step taken by Lord Denning's Court of Appeal in Schorsch Meier G.m.b.H. v. Hennin, [1975] Q.B. 416, and the total change, long advocated in this book, which it caused to the whole of English law on foreign money obligations. I am

conscious of the good fortune that permitted me to make a fourth edition available, which, while leaving unchanged the general character, purpose, and scope of the book as described in the earlier Prefaces, attempts to take care of these and other developments and states the law as at 1 May 1981.

I have to thank many foreign friends who were kind enough to send me interesting material which otherwise I would probably have overlooked—even so the comparative surveys do not claim to be complete or unerring; the book by Professor Lopez-Santa Maria on *Le Droit des obligations et des contrats et l'inflation monetaire: Chili et droits hispano-americains* (Paris, 1980) became available while the manuscript was in the hands of the printer and could be taken into account only in exceptional cases. I also have to thank Miss Claire Dillon, B.A. (Oxon.), who prepared the Tables of Cases and the Index and helped in correcting proofs.

Once again this Preface is being written on the day on which fortyeight years ago I married. But she to whom veiled tribute was thus paid and intended to be repeated today, died almost a year ago. Let this book be a means of remembering and honouring 'uxorem singularis exempli'.

F. A. M.

London 12 October 1981

PREFACE TO THE THIRD EDITION

There is no sphere of human thought in which it is easier for a man to show superficial cleverness and the appearances of superior wisdom than in discussing questions of currency and exchange.

Sir Winston Churchill, *Hansard*, vol. 468, col. 160 (28 September 1949).

Although the prefaces to the previous editions have been reprinted and, in essence, the present edition which states the law as at 1 October 1970 leaves the character of this book unchanged, it may be as well, probably for the last time, to explain its purpose and scope.

It is a book about money. This is a conception which means many different things to different readers. If a lawyer decides to shut out certain subjects, his decision is not necessarily wrong merely because others may expect them to be included. The law of bank or postal Giro accounts or the law relating to Treasury Bills or the Bank Rate or credit or financial transactions between international persons—these are only some of the many matters which a book on money could legitimately discuss. The present one does not do so, because a line had to be drawn somewhere and there seemed to be strong arguments for drawing it at the point which leaves intact such distinct, or at least distinguishable, branches of the law as, for instance, banking and finance, negotiable instruments, or the status and function of the Central Government and the Bank of England within the framework of the country's financial organization.

This is a book about the law of money. It is not a book about economics, finance, sociology, political science, or history. To the lawyer economic life and its incidents are facts which, if and in so far as they are material to the elaboration or application of legal rules, depend on evidence. Just as a book on the sale of goods does not usually discuss, for instance, the causes of variations in demand and supply or the practices adopted by various trades, so a book on the law of money should not, and the present work does not, venture outside the boundaries of the strictly legal approach. Thus the origin, growth, and function of that misnamed and by no means novel phenomenon, the Euro-currency market, or problems of the supply of money or the management of exchange rates cannot be explained or even described within the covers of this book. Similarly the law has to accept the remarkable fact that, while man has conquered the moon, he has signally failed to conquer the problem of the value of money, its

stability and its relationship with full employment, credit, and economic growth. A lawyer will refrain from entering unfamiliar territory, for he is much too conscious of the wisdom of that great man's words which form the motto to this Preface and which, alas, have remained largely unheeded.

This is a book on the English law of money. There is no law of money that is common to the nations of the world. But money is a universal institution. Hence the comparative method has peculiar value. It discloses where English law has adopted the right or the wrong road. The lesson, however, is useless if practical conclusions are not drawn from it. Chapter X dealing with the effect of legal proceedings upon foreign money obligations, is the foremost example of a field which English law has stubbornly refused to plough afresh in accordance with foreign experience and objectively ascertainable principles of logic and justice. This country's failure even to consider the European Convention on Foreign Money Liabilities, printed in Appendix IV, is explained, though not necessarily excused, by the majority Report of the (unfortunately defunct) Standing Committee on the Reform of Private International Law (Cmnd. 1648). Now Lord Denning has, perhaps somewhat surprisingly, decried the present state of the English law,—compare his speech in Re United Railways of Havana and Regla Warehouses Ltd, [1961] A.C. 1007, at pp. 1067, 1068, with the pronouncement heading Chapter X. Perhaps the Master of the Rolls's voice will succeed where, for more than thirty years, others have failed.

The fact that this book is devoted to English law imposes some limits upon the use of foreign material, for not all of it is of potential interest to the English lawyer. Such is the test that was applied throughout; it accounts for most omissions of foreign sources, which have occurred, although, no doubt, some of these have been overlooked inadvertently.

On the other hand the concern with English law does not by any means exclude, but, on the contrary, demands the consideration of such rules of public international law as bind Britain. The development in this branch of the law has been so rapid and far-reaching that the fourth Part of the book has probably been more thoroughly changed than any other, though all parts have been fully revised and brought up to date and many have been rewritten. In that connection the course of lectures on *Money in Public International Law* given at the Hague Academy of International Law (Recueil 96 (1959 i) 1) has, with the kind permission of the Academy's Curatorium, to some extent been incorporated into the present work.

A German translation of the second edition appeared in 1960. A German translation of the present edition is planned.

F. A. M.

PREFACE TO THE SECOND EDITION

Since the first edition of this book appeared in October 1938 the legal aspect of money has undergone radical changes. In preparing the second edition it thus became necessary, while retaining the broad character of the work, to write what to a large extent can only be presented as a new book.

Those changes arise from four causes, viz. the establishment of the International Monetary Fund by the Articles of Agreement, concluded by forty-four nations in July 1944 at Bretton Woods and at present binding upon fifty-four nations; the introduction of exchange control in this country and the extension of exchange control over the greater part of the world; the depreciation of money during and after the Second World War which in some countries led to the ruin of the existing, and the creation of new, currency systems and which in this country provoked devaluation in September 1949; and the very considerable amount of new, or old but newly discovered, material. Many important decisions rendered both in this country and abroad had to be considered. The literature on the subject was greatly enriched by Professor Nussbaum's book on Money in the Law, of which two editions appeared in 1939 and 1950 respectively, and by discussions in almost all modern textbooks on Private International Law, particularly in the sixth edition of Dicey's Conflict of Laws to which more than forty pages dealing with foreign currency obligations were contributed by Professor Kahn-Freund.

The present edition of this book contains eight new chapters. Chapter VII takes the place of the inadequate discussion on pp. 197–200 of the former edition and incorporates portions of an article published in the Law Quarterly Review of 1952. Chapters XI to XIV constitute an elaboration of problems of exchange control and of the rate of exchange, which was necessitated by the events referred to above; the substance of Chapter XIII was published during the current year in the International and Comparative Law Quarterly, while Chapter XIV is in many respects founded upon a paper published in 1944 in the Modern Law Review. Finally, Chapters XV to XVII are new, though they almost repeat what appeared in the British Year Book of International Law for 1949. The author is indebted to the editors of these four publications for their permission to make use of this material. The rest of the book has been extensively revised and although in some places it was possible to

shorten the discussion, the book exceeds the size of the first edition by more than half.

F. A. M.

London 12 October 1953

PREFACE TO THE FIRST EDITION

'Although the civil law is not of itself authority in an English Court it affords great assistance in investigating the principles on which the law is grounded.'—Blackburn J. in *Taylor* v. *Caldwell* (1863), 3 B. & S. 826.

In general words, the object of this work is to treat the legal aspects of money in a systematic and comprehensive manner. There were, however, so many obstacles on the way to this goal which the author was unable to overcome in their entirety, that he must ask for the reader's indulgence. In support of this plea for leniency a few observations may perhaps be offered.

The first cause of the difficulties lies in the fact that there does not seem to exist any English (or American1) work dealing with the subject as defined above. The century from the end of the Bank Restriction period to the outbreak of the Great War in 1914, which witnessed so rich a development in the field of law, was marked by an unheard-of stability of economic and, consequently, of monetary conditions. It is, therefore, not surprising that lawyers were led to regard money, not as a problem of paramount importance, but as an established fact. This security was not shaken until the great and sometimes even chaotic disturbances of the monetary systems with which every country has been visited since 1914,² and which deeply imprinted themselves on the economic situation and the law not only of foreign countries but also of this country. Though it was never doubted that, whatever happened, the pound sterling remained the same in character and (internal) value, business men and courts were confronted with many intricate questions which originated from the depreciation or collapse of foreign currencies or from the changes in the international value of the pound. Thus, many important decisions of the English courts came into being, and yet it is probably no exaggeration to say that, in so far as the fundamental legal problems of money are concerned, the observations of Sir John Davis on the Case de Mixt Moneys3 still were the only English source of information, and that in respect of many questions of detail there was no guidance at all in the otherwise rich treasures of the

³ (1604) Davis's Rep. (Ireland) 18.

¹ The book by Bakewell, Past and Present Facts about Money in the United States (New York, 1936), is only of very limited value.

² A survey is given by Griziotti, 'L'Évolution monétaire dans le monde depuis la guerre de 1914', Rec. 1934 (48), pp. 1 sqq.

common law. There is obviously a gap to be filled, but, in view of the lack of preliminary studies on the one hand, and the immense number of problems and foreign material on the other, this gap is so great that it could not be attempted to give more than a first introduction on the lines of a general survey of and a guide to an inaccessible, though theoretically fascinating and practically vital, part of the law.

The choice of problems suitable for and requiring discussion has been restricted to three groups. In the first place, all those questions have been included which, for the sake of systematical elucidation, had to be answered; for it is believed that the subject demands particular care in putting and arranging the questions, in drawing clear distinctions and demarcations, and in working a way through the labyrinth of material. Secondly, all those questions have been dealt with which have been raised or answered in the cases decided by English courts; it is hoped that all, or at least all important, cases have been considered, but as some have been hunted up which hitherto have escaped the attention due to them, the suspicion is justified that there are many more either hidden in the reports or known but treated under the head of other than purely monetary problems. Thirdly, only those problems have been treated which had been, or might reasonably be expected to be, of practical importance from the point of view of English (municipal or private international) law; mere theory and speculation have in general been eliminated, though in the first part it was necessary to give a certain amount of space to theory; the question of which problems might become important for the law of this country is naturally a difficult one, but in such connections judgment has been based on the experiences of foreign countries.

Within these limits the legal aspects of money will be discussed from a purely legal point of view. Though economic theory will not be disregarded, it is no disparagement of it to say that its usefulness for legal research is not very great. Anglo-American monetary science has undoubtedly neglected the problem which from the point of view of the law is the vital one, namely nominalism and its various phenomena. In this respect it has therefore been necessary to have resort to the research of continental economists. Nevertheless, the lawyer's gratitude is due to those economists who have dealt with the economic and, more particularly, the monetary history of Great Britain, to which the law will have to attribute considerable importance. Mr. Feavearyear's short but excellent book on *The Pound Sterling* (1931) is of particular assistance.

Though this book is devoted to the discussion of English law, an extensive space has been conceded to comparative research. The usual argument that comparative studies are necessary and useful because they place a wealth of experience at our disposal, and show what is right

and what is wrong with us, is fortified by many circumstances. When Sir John Davis wrote more than 300 years ago, he largely drew on continental scholars, and if his observations have been accepted by the common law, as in the absence of other material they seem to have been, it follows that the sources of the English law of money are to a great extent of foreign origin. This may perhaps also be regarded as a justification for the fact that it is a lawyer originally trained under a foreign legal system who now ventures to revive the study of the law of money. Furthermore, the developments since 1914 have given rise to an abundance of foreign decisions and legal literature to which international value may justly be ascribed. In France, Italy, and Germany three important works have been published by Mater, Ascarelli, and Nussbaum respectively. The writer is particularly indebted to Professor Nussbaum, 4 who by his indispensable treatise as well as by many other publications dealing with various monetary problems paved the way for further research to a greater extent than any one of his contemporaries. Finally, it appears that in many foreign laws monetary problems have not been regulated by legislative measures, but left to be moulded and solved by judge-made law. This is a further reason why a comparison with English law is interesting.

The foreign material is so vast that the selection presented to the English reader is bound to be incomplete. Paramount importance has been attributed to the decisions of Supreme Courts; decisions of courts of first and second instance have generally been disregarded, because it is believed that decisions of such courts are very often unsuitable for comparative research, as their authority, under no circumstances binding, is especially assailable, and as the picture they convey can, therefore, too easily become misleading. Legal literature will be referred to rather eclectically, though a much greater quantity of books and articles have been consulted. All available decisions of the Supreme Court of the United States which 'are always considered with great respect in the courts of this country's and many decisions of American State Courts have been used. Otherwise, comparative research has chiefly been directed to French and German law. The method of dealing with comparative material will vary. Sometimes it will be used as a mere illustration; in other connections it will be referred to as a

⁴ Formerly Professor at Berlin University, now visiting Professor at Columbia University in New York. Professor Nussbaum has announced that he is engaged in preparing a comprehensive study of the legal aspects of monetary theory and practice which, prepared under the auspices of the Columbia Council for Research in the Social Sciences, will 'primarily rest on Anglo-American law and will consider as well important developments which have occurred since the publication of the German volume'. See the article in 35 (1937) *Mich. L.R.* 865, which constitutes the first chapter of the forthcoming volume.

⁵ Beresford v. Royal Insurance Co., [1937] 2 All E.R. 243 (C.A.), at p. 252 B per Lord Wright.

persuasive, or at least supporting, authority; in a third group of cases it will serve as a contrast to elucidate a rule of English law or to test its soundness.

Within these limits and on these foundations an attempt has been made to investigate the legal aspects of money, the subject being divided into two distinct parts the difference between which needs emphasis: the first part deals almost exclusively with English money in English municipal law, and comparative material is used for the single purpose of showing the position of a given domestic currency within the frame of the given domestic law. Where questions connected with a currency other than the domestic one are considered in the first part. this is due to the necessity of elaborating certain connections between both. But otherwise, all questions relating to foreign currency, i.e. to the position of a currency within the ambit of a municipal or private international law of a country other than that to which the currency belongs (e.g. American money in England, German currency in France), have been reserved for the second part. It is the present writer's experience and conviction that this separation between domestic and foreign money obligations is absolutely essential for a clear exposition of the subject although it cannot be carried through without exceptions. and although it may sometimes cause inconvenience or overlapping. There is in each case not only a difference of problems, but there are also many differences of approach to the problems, which make it impossible to apply to the one case, without qualification, considerations operative in, or decisions relating to, the other.

The final revisions of the manuscript were completed on 29 July 1938; decisions and literature which appeared after that date could not be taken into consideration.

F. A. M.

London 12 October 1938

CONTENTS

TABLE OF STATUTES	xxiii
TABLE OF ENGLISH CASES	xxix
TABLE OF SCOTTISH AND COMMONWEALTH CASES	xli
TABLE OF CASES FROM THE EUROPEAN COURT OF JUSTICE	xlv
TABLE OF INTERNATIONAL CASES	xlvi
TABLE OF UNITED STATES OF AMERICA CASES	li
TABLE OF SOME BOOKS	lxi
SOME ABBREVIATIONS	lxii
Part I	
THE LEGAL PROBLEMS OF MONEY IN GENERAL	
I. THE CONCEPT OF MONEY	3
I. Importance of a definition (p. 3). II. Law and economics of money (p. 5). III. Requirements of money in law: (1) chattel personal (p. 8); (2) creature of the law (p. 14): (a) the prerogative over money (p. 14); (b) the aspects of the State theory of money (p. 19); (c) the 'societary' theory of money (p. 22); (3) denomination (p. 23); (4) universal medium of exchange (p. 24). IV. The intrinsic nature of money (p. 28)	
II. THE MONETARY SYSTEM, ITS ORGANIZATION AND INCIDENTS	31
I. Introduction (p. 31). II. Sterling within the international legal order: (1) the gold standard before 1931 (p. 32); (2) the gold parity standard of Bretton Woods (p. 33); (3) the international monetary system since 1978 (p. 36). III. Sterling within the British legal order (p. 38). IV. Types of currency: (1) convertible and inconvertible currency (p. 40); (2) legal tender (p. 42). V. The unit of account and its definition (p. 43). VI. Changes in the monetary system (p. 49). VII. Monetary systems with common characteristics: identity and diversity; The Significance of the unit of account: (1) in general (p. 52); (2) for the existence of distinct monetary systems in case of (a) the Latin Monetary Union (p. 54); (b) former dependant territories (p. 54). VIII. Changes in the value of the unit of account (p. 60). IX. Eurocurrency (p. 63)	-
III. MONETARY OBLIGATIONS: TYPES AND PAYMENT	65
I. Types of monetary obligations: (1) debts (p. 63); (a) the character of a monetary	

obligation (p. 66); (b) the effects of a failure to pay (p. 69): (i) the contract continues (p. 70); (ii) therefore accord and satisfaction are unnecessary (p. 70) (iii) yet a breach of contract occurs and justifies a claim for damages which may be lower or higher than the

debt (p. 71); (iv) the breach may amount to repudiation which would revise the debt (p. 72); (v) the recovery of damages for depreciation is a further and distinct problem (p. 72). (2) unliquidated claims (p. 72). II. The payment of monetary obligations: (1) payment as a consensual act or a fact (p. 74); (2) payment or tender of money (p. 75); (3) the place of payment (p. 81); (4) the time of payment (p. 83); (5) the completion of payment (p. 83)

IV. MONETARY OBLIGATIONS: THE EXTENT OF LIQUIDATED SUMS (NOMINALISM)

86

I. The foundation of nominalism (p. 86). II. The historical development of nominalism: (1) abroad (p. 92); (2) in England (p. 96). III. The general nature and scope of nominalism (p. 102): (1) public policy (p. 102); (2) Judicial notice (p. 102); (3) nominalism in statutes (p. 108); (4) nominalism in the field of taxation (p. 104); (5) the case of the collapse of a currency (p. 106). IV. The effect of nominalism in specific contexts: (1) debts (p. 103); (2)\damages for default in payment (p. 114); (3) depreciation as justification for discharge of a contract (p. 117); (4) specific performance (p. 120)

V. MONETARY OBLIGATIONS: UNLIQUIDATED AMOUNTS

122

I. Introduction (p. 122). II. Damages: (1) a comparative survey (p. 123); (2) damages in English law (a) for breach of contract (p. 131); (b) for tort (p. 132); (c) where there is mitigation (p. 138). III. Compensation for expropriation (p. 139). IV. Sharing a fund (p. 141)

VI. METHODS OF EXCLUDING THE EFFECTS OF NOMINALISM

143

I. Methods of protection in general (p. 143). II. The gold clause: (1) its existence as a result of (a) an express (p. 148); (b) an implied agreement (p. 149); (2) gold coin or gold value clause? (p. 154); (3) the operation of a gold clause: (a) absence of a definition (p. 158); (b) uncertainty as to the price of gold (p. 161); (c) local differences in the price (p. 163). III. Index clauses (p. 164). IV. The unit-of-account clause (p. 166). V. Validity of protective clauses under (1) nominalism (p. 169); (2) ordinary legal tender legislation (p. 169); (3) compulsory tender legislation (p. 169); (4) public policy (p. 170); (5) special legislation (p. 175). VI. The legislative problem (p. 180)

PART II

FOREIGN MONEY OBLIGATIONS

INTRODUCTION: FOREIGN CURRENCY AND ITS GENERAL RELATIONS WITH MUNICIPAL AND PRIVATE INTERNATIONAL LAW

185

VII. THE GENERAL POSITION OF FOREIGN MONEY AND FOREIGN MONEY OBLIGATIONS IN ENGLISH LAW

189

I. Definition of foreign money (p. 189). II. Foreign money as money or commodity (p. 190). III. Foreign money debts as contracts to pay money or as contracts to deliver a

commodity (p. 196). IV. Euro-currency (p. 199). V. The legality of foreign money obligations (p. 202). VI. Money of account and money of payment (p. 205). VII. Foreign currency clauses: (1) '£100 payable in dollars at the rate of exchange of \$2 to £1' (p. 207); '£100 payable at the rate of exchange of \$2 to £1' (p. 208); (2) '£100, rate of exchange of £1 = \$2' (p. 208). VIII. Option of currency, option of place (p. 213). IX. A survey of the two preceding sections (p. 219). X. The place of payment: (1) its meaning in comparative law (p. 220); (2) its meaning in private international law (p. 221); (3) the law of the place of performance and its effect in private international law (p. 221)

VIII. THE DETERMINATION OF THE MONEY OF ACCOUNT: INITIAL UNCERTAINTY

I. The problem stated (p. 226). II. The determination of the money of account in case of fixed indebtedness: (1) the rules of municipal law (p.229); (2) the problem of private international law; the Adelaide and the Auckland Corporation cases in particular (p. 238). III. The determination of the money of account in case of unforeseen liability: (1) the rules of municipal law in general and in particular cases: (a) indication in the contract (p. 247); (b) restitution of value (p. 249); (c) agency (p. 251); (d) the injured party's currency (p. 252); (2) the rule of private international law (p. 255)

IX. THE DETERMINATION OF THE MONEY OF ACCOUNT (continuation): SUBSEQUENT UNCERTAINTY

257

226

I. The problem stated (p. 257). II. The effect of the curtailment of the monetary system upon the money of account: (1) municipal law (p. 259); (2) private international law (p. 261). III. The extinction of the money of account: (1) by the substitution of one monetary system for another (p. 266); (2) by the dissolution of a unitary currency system into separate systems: (a) municipal law (p. 268); (b) private international law (p. 270)

X. THE NOMINALISTIC PRINCIPLE, ITS SCOPE, INCIDENTS, AND EFFECTS

271

I. The province of the law of currency (p. 271). II. The private international law governing revalorization (p. 280). III. The rules of municipal law relating to compensation in respect of depreciation of foreign money obligations: (1) the quantum of simple debts (p. 287); (2) damages for non-payment (p. 291); (3) determination of the amount of unliquidated damages (p. 295); (4) frustration (p. 295); (5) equitable remedies (p. 296). IV. Protective clauses; gold clauses in particular. The law governing (1) the existence of a gold clause (p. 298); (2) the construction of a gold clause (p. 299); (3) the validity of a gold clause (p. 299); (4) the enforcement of a gold clause governed by English law (p. 304); (5) attempts made to avoid the abrogation of gold clauses by the proper law: (a) restrictive interpretation of the parties' reference to the proper law (p. 306); (b) denial of extraterritorial effects (p. 306); (c) confiscation (p. 307); (d) incompatibility with public policy (p. 308)

XI. THE PAYMENT OF FOREIGN MONEY OBLIGATIONS

311

I. The problems to be considered (p. 311). II. The money of payment: (1) the problem and its solution in foreign laws (p. 312); (2) the rules of English law (p. 320); (3) the effective clause (p. 324); (4) the rule of private international law (p. 325). III. The discharge of foreign money obligations: (1) in English municipal law: (a) the due payment (p. 327); (b) payment after repudiation (p. 328); (c) set-off (p. 331); (2) in