Contents

Table of Cases

PART I: BANKS, BANKING AND BANK REGULATION

Chapter 1: Banking and bank organizations
I: The nature of banking
A. Common law definitions
B. Statutory definitions
C. Deposit taking: the UK approach
D. The EC approach
II: Banking structures
A. Branches
B. Representative offices
C. Banking groups
D. Bank mergers and acquisitions
E. Bank insolvency
III: The multifunctional bank
A. Growth of multifunctional banking
B. Legal problems with multifunctional banks
C. The securities laws and conflicts of interest
D. Self regulation and conflicts of interest
IV: Banks and industry
A. Banks and non-financial activities
B. Industrial ownership of banks
C. Banks as owners of industry
D. ‘Bancassurance’

Chapter 2: Interbank networks
I: Networks
II: Correspondent banking
A. The nature of correspondent banking
B. The correspondent’s error
III: The interbank markets
A. Contracting on interbank markets
**Principles of Banking Law**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>B.</td>
<td>Standard form documentation</td>
<td>49</td>
</tr>
<tr>
<td>C.</td>
<td>The terms and their interpretation</td>
<td>51</td>
</tr>
<tr>
<td>D.</td>
<td>'Soft' regulatory law</td>
<td>53</td>
</tr>
<tr>
<td>IV:</td>
<td>Exchange markets and clearing systems</td>
<td>53</td>
</tr>
<tr>
<td>A.</td>
<td>The rules of the market/system</td>
<td>55</td>
</tr>
<tr>
<td>B.</td>
<td>The position of non-member customers</td>
<td>56</td>
</tr>
<tr>
<td>C.</td>
<td>Regulation of markets and clearing systems</td>
<td>58</td>
</tr>
<tr>
<td>V:</td>
<td>Bank syndicates</td>
<td>59</td>
</tr>
<tr>
<td>A.</td>
<td>'True' syndicates and participation syndicates</td>
<td>59</td>
</tr>
<tr>
<td>B.</td>
<td>The severalty clause in context: syndicated loans</td>
<td>60</td>
</tr>
<tr>
<td>C.</td>
<td>Subscription agreements for securities issues</td>
<td>61</td>
</tr>
<tr>
<td>D.</td>
<td>Legal characterization of a syndicate</td>
<td>62</td>
</tr>
<tr>
<td>E.</td>
<td>The agent bank</td>
<td>65</td>
</tr>
<tr>
<td>F.</td>
<td>The lead's liability for the information memorandum</td>
<td>66</td>
</tr>
</tbody>
</table>

**Chapter 3: Bank regulation**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I:</td>
<td>Reasons for regulation</td>
<td>70</td>
</tr>
<tr>
<td>A.</td>
<td>Systemic risk</td>
<td>71</td>
</tr>
<tr>
<td>B.</td>
<td>Prevention of fraud and money-laundering</td>
<td>73</td>
</tr>
<tr>
<td>C.</td>
<td>Consumer protection and deposit insurance</td>
<td>78</td>
</tr>
<tr>
<td>D.</td>
<td>Competition (anti-trust) policy</td>
<td>83</td>
</tr>
<tr>
<td>II:</td>
<td>Techniques of prudential regulation</td>
<td>84</td>
</tr>
<tr>
<td>A.</td>
<td>Machinery of prudential regulation</td>
<td>85</td>
</tr>
<tr>
<td>B.</td>
<td>Capital adequacy</td>
<td>92</td>
</tr>
<tr>
<td>C.</td>
<td>Large exposure regulation</td>
<td>94</td>
</tr>
<tr>
<td>D.</td>
<td>Crisis management—bank rescues</td>
<td>96</td>
</tr>
<tr>
<td>III:</td>
<td>Regulating the multifunctional bank</td>
<td>100</td>
</tr>
<tr>
<td>A.</td>
<td>Glass–Steagall in the United States and Japan</td>
<td>102</td>
</tr>
<tr>
<td>B.</td>
<td>Universal banking in the EC and the CAD</td>
<td>103</td>
</tr>
<tr>
<td>C.</td>
<td>The special problem of derivatives</td>
<td>106</td>
</tr>
<tr>
<td>D.</td>
<td>Securities regulation and banks: institutional arrangements</td>
<td>108</td>
</tr>
<tr>
<td>IV:</td>
<td>Regulating international banks</td>
<td>109</td>
</tr>
<tr>
<td>A.</td>
<td>National measures</td>
<td>110</td>
</tr>
<tr>
<td>B.</td>
<td>Consolidated supervision: allocating regulatory responsibilities</td>
<td>110</td>
</tr>
<tr>
<td>C.</td>
<td>Making consolidated supervision more effective post BCCI</td>
<td>113</td>
</tr>
<tr>
<td>D.</td>
<td>Regulating international banks and the future</td>
<td>116</td>
</tr>
</tbody>
</table>
# Contents

**Chapter 4: Central banking**

I: Banker to the banks and to government  
A. The banks' bank  
B. Government banker  

II: The legal regime for central banking  
A. Status  
B. Structure of central banks  
C. Central bank objectives  

III: Instruments of monetary policy  

IV: Financing government  

V: Conclusions  

**PART II: BANKS AND THEIR CUSTOMERS**

**Chapter 5: The banker–customer relationship**  

I: Bank customers and banking services  
A. Matters of definition  
B. Characterising the banker–customer relationship  

II: Banking contracts  
A. Identifying the customer  
B. Validity of a banking contract: authority and capacity  
C. The bank's mandate  
D. Contract terms  

III: Regulating banking contracts  
A. The common law  
B. UCTA  
C. The Unfair Terms in Consumer Contracts Directive  
D. The banking code and banking ombudsman  

IV: The bank as depository—the account  
A. The current account  
B. Statements of the account  
C. Combination of accounts  
D. Bank charges
Chapter 6: The duty of confidentiality

I: An outline of the duty
A. Nature and justification of the duty
B. Basis of the duty
C. Scope of the duty

II: Qualifications to the duty
A. Compulsion of law
B. Public interest
C. Customer's consent

III: International dimensions

Chapter 7: Advisory and transactional liability

I: Doctrinal bases of liability
A. Reasonable care and skill
B. Fiduciary law
C. Knowing assistance, inconsistent dealing and knowing receipt
D. Emerging standards: due diligence, suitability, good faith

II: Determining the content of liability standards
A. Banking practice
B. Industry and regulatory codes
C. Bank manuals
D. Type of transaction and customer

III: Advice
A. Duty to advise
B. Liability for advice given

IV: Vitiating factors in banking transactions
A. Undue influence, unconscionability and duress
B. Vitiating and third party behaviour

V: Lender liability
A. Promoting risky loans
B. Management and termination of a facility
C. Workouts, receiverships, and insolvencies
D. Environmental liability
<table>
<thead>
<tr>
<th>Chapter 8: Principles of payment</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>I: Basic elements and mechanisms</td>
<td></td>
</tr>
<tr>
<td>A. Basic elements</td>
<td></td>
</tr>
<tr>
<td>B. Payment methods: credit/debit transfers</td>
<td></td>
</tr>
<tr>
<td>C. In-house, domestic, correspondent, and complex payment</td>
<td></td>
</tr>
<tr>
<td>II: Discharging payment obligations, countermand, funds availability, and completion</td>
<td></td>
</tr>
<tr>
<td>A. Discharge of underlying payment obligation</td>
<td></td>
</tr>
<tr>
<td>B. Countermand</td>
<td></td>
</tr>
<tr>
<td>C. Availability of funds</td>
<td></td>
</tr>
<tr>
<td>D. Completion of payment</td>
<td></td>
</tr>
<tr>
<td>III: Mistaken and void payments</td>
<td></td>
</tr>
<tr>
<td>A. Mistaken payments</td>
<td></td>
</tr>
<tr>
<td>B. Void payments</td>
<td></td>
</tr>
<tr>
<td>IV: The identification rules—tracing</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 9: Payment methods</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>I: Cheques</td>
<td></td>
</tr>
<tr>
<td>A. The nature of cheques</td>
<td></td>
</tr>
<tr>
<td>B. Collection of cheques</td>
<td></td>
</tr>
<tr>
<td>II: International cheques, eurocheques, and travellers’ cheques</td>
<td></td>
</tr>
<tr>
<td>A. The use of cheques cross-border</td>
<td></td>
</tr>
<tr>
<td>B. Processing cross-border cheques</td>
<td></td>
</tr>
<tr>
<td>C. London Currency Clearings</td>
<td></td>
</tr>
<tr>
<td>D. Eurocheques</td>
<td></td>
</tr>
<tr>
<td>E. Travellers’ cheques</td>
<td></td>
</tr>
<tr>
<td>III: Payment cards</td>
<td></td>
</tr>
<tr>
<td>A. The contract networks</td>
<td></td>
</tr>
<tr>
<td>B. Regulating payment cards</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Chapter 10: Settlement, clearing, and netting</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>I: Settlement and clearing</td>
<td></td>
</tr>
</tbody>
</table>
A. Settlement and clearing systems 305
B. The rules of clearing systems 307
C. Regulating clearing systems 309

II: Netting 313
A. Netting and risk 314
B. Legality of netting 316
C. Multi-jurisdictional and multilateral netting 320

PART IV: BANKS AND FINANCE 325

Chapter 11: Lending 326

I: Identifying the agreement 326
A. Inferring an agreement and agreements to agree 326
B. Varying the agreement 327
C. Commitment letters 327
D. The adviser-arranger 329
E. Mandate of lead bank in forming bank syndicate 330

II: The facility and its repayment 331
A. Draw-down and demand facilities 331
B. The obligation to lend and force majeure 332
C. Purpose clauses, illegality and vires 333
D. Repayment 334
E. Interest 337
F. Payment and the rule against penalties 337

III: Conditions precedent, representations and warranties, covenants 339
A. Conditions precedent 339
B. Representation and warranties 340
C. Covenants 340
D. Breach by the borrower 341

IV: The negative pledge and pari passu clauses 342
A. Negative pledge lending 342
B. Ambit of the negative pledge 343
C. Bank v. borrower for breach of negative pledge 344
D. Bank v. third party on breach of negative pledge 346
E. The pari passu clause 349
Chapter 14: Trade finance

I: Bills of exchange
A. Trade bills
B. The underlying transaction
C. Acceptance credits
D. Forfaiting

II: Letters of credit
A. Basic features
B. Fundamental principles
C. Trust receipts

III: Demand guarantees
A. Legal character
B. Fraud and enjoining banks from paying
C. Indemnities

Chapter 15: Security

I: Security: its nature and rationale

II: Types of security: pledge, mortgage, and charge
A. A brief overview
B. Pledging goods and documents
C. Mortgaging life assurance policies
D. Receivables financing by way of security
E. Security over contracts—project finance
F. The floating (universal business) charge

III: Some current issues
A. Security over securities
B. Quasi-security—repos and stock lending
C. Conflict of laws

IV: Ineffective security
A. Vitiating factors in formation
B. Non-compliance with formalities
C. Statutory vulnerability
PART V: THE INTERNATIONAL DIMENSION

Chapter 16: International banking 459

I: Nature of international banking 459
   A. Recent growth in international banking 460
   B. Forms of international banking 461

II: The host country response 462
   A. Facilitating foreign banks 462
   B. Limiting foreign banks 464
   C. The concept of reciprocity 465

III: Regional and international measures 470
   A. The single licence and the single European market 470
   B. The GATS 472

Chapter 17: Cross-border banking 474

I: Introduction 474

II: The problems examined 475
   A. Regulating the multinational bank 475
   B. Extraterritorial jurisdiction 476
   C. Moratoria and freezes 480
   D. Anti-suit injunctions 485
   E. Secrecy laws 486

III: Resolving a clash of jurisdictions 488
   A. Avoiding problems 489
   B. Judicial decision-making: comity and balancing 489
   C. International co-operation 491
   D. International harmonization 494

IV: Conclusion 494

Index 497