CURRENT DEVELOPMENTS IN INTERNATIONAL BANKING AND CORPORATE FINANCIAL OPERATIONS. BY KOH KHENG LIAN, Ho PENG KEE, CHOONG THUNG CHEONG AND Boo KING ONG (Eds.) [Singapore: Butterworths. 1989. 540 pp. (including index). Hardcover: S$250.00.]

THIS book is the fourth in a series of publications edited by, and published on behalf of, the National University of Singapore, Faculty of Law, comprising papers presented by speakers at the biennial Singapore Conferences on International Business Law, organised by the same Faculty. It comprises papers presented by legal practitioners and academics as well as bankers at the fourth Conference held in August 1988 on *Current Developments in International Banking and Corporate Financial Operations.*

This book is divided into four parts. Each part is introduced by a keynote speaker who sets the theme for that part. Part 1, *Modern Facilities in Banking,* examines some of the current developments in modern banking such as electronic funds transfers, swaps, commercial paper facilities and the multi-currency clause. Part II, *Corporate Finance, Reorganization and Insolvency,* focuses on certain areas of interest within the very wide topic of corporate finance, namely reorganization and insolvency, examining them from the legal viewpoint. Part III, *Extraterritorial Aspects of Banking and Corporate Financial Operations,* discusses the problems of extra-territoriality in international banking and corporate financial operations as a result of technological changes and the development of multi-national corporations, banks and financial institutions. Part IV, *Banking and Corporate Financial Operations in ASEAN, China and Japan,* provides insights into current developments in banking and corporate financial operations in the ASEAN countries, the legal framework for financing enterprises with foreign investment in the People's Republic of China (PRC) and the domestic commercial paper market in Japan.

The writers in Part I of the book, *Modern Facilities in Banking,* examine some of the legal issues relating to electronic funds transfers (EFT), swaps, commercial paper facilities and the multi-currency clause.

In *International Money Transfers,* Mr. Bradley Crawford examines the growing importance of EFT, its effect on settlement procedures for banks, the legal relations that underlie international EFT and he observes the need to draft model rules on international EFT based on a uniform terminology. Hence, the current draft UNCITRAL model rules on EFT make provision for funds transfers and payment orders - two new concepts of international EFT which are of fundamental importance.

In *Swap-Credit Risk: A Multiple-Perspective Analysis,* Mr. Schuyler K. Henderson has written a comprehensive article on swaps, a central feature of international finance. Swaps are today used for a variety of reasons: to reduce borrowing costs, for asset and liability management, as an investment device, and as a financial service and dealing instrument. But regardless of its use, swap creates risk. This credit risk is essentially the risk of losing the cash flows generated by the swap and the exposure arising in respect of hedged transactions. The problem is enhanced by difficulties in quantifying this credit risk owing to legal uncertainties relating to problems of enforcement under general contractual provisions and insolvency laws.

Professor Phiroze K. Irani in *Multi-Currency Clauses and Conflict of Laws Issues* states that the multi-currency clause *(option de change)* in an international financial contract is a device to offset the risk of loss due to a fall in the value of the currency of a contract. Its flexibility today is illustrated by the recent innovation of the multi-currency global MTN. Under such a programme, notes can be issued during the life of the programme in different currencies, allowing the issuer to take advantage of changing market conditions in those currencies. The most fundamental conflict of laws principle relating to foreign monetary obligations

is the principle of nominalism and the multi-currency clause remains as the main protection against the iniquities of this out-dated principle.

In *Commercial Paper Facilities,* Mr. Robert Mac Vicar identifies some of the distinctive features of this low-risk short-term paper facility. An interesting feature of this facility is the use of a single global note to represent an entire tranche or series of definitive commercial papers, which is held by a clearing system such as Euro-clear or CEDEL. However, this raises legal issues of enforceability by investors and documentation involving a separate deed of covenant has been developed under English law to overcome this problem.

Part II, *Corporate Finance, Reorganization and Insolvency,* includes articles on *Securitization of Assets by Banks* by Mr. Hal H. Scott; *Corporate Restructurings in the United States as an Economic Defensive Tactic* by Mr. Marc E. Perlmutter; *Subrogation and Contribution: Some Debtor-Creditor Implications* by Professor Ross Cranston; *Judicial Management (in Singapore): Implications for Bankers* by Messrs V. K. Rajah and Sajjad Akhtar; and *The Bank's Liability as Manager and Adviser in Corporate Financing, Reorganizations and Insolvencies* by Mr. Michael Hwang.

In his article on corporate restructuring in the United States, Mr. Perlmutter states that "restructuring" is a catch-all phrase used to describe the various methods of changing a company's capitalization or economic structure. A company may decide to restructure for various reasons: to facilitate an acquisition, to make itself less attractive to a potential bidder, or for profit-making reasons. There are essentially two forms of restructuring: asset-based restructurings such as the sale of assets to third parties, the "spin-off" of assets to existing stockholders or their sale to the public by means of a public offering of shares by a newly-formed company; and stock-based restructurings such as, in the ultimate defence to an unwanted takeover, "going-private", or a recapitalization.

Of particular interest is Professor Ross Cranston's article on subrogation and contribution in which he discusses three examples of subrogation. Firstly, where the lender lends money to a borrower who uses the money to purchase real estate from a vendor, the lender may gain security by being subrogated to the equitable lien which the vendor would have had if the purchase had remained unpaid. He discusses the case *of Nottingham Permanent Benefit Building Society* v. *Thurstan*[1] in this context. Secondly, where a lender provides money to a borrower to pay off a creditor and the money is used to discharge the creditor's security over the borrower's property, the lender may be subrogated to the creditor's security to the extent that the money provided by the lender has been used to discharge the borrower's liability to the creditor. This method has been used in situations where the lender has been ineffective in creating his own security over the same property, giving rise to the need to "revive" the creditor's

[1] [1903] A.C. 6.

security by subrogating the lender to the rights of the creditor. This has been done by looking at the lender's intention or by an agreement or presumed mutual intention between the parties in keeping the security alive for the benefit of the lender, which the writer concludes is unsatisfactory and highly artificial in approach. The third example of subrogation involves looking at the extent to which a drawer or previous endorser of a bill of exchange who has paid the holder when the bill has been dishonoured can be subrogated to any security which the holder has taken in respect of the borrower's liability.

The articles in Part III of the book include an introduction by Professor E. P. Ellinger on *Extraterritorial Aspects ofBanking and Corporate Financial Operations; Conflicts of Laws Issues in General* by Professor Michael C. Pryles; *Following the Proceeds of Fraud and Breach of Trust through the International Banking System* by Peter Creswell QC and Mr. William Blair; *Confiscatory Orders and Embargoes .International Effects* by Mr. M. Sornarajah; *Banking Secrecy and Taking Evidence Abroad* by Mr. Soh Kee Bun and *Liquidation of Foreign Companies: An East Asian Perspective* by Mr. Walter Woon. The focus in this part of the book is on the problems of extraterritoriality and the conflictual issues in international banking and corporate financial operations arising from technological changes in banking such as the development of electronic banking, the use of tested telexes to effect international money transfers and the development of international banking networks such as CHAPS in the United Kingdom, CHIPS in the United States and SWIFT in the international banking system. The internationalization of business and the expansion of banks and financial institutions worldwide have resulted in the creation of multinational bodies, which also raises issues of extraterritoriality in the field of insolvency.

Professor Ellinger in his keynote speech observes that major changes in the banking scene have failed to trigger corresponding developments in banking law. Modern banking transactions continue to be governed by traditional legal principles in common law jurisdictions. However, the strength of the common law seems to lie in its ability to adapt these well-settled principles to modern needs as illustrated by the case *of Libyan Arab Foreign Bank* v. *Bankers Trust*.[2] Professor Pryles provides an overview of the range of conflict problems that can arise in international banking transactions, focusing on questions of the proper law of the contract and the situs of a debt. He foresees that for the future, banks will increasingly be embroiled in disputes not as primary participants but as third parties. In this respect, the problem of enforcement of security regulations and the effect of secrecy laws will continue to trouble banks and courts.

Associate Professor Sornarajah's article on confiscatory orders and embargoes and their effects on international financial transactions is highly relevant today. There are essentially three broad categories of sovereign embargoes: the nationalization of banks; exchange control measures prohibiting the payment of capital or interest in foreign currencies; and orders freezing

[2] (1987) 2 F.T.L.R. 509.

accounts belonging to hostile states directed not only at parent branches operating within the state making the order but also at branches operating in neutral states. The pertinent question to ask is whether foreign courts have a duty to accept the second category of embargo as valid and binding. The answer seems to lie in the recognition of the act of state doctrine in the United States. A successful plea of act of state means that the embargo cannot be successfully contested before foreign courts. Of significance are the exceptions to this doctrine, the most important of which is the extraterritoriality exception. This exception arises from territorial limitations to sovereign power; *i.e.*, from the simple notion that a sovereign act cannot have any effect outside the territory controlled by the sovereign. In the context of bank loans, this exception depends also on showing that the situs of the loan is outside the territory of the state issuing the embargo. The problems of determining the situs of a debt are therefore relevant. This problem of extraterritoriality also affects the third category of embargo or asset seizures when the embargo is sought to be applied to accounts held in overseas branches of a local bank. This is illustrated in the Libyan case referred to above. The situs of the bank account in this case is an important issue.

Mr. Walter Woon's article on the liquidation of foreign companies examines the legal effects of transnational liquidations. Two aspects of this area in Singapore, Hong Kong, Malaysia and Brunei are examined: the jurisdiction of foreign courts to liquidate foreign companies and the effect of extraterritorial liquidation orders. The legislative provisions governing the jurisdiction of the courts in each of these four countries to liquidate foreign companies are similar and the writer has chosen to discuss the issues involved by looking at the position in Singapore.

Part IV focuses on current developments in banking and corporate financial operations in Malaysia, Thailand, Philippines, Indonesia, Singapore, China and Japan and the rules and regulations governing such operations in these countries.

Professor Visu Sinnadurai in his keynote speech observes that there are no special provisions in the six ASEAN countries under study to permit any bank of an ASEAN member country to operate banking operations in another ASEAN country. Such a bank would be designated a "foreign" bank. Professor Sinnadurai suggests, *inter alia,* the implementation of certain policies such as the establishment of commercial banks and merchant banks in each of the ASEAN countries by the other member countries; syndicated loans by ASEAN banks; and the setting up of a common stock exchange.

Mr. Keith Ross in his article on Singapore considers the rules relating to the establishment of banks in Singapore, the supervisory and licensing role of the Monetary Authority of Singapore, recent developments in the Singapore International Monetary Exchange (SIMEX), the Stock Exchange of Singapore Dealing and Automated Quotation System (SESDAQ) and trading in the North American Securities Dealers Automated Quotation System (NASDAQ).

In his article on China, Mr. David G. Pierce describes the principal methods for financing enterprises with foreign investment in the PRC. These currently include initial capitalization by direct investors, loans, financial leasing, bonds and, in theory, equity securities issued by companies limited by shares in the Guandong Special Economic Zones. The PRC has no national mortgage law, but the Civil Law Principles provide that debtors may pledge property to guarantee the discharge of a liability and, if the debtor defaults, the creditor can sell the property and will have a prior claim on the proceeds.

The wide variety of topics covered in this book should interest international bankers, lawyers and other professionals in the banking and corporate finance sector. Parts I and II will be helpful to international bankers and practising lawyers wishing to familiarise themselves with the mechanics and inherent legal problems of electronic funds transfers, swaps, commercial paper facilities and asset-backed securities. Bankers and their lawyers practising in Singapore should also note, in particular, the articles in Part II on judicial management in Singapore and the bank's liability as manager and adviser in corporate advisory activities. The articles in Part HI discussing the problem of extraterritoriality in international banking and corporate financial operations issues should be of interest to legal scholars and academics.

ANGELINE LEE