Principles of International Financial Law

Colin Bamford
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384 pp.
£98

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When I first opened Colin Bamford's wonderful *Principles of International Financial Law*, I was initially surprised by the table of contents, which differed from what I had expected. The table of contents did not focus on many of the nitty-gritty issues that arise in the day-to-day practice of financial transactions, which advice-seekers and novices would instinctively search for in a financial law book. Rather, this book seemed to go down a different route. My initial feeling proved right and wrong at the same time. Right because it is quite an extraordinary book, and wrong because exactly these advice-seeking practitioners and novices will benefit greatly from it.

Bamford takes the term "principles" in the title seriously. He explains his approach at the beginning, stating he intends "to point practitioners towards their own understanding"[1] of financial law. In the introduction, he convinces the reader that knowing and applying principles is key to understanding the ever more complex and internationalised world of financial transactions. Thus, the book "frees" the world of financial law from its over-emphasis on practicalities and the terminology of the market, which are normally ubiquitous in financial law texts. Instead, it concentrates on the fundamental case law that is the source of most explanations financial lawyers, students and scholars seek in this area of law.

Principles usually have the great advantage that they are an easy read. This is definitely the case with Bamford's book. As a reviewer, I supposed I should read it from its first to its last page, which is page 340. I did exactly that with the greatest pleasure. Apart from the language being clear and precise, it is actually quite entertaining because of the prominent role of case law. Bamford employs the cases to illustrate the fundamental issues of financial law, and develop principles to address these very issues. This makes the book lively to read and students will be highly appreciative of this technique.

As a starting point, the author identifies a number of issues capable of being at the heart of any lawyer's assessment regarding a court's handling of future disputes in international financial market transactions. These issues are (i) the concepts of

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1 Section 1.22.

money and payment; (ii) differences between common law and civil law, in particular in respect of the treatment of intangible property; (iii) the dependency of the development of law on incremental shifts in the practices of the financial market; (iv) the potential need to combine property and contractual security interests with other credit enhancement techniques; and, (v) the important role of fiduciary duties. *The Principles of International Financial Law* is basically structured along those lines.

After the introduction, Bamford catches the reader's attention with a seemingly simple question: "what is money?" Given that much of international financial markets are about money, one would expect the law and judiciary to have provided a workable answer to that question, (even though the reader will often admit to himself that his own ideas about that question probably end at the understanding that money is issued by the central bank and backed by certain reserves). Bamford presents a bouquet of concrete financial law questions related to the understanding of what money is and where it is. Starting from the finding that "money" can mean many things depending on the function, its nature is identified as an obligation of the central bank incurred on behalf of the sovereign. It is not only enlightening, but also entertaining to read his illustrations of *Banco de Portugal v. Waterlow & Sons Ltd.*,[2] making clear the practical relevance of the question of what money actually is.

Further, there is a section on the Euro which analyses, amongst other things, the question of whose currency the Euro is. It is remarkable that the crisis, which must have been lurking at the time of completion of the manuscript, already led Bamford to the conclusion that all participating European states are collectively liable to eliminate the default risk, since Greece, for example, is unable to eliminate default risk on its own because the Euro is not only *its* currency. Only in respect of a country's *own* currency is its government able to address a crisis like this by printing new money, the only available option besides default.

Closely related to the analysis of the nature of money, is the analysis of the nature of payment — another question that seems to have an obvious answer, but actually does not. Bamford approaches this issue from the two meanings of the word "payment". First, "payment" meaning the discharge of an obligation; and second, "payment" meaning the process of transmitting money. Here, again, the book does not confront us with a myriad of technical detail. Instead, the author lets a handful of court decisions open the reader's eyes to the problems that a financial lawyer needs to be aware of: cross-jurisdictional set-off, freezing orders, disruption of payment process, and "Herstatt risk". Only with an understanding of these problems should a solicitor devise legal solutions to her client's needs in relation to payment.

In the fourth chapter, Bamford reminds the practitioner of (and introduces the student to) the principles underlying the distinction between personal and property rights, and the relevance of this distinction for the practice of legal drafting. He explains how English law regards the nature of ownership and the difference between personal rights and property rights in the light of the need for practical solutions. Bamford elaborates on how this pragmatism, at its most fundamental level,

2 [1932] All E.R. Rep. 181, [1932] A.C. 452 (U.K. H.L.).

gave rise to the creation of the trust and the division of property interests into legal and equitable interests. In his view, the inherent flexibility in this system makes common law the ideal basis for the structuring of complex financial and commercial transactions, and thus explains its popularity around the globe for that purpose. It is a joy to follow his succinct presentations of the findings that can be drawn from the cases *Lomas*,[3] *Charge Card*[4] and *BCCI (No 8)*.[5] He draws on history to explain the differences between common law and civil law and looks at the fundamental contributions to the development of this dichotomy by Emperor Justinian and the German jurist Carl von Savigny. The Provisions of Oxford of 1258 and the 1873–75 Judicature Acts open the reader's eyes to the relationship between common law and equity, and Bamford needs only a few intriguing sections to lay out the fundamentals of trust and equitable ownership, and charge-backs.

The first thing I realized in respect of the fifth chapter is that shortly after having read the title "Intangibles as Property" the term "intangible" is dropped from the vocabulary. Not surprisingly so, given the conceptual difficulties surrounding the part of intangibles that are most relevant for the financial market — *choses in action*. Here, Bamford masterly binds together the subject matter addressed in the previous chapter on property rights and equity with the questions of what *choses in action* are and how they are dealt with, in particular transferred, in legal terms. The text carries the reader to a number of classical core problems of financial law, notably the transfer of parts in a syndicated loan, the nature of security certificates and the issues surrounding intermediated securities. Again, the author contents himself to outlining the practical problems flowing from fundamental considerations of commercial law, and leaves the analysis of the various ways to solve them to specifically focussed works.

The sixth chapter is dedicated to the international bond market, or as it is also called, the Eurobond market. Originally, a bond was a relatively simple thing from a legal perspective. However, structures became increasingly complicated, mainly due to two incremental changes in the market: The internationalisation of the bond market, and the loss of importance of bond certificates and issuer's register as evidence of the investor's entitlement, (which are now derived from electronic book entries instead). The author skilfully unfolds the various complications which make presumably simply questions like "what are the rights of a bond holder" a legal jigsaw. Indeed, the rules of private international law of different countries shape the various pieces of that jigsaw, however, taken together, the whole does not necessarily result in a complete and consistent picture. Having personally been involved in legal questions surrounding "indirect holding" of securities for many years, I particularly enjoyed reading this part. With especially clear language, Bamford re-focuses the problem of indirect holding in terms of the basic legal concepts that are applied, with great difficulty, to modern securities holding.

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3 [2009] EWCH 2545 (Ch.).

4 (1986), [1987] Ch. 150, [1986] 3 All E.R. 289 (Eng. Exch.); affirmed (1988), [1989] Ch. 497, [1988] 3 All E.R. 702 (Eng. C.A.).

5 (1997), [1998] A.C. 214, [1997] 3 W.L.R. 909, [1997] 4 All E.R. 568, [1998] Lloyd's Rep. Bank. 48, [1997] B.C.C. 965, [1998] 1 B.C.L.C. 68, [1998] B.P.I.R. 211, 94(44) L.S.G. 35, 147 N.L.J. 1653, 141 S.J.L.B. 229 (H.L.).

Bamford includes two chapters on fiduciary duties. The first is general, focussing on how fiduciary duties arise and the natures of these duties. Bamford's strategy in this chapter is to dwell on a handful of leading cases. He manages to boil down the whole topic to a set of four simple principles, which nevertheless are — as he underlines — often difficult to apply in practice, especially when it comes to financial markets. He turns to the question of application in the financial area in the second fiduciary duties chapter. Bamford divides the cases in which fiduciary duties can arise, despite the parties' general arm's-length relationship, into three categories: (i) the seller of a financial product facing an inexperienced buyer; (ii) the former adviser now advising a competitor; and, (iii) the agent having access to better information than his principal. His analysis of cases like *Dharmala*[6] and *Springwell*[7] appear extremely topical in the present financial crisis environment, where consumers, corporations and municipalities increasingly seek compensation from their banks on the grounds that they were not sufficiently protected against the negative effects of complex financial products.

The two following chapters deal with the various forms of reinforcing a creditor's position. First, the book looks at personal undertakings given by a third party with a view to enhancing the personal obligation of the debtor ("credit support"). Through a very useful recap of the differences between several, joint, and joint and several obligations, the author easily guides the reader through the outlines of suretyship. The most intriguing part of this chapter is its coverage of credit insurance. Here again, the book touches upon a very topical issue, notably the law and regulation of credit default swaps. I started reading this part secretly hoping that Bamford would be in a position to enlighten me on the judiciary's conceptual approach to the questions of what an insurable interest is. This question arises in respect of the distinction between insurance and derivatives and is potentially important for future regulatory concepts regarding credit derivatives. In the end, I was somewhat relieved that even he had to stop short of interpreting a clear line into case law where the courts simply have not indicated one.

Bamford goes on to look at security interests using their four most basic aspects as a framework, namely: (i) the perspective of the security provider's various potential motivations; (ii) the confusing terminology of "security"; (iii) the complexity of registration requirements; and, (iv) the predominant role of cross-border insolvency questions in this area of law. Only then does the book embark on classification of security interests, under the heading of "title based security", and here it follows the usual nomenclature of "mortgage", "charge", "pledge", etc. What follows are a number of illuminating thoughts on "contract based" security which address the use of charge-back, set-off and netting for the purposes of providing security. Using the *Perpetual*[8] case, this chapter also introduces the reader to the knock-out question of possible violation of the anti-deprivation principle and the importance of avoiding relevant contractual arrangements. Ultimately, the author

6 (1995), [1996] C.L.C. 518 (Q.B. (Comm.).

7 [2008] EWHC 1186 (Q.B. (Comm.).

8 (2011), [2011] UKSC 38, [2012] 1 A.C. 383, [2011] 3 W.L.R. 521, [2011] Bus. L.R. 1266, [2012] 1 All E.R. 505, [2011] B.C.C. 734, [2012] 1 B.C.L.C. 163, [2011] B.P.I.R. 1223 (S.C.).

familiarises the reader with the motivations and different possibilities to create reverse security, a mechanism which basically serves the goal of limiting the security provider's liability, as opposed to the motivation of granting the security taker an enhanced position in relation to the performance on the obligation owed to him.

The final chapter is dedicated to principles of construction of financial contracts. Here, the author explains the difference between the common and the civil law approach to the interpretation of contracts. He argues convincingly that in the sphere of the financial market, the common law approach is more favourable. Then, he adds a very useful part on the danger of the recharacterisation of contracts by courts. In this context, Bamford describes the sometimes difficult distinction between a floating and fixed charge, which is a very important issue for practitioners and students alike.

Colin Bamford's *Principles of International Financial Law* is an excellent book. Suitable both for practitioners and students, it is clear, concise, and a pleasure to read. It is true that principles often carry the disadvantage of being of uncertain practical use, but this is not the sentiment of the present book. The author fully achieves his aim of pointing the readers to their own understanding. I will certainly consult the *Principles of International Financial Law* often, and some chapters have already found their way into the list of essential reading for my students.