BOOK REVIEW: BENJAMIN GEVA, BANK COLLECTIONS AND PAYMENT TRANSACTIONS (Oxford: Oxford University Press, 2001).

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Each day more than two trillion dollars, a sum equal to almost one-fifth of the American gross national product, is transferred by wire.[2] The dollar volume of checks processed in the United States alone exceeds 15 trillion dollars per year.[3] The payment systems that carry these vast amounts span the globe and are subject to a myriad of sometimes-conflicting national laws.

With diverse laws governing a tremendous volume of trans-national payment transactions that involve large sums of money, one would expect that some legal scholar would have written a treatise about the comparative law of bank collections and payment transactions. Yet, attorneys researching the laws that govern bank collections and payment transactions in different countries have found a surprising paucity of works on the subject.

While Professor Benjamin Geva's recent book, Bank Collections and Payment Transactions,[4] was not written as a practice guide, it will meet the needs of many practitioners when presented with problems involving cross-border and offshore payment transactions. This compact and scholarly book, which took seven years to write, provides a thorough and accurate comparative analysis of the laws that govern bank collections and payment transactions in the United States, other common law countries, and in civil law jurisdictions.

Although the scope of the book is limited – for example, preauthorized debit and credit transfers and credit card payments are not discussed – the book covers a good deal of material not presented in most other works on payment systems. The book compares the laws governing bank collections and payment transactions in Australia, Canada, the United Kingdom, France, Germany, Israel, Italy, Japan, South Africa, Switzerland and the United States. It also discusses the Uniform Cheques Law ("U.C.L.") of the Geneva Conventions of 1932 and various directives of the European Union that pertain to payment transactions and the bank-customer relationship.

Professor Geva is Professor of Law at Osgoode Hall Law School of York University in Canada, and is unusually well-qualified to write about the comparative law of bank collections and payment transactions. He is a graduate of the Hebrew University in Jerusalem, holds an L.L.M. and S.J.D. from Harvard Law School and has been a visiting professor at the University of Chicago, the University of Illinois, the University of Cambridge, and law schools in Australia, France and Israel. Professor Geva has written or co-authored several texts, including a leading treatise on the law of electronic funds transfers,[5] and has published works on the payment systems of several countries. His experience, practicing law in Canada and working as an advisor to the governments of several countries on banking and payment systems, has enriched his scholarship. For example, he provides an informative and accurate description of the structure and functioning of large value transfer systems not only in the United States, but in six other countries and the European Union.[6] Few American legal scholars would possess the requisite knowledge to do so.

The book is divided into four parts. The first, an introduction, gives some background about the nature of payment transactions and the history and structure of the payment system that will be useful to practitioners who are unfamiliar with this area of law. The author explains his objective in comparing the fundamental laws that govern payment transactions: to try to identify a "universal law merchant" applicable to payment transactions "transcending the boundaries of the diverse jurisdictions."[7] His premise is that because "the fundamental needs of payment transactions participants are quite the same," a universal law merchant exists "to the extent that solutions are common and pragmatic, so that gaps separating different legal systems are abridged."[8] His methodology also encompasses an analysis of the ways in which the principles existing in different legal systems have been adapted to deal with the circumstances of commercial and financial transactions arising within those jurisdictions.[9]

The second part of the book compares the juridical relationship between a bank and its customer in various legal systems, including the account agreement, the nature of a deposit, the bank's duty to its customer (referred to as its "mandate" in the civil law systems), and the manner in which a customer's current account is determined, including the bank's right of setoff. This portion of the book covers some subjects, such as the determination of the current account, that play a greater role in civil law systems and are not often given attention in common law jurisdictions.[10] It includes a useful comparison of the extent to which the laws of several countries impose duties of care and good faith on banks and give force to disclaimers in bank-customer agreements, which can play a decisive role in disputes between banks and their customers.[11] It also compares in some detail the banking codes and general conditions that are imposed on the bank-customer relationship or that establish standards of banking practice in various countries, such as Canada's Code of Practice for Consumer Debit Card Services,[12] the U.K. Banking Code,[13] and Germany's General Business Conditions,[14] and the extent to which provisions in bank-customer agreements are susceptible to challenge based on doctrines of unconscionability and the like. However, American bank attorneys are likely to take issue with the author's assertion that "[g]enerally speaking, a businessperson using a standard form contract is required to point out disclaimers and other onerous terms to customers."[15]

In addressing the nature of the bank deposit, the book somewhat surprisingly discusses the situs of a bank account and the allocation of political risk only in one brief paragraph and three footnotes.[16] Many of the major conflicts of the 20th century resulted in trans-national disputes that raised the issue of how to allocate political risk, where the deposit agreement failed to do so. Examples include the Nazis' confiscation of bank accounts of Jews, and other disputes among governments, banks, and their customers that were brought about by the expropriation of assets during the two World Wars and the Russian, Mexican and Cuban Revolutions.[17] The resolution of these disputes may depend on whether a bank account is located within the borders of the expropriating government, and whether the account is in the nature of a loan by the customer to the bank, a bailment of the customer's money, or some other right or obligation.

The book's focus is on comparing a bank's relationship with its customers, with other banks, and with third parties to payment transactions in various legal systems.

Practitioners seeking an in-depth analysis of federal regulation of banking in the United States generally will not find it a sufficient resource.[18]

In the third part of the book, Professor Geva analyzes the bank's performance of the duties imposed upon it in the collection and payment of checks and other orders for disposition of funds and in credit transfers; and the effect of a bank's error in performing these duties that results in misdelivery of funds. In discussing the bank's duties to its customer, the author uses the word "mandate," a civil law term derived from Roman law which, however, is the source, in common law countries, of the contractual duty owed by an agent (in civil law systems, the "mandatary") to its principal (the "mandator").

The third part begins with an excellent and concise overview of the common as well as the distinguishing features of checks and the check collection process under various national laws.[19] The overview is followed by a summary of check legislation in France, Italy and Israel,[20] then by a discussion of the corresponding statutory law in the U.K., Canada and Scotland.[21] Check collection under UCC Article 4 and funds availability under Federal Reserve Regulation CC are explained.[22] The author then discusses the Geneva Uniform Law for Cheques ("ULC"),[23] which is the basis of check legislation in the civil law countries, then describes deviations from the ULC in Germany, Italy, Japan, Switzerland and France.[24]

Lawyers who have had experience with NSF checks will be interested to learn from the book that two NSF checks in France within 12 months require the drawee bank to revoke the drawer's checking authority, to demand the return of all blank checks, and to withhold all checking privileges for ten years unless the drawer pays a fine.[25] Similar but less draconian laws also exist in Italy and Israel.[26]

The book does not include any discussion of check truncation, and mentions electronic presentment of checks only in passing.[27] With the enactment of the Check Clearing for the 21st Century Act ("Check 21"), effective October 28, 2004,[28] check truncation and electronic check image exchange will become the usual method by which banks process checks.[29] Check truncation permits the exchange of check images in electronic form as a substitute for the physical delivery of the paper check. It also, however, means the destruction of the original paper check by the depositary bank or another bank in the check collection process, making forgery and alteration difficult to investigate and prove.[30] Check 21 will reduce legal impediments to check truncation by creating a new negotiable instrument called a substitute check, which would be the legal equivalent of the original check for the purpose of proving payment and would include most of the information contained on the original check.[31]

One of the longest sections of the book concerns credit transfers, with an emphasis on a detailed comparison of the laws of different countries regarding large value wire transfers. The author is a leading expert on this subject and the book's treatment reflects his expertise.

A "credit transfer," most commonly a wire transfer, can be understood metaphorically as a "push" transaction, in which a payor, called the "originator," wants to "push" funds from its account to the account of a payee.[32] The originator instructs its bank, called the "originator's bank," to send funds to the account of the payee, referred to as the "beneficiary" of the transfer. The instruction is called a "payment order." The originator's bank executes the payment order by sending another payment order to a "receiving bank." Payment orders are sent from one bank to another in sequence until a payment order is sent to the beneficiary's bank, which credits the account of the beneficiary and notifies it of the payment. Settlement between banks is often made directly between participating banks through "vostro" and "nostro" accounts or a mutual correspondent bank. Wire transfers that utilize Fedwire, operated by the Federal Reserve, as a clearing house are settled by debit and credit on the books of the Federal Reserve bank or banks. Another clearing house facility is CHIPS, the Clearing House Interbank Payment System, operated by the New York Clearing House Association, an association of large New York banks.[33] CHIPS is commonly used for cross-border wire transfers, and settlement is made by posting entries on the accounts of the participating banks at the Federal Reserve Bank of New York.

In the section on credit transfers, the author first describes and compares the large value credit transfer systems in various countries, including the United States, Switzerland, the United Kingdom, Japan, Canada, France and Germany. The European Union's EURO-1 clearing and settlement service is also discussed, as are the laws of Quebec, Israel, and South Africa to some degree. The book then discusses the legal nature of a credit transfer, the duties of the parties and the allocation of the risk of loss in credit transfer systems in these countries.

The book makes clear some significant differences among national laws concerning loss allocation in credit transfers. In the United States, the originator's bank has fulfilled its duty to the originator once it transmits a payment order to an intermediary bank and that order has been accepted. In contrast, in some other countries such as Switzerland, the originator's bank remains legally responsible for the transfer and is liable for any loss due to delay, error or insolvency until the beneficiary's bank receives the funds. In view of the global nature of the credit transfer system, the extent to which national laws conflict in allocating the risk of loss is surprising. One is left with the impression that loss allocation in credit transfers would be an appropriate subject for an international agreement, although, as the author points out, the Model Law on International Credit Transfer prepared by UNCITRAL has not been adopted by any country to date.[34]

A short section follows on checks and other drafts, such as “payable through” and “payable at” drafts, drawn on non-depository account holding institutions such as brokerage firms and insurance companies. Debit cards are mentioned only in passing. The book does not discuss person-to-person payment systems and non-bank payment service providers, some of which, such as PayPal, do hold accounts for customers,[35] nor new payment methods such as stored value cards and e-checks.

The final part of the book is a detailed comparison of laws that govern the allocation of losses resulting from a third party’s fraud that causes an unauthorized payment. This part is divided into sections dealing with fraud in the issuance of payment instructions, such as forged checks and unauthorized payment instructions issued by a defrauder, and sections concerning fraud by a third party that causes misdirection of funds under payment instructions that were properly issued, such as forged indorsements of checks and credit transfers to an erroneous or non-existent account.

The final part begins with a convenient summary comparing the rules for allocation of loss due to a forged drawer’s signature or material alteration of a check in common and civil law jurisdictions, excluding the United States.[36] The summary is particularly helpful in view of the fact, noted by the author, that the United States is the only nation to have adopted specific code provisions on the allocation of forged check losses; in other common law countries loss allocation is determined according to often complex general principles of law, and in civil law countries according to general code provisions not specific to checks.[37] The author goes on to compare the rules of different legal systems regarding modification of loss allocation by contract.

The author's ensuing discussion of the problem of unauthorized electronic funds transfers ("EFT's") highlights the inconsistencies among loss allocation systems, both between the treatment of forged checks and unauthorized EFT's within a legal system, and across legal systems. He points out that UCC Articles 3 and 4 generally allocate forged check losses among banks and their customers according to fault in order to encourage loss prevention,[38] but the American statutory system for loss allocation in the case of unauthorized EFT's downplays fault, and makes the loss allocation depend on whether the originating bank used commercially reasonable security procedures,[39] or on whether a consumer provided the debit card, code or other access device to the perpetrator.[40] In contrast, other common law jurisdictions tend to allocate forged check losses according to loss distribution principles[41] but according to agency principles in the case of unauthorized EFT's, giving full effect to the concepts of apparent and implied authority.[42] Civil law jurisdictions such as Switzerland take yet a different view, placing the risk on even the non-negligent customer for forged check losses in most cases[43] while allocating the risk of unauthorized EFT's on the "mandatary" (originating) bank unless the loss would not have occurred in the absence of the customer's negligence.[44]

The book goes on to provide a comparative analysis of laws on forged indorsements of checks. On this subject the author explains how the Continental and

English legal systems, once similar, diverged in the 18^{th} century. The Continental systems came to recognize the rights of bona fide purchasers to stolen instruments while the English and American systems preserved the rule that a thief cannot pass title to an instrument.[45] The Geneva U.C.L. expanded the Continental rule.[46] However, the Anglo-American rule, though preserved in the UCC, has been riddled with exceptions for indorsements by "responsible employees," impostors, and fictitious and unintended payees, and altered by a comparative negligence rule where a party's negligence substantially contributes to the making of a forged signature on an instrument.[47]

The book concludes with a section on misdirected credit transfers. A point of interest is that the United States is the only country other than Germany to have adopted a code governing electronic funds transfers.[48] In other legal systems, disputes concerning EFT's are decided according to general principles of law. The discussion of misdirected credit transfers in general law jurisdictions is perhaps the most original in the book, in the sense that it presents and analyzes material not collected in other sources. Issues discussed include inconsistency between the beneficiary's name and account number, non-existent or unidentifiable beneficiaries, and resolution of ambiguities and inconsistencies in the payment order by the beneficiary's bank contrary to the originator's true intention. The author notes a trend toward a "strict compliance" standard in the interpretation of payment orders, and takes a position contrary to that trend and in favor of a more flexible approach.

Because the book was intended as a scholarly work, practitioners may find it less helpful as a practice resource than Professor Geva's widely-cited treatise on electronic funds transfers.[49] The book's scope, limited mostly to checks and large value wire transfers, will affect its usefulness to some practitioners. The book gives little or no attention to some of the most common types of payment transactions. Debit cards and other consumer EFT's governed in the United States by the Electronic Funds Transfer Act ("EFTA")[50] and Regulation E[51] are discussed only in connection with the disclosure requirements imposed on banks and their effect on the bank-customer relationship, and briefly in the section on unauthorized EFT's. Credit card payments also are not covered in the book, a major omission in view of the vast and growing volume of credit card payments and their importance in Internet and cross-bordercommerce. A comparison of various countries' laws applicable to credit cards would have been particularly valuable.

The book further omits discussion of automated clearing house ("ACH") payments, which include pre-authorized debit and credit transfers such as direct payroll deposits, direct deposit of Social Security payments, and preauthorized bill payments. ACH payments are governed by the National Automated Clearing House Association Operating Rules, which are not discussed.

The book's structure, centered on the civil law concept of "mandate," may make the book difficult to use when researching a specific issue of American law regarding a payment transaction. Unlike the author's treatise on electronic funds transfers, the book does not include practice pointers that might assist practitioners in drafting or negotiating an agreement involving a payment transaction or in advising clients regarding a problem or dispute arising out of a payment transaction.

However, despite the book's academic approach and the necessary limitations in its scope, it is a scholarly tour de force, and will be valuable to many practitioners who need to research issues pertaining to cross-border and offshore payments.

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[2] The volume of payments by wire transfer over the two principal wire payment systems, Fedwire and CHIPS, already exceeded one trillion dollars per day as of 1990. *See* U.C.C., Article 4A, Prefatory Note; §4A- 101, 55 Fed. Reg. 40,791 (Oct. 5, 1990). By 1996, the average daily volume well exceeded two trillion dollars. Remarks by Federal Reserve Board Governor Edward W. Kelley, Jr. at the BAI Money Transfer '96 Conference, New York, October 31, 1996. As of 2002, the CHIPS daily volume alone was over 1.2 trillion dollars, and Fedwire daily volume exceeded one trillion dollars in the Second Federal Reserve District (New York) alone. *See* the website maintained by the Federal Reserve Bank of New York at http://www.ny.frb.org/aboutthefed/fedpoint/fed43.html. Fedwire is a wire transfer system operated by the Federal Reserve. CHIPS, the Clearing House Interbank Payment System, is a privately operated wire transfer system owned by the New York Clearing House Association, an association of large New York banks, which primarily handles international funds transfers. These figures do not include transfers through SWIFT (the Society for Worldwide Interbank Financial Telecommunications), the principal network

for transfer of funds not denominated in U.S. dollars, or ACH (automated clearing house) payments. The U.S. gross domestic product in 2002 was about 10.48 trillion dollars. U.S. Department of Commerce Bureau of Economic Analysis, "Current Dollar and `Real' Gross Domestic Product," 2/27/04, http://www.bea.gov/bea/dn/gdplev.xls.

[3] The dollar volume of checks processed by the Federal Reserve System in 2002 totaled about 15.37 trillion dollars, up slightly from 2001. Board of Governors of the Federal Reserve System 89th Annual Report to Congress, April, 2003, Table 8. About 17 billion checks were processed by the Fed in 2002 (*ibid.*), a fraction of the total number of checks issued which is estimated to reach about 60 billion in 2004. 149 Cong. Rec. House 9289 (remarks of Cong. Ford). The number of checks processed has gradually declined since the 1990's, but total dollar volume of checks processed has shown moderate increases. These figures do not include "on-us" checks or checks cleared through other clearing houses.

[4] Benjamin Geva, Bank Collections and Payment Transactions (Oxford: Oxford University Press, 2001) ("Geva")

[5] Benjamin Geva, The Law of Electronic Funds Transfers (New York: Matthew Bender & Co., 1993).

[6] *See* Geva, 193ff.

[7] Geva, 5.

[8] Geva, 22.

[9] Geva, 5.

[10] The author recognizes that the bank's "mandate" and the current account are not often discussed in common law jurisprudence. Geva, 98, 124. However, he makes the

intriguing point that from the early 19th century, the civil law concept of "mandate" provided the foundation for the common law concept of a bank's and its customer's mutual duties in the check collection process. *Id.*, 98, 349.

[11] Geva, 92-105.

[12] Geva, 52.

[13] Geva, 55.

[14] Geva, 57.

[15] Geva, 99. The author cites a single Ontario case, Tilden Rent-a-Car Co. v. Clendenning (1978), 83 D.L.R. (3d) 400 (Ont. C.A.), for this proposition. As the author recognizes in the following sentence, however, exculpatory clauses are not unconscionable or unenforceable *per se.* In the United States, the fact that an onerous clause is pointed out to the customer, or is in large print on the contract, tends to show that it is not a contract of adhesion. See, e.g., Orkin Exterminating Co. v. Petsch, 2004 Fla. App. LEXIS 1162 (Feb. 6, 2004). However, the converse is not necessarily true; the fact that an onerous clause is in fine print and not pointed out to the customer does not render it unenforceable without a showing of unequal bargaining power or other facts indicating a lack of meaningful choice on the part of the customer. Jureczki v. Banc One Texas, N.A., 252 F. Supp. 2d 368, 378-379 (S.D. Tex. 2003).

[16] Geva, 86, fn. 124-126.

[17] *See* Joseph Sommer, "Where is a Bank Account?" 57 Md. L. Rev. 1 (1998); Richard Herring and Friedrich Kubler, "The Allocation of Risk in Cross-Border Deposit Transactions," 89 Nw. U.L. Rev. 942 (1995).

[18] The federal government regulates the bank-customer relationship in the United States both to aid law enforcement, especially the detection of money laundering, and to protect consumers of bank services. See, generally, Jerry Markham and Lissa Broome, Regulation of Bank Financial Service Activities (St. Paul: West Group, 2001); Jonathan Macey, Geoffrey Miller and Richard Carnell, Banking Law and Regulation, 3d ed. (St. Paul: West Group, 2002).

[19] Geva, 132ff.

[20] Geva, 132ff.

[21] Geva, 140ff.

[22] Geva, 158ff.

[23] Adopted March 11, 1931 by the Second Geneva Convention.

[24] Geva, 179ff.

[25] Geva, 136-137.

[26] Geva, 138, 139.

[27] Geva states at one point that "[e]lectronic presentment, and hence, cheque truncation, is authorized by statute in the USA, UK and Australia." Geva, 133. See also *id.*, 168 n. 188. Elsewhere he points out that electronic presentment is not authorized in Canada and Israel, and that authority for electronic presentment recently was added in South Africa. *Id.*, 148. The problems that may arise with respect to the creation of substitute checks and the discarding of originals to facilitate electronic presentment, such as the difficulty of ascertaining the genuineness of signatures from an electronic image or substitute copy, and the manner in which these problems have been dealt with in various legal systems, are not addressed in the book.

[28] P.L. 108-100, 117 Stat. 1177 (enacted October 28, 2003), codified as 12 U.S.C. §5001 *et seq.* ("Check 21 Act").

[29] *Viz.* the remarks of Fred Redeker, President and CEO of the National Clearing House Association ("NCHA"): "It's an exciting time for the banking industry that is clearly gearing up for the future of check image exchange with the passage of Check 21." NCHA Press Release, September 25, 2003. So-called "voluntary" check truncation already is common, but requires consent in writing from the consumer.

[30] For a critique of Check 21, see Gail Hillebrand, "Questions and Answers About the Check Clearing for the 21st Century Act, `Check 21'" (Consumers Union, October 24, 2003), at www.consumersunion.org/finance/ckclear1002.htm.

[31] Check 21 Act, §§3(16) and 4(b), 12 U.S.C. §§5002(16) and 5003(b). Substitute checks would be available, for a fee, to bank customers who require the equivalent of a cancelled check.

[32] In contrast, payment by check is a "debit transfer," metaphorically a "pull" transaction. The payor, by issuing a check, transfers to the payee the right to order the drawee bank to debit the payor's bank account, or to pursue the same metaphor, to order it to "pull" money from the payor's account. If the payee deposits the check, its bank, the depositary bank, acquires the right to order the drawee bank to debit the payor's account. The depositary bank transfers that right through the forward collection process, and in most cases through a check clearing house, until the check is presented to the drawee bank, which in the usual case pays the check and debits the payor's account.

[33] Geva, 196.

[34] Geva, 210.

[35] Regulation of PayPal and similar payment service providers recently has been the subject of some controversy. The process of settlement of transactions involving accounts held by payment service providers can be entirely internal to the service provider and unregulated by any statute or regulatory agency. For example, if a buyer uses a credit transfer to deposit funds in his PayPal account, then uses the funds to purchase goods from a seller that has instructed PayPal to send him a check for the proceeds, the credit transfer is governed by UCC Article 4A or Regulation E, and the collection of the check issued to the seller is governed by UCC Article 4, but the adjustment of accounts between buyer and seller is a book entry internal to PayPal and is governed only by whatever duties and restrictions are imposed by PayPal's customer agreement.

[36] Geva, 347-355.

[37] Geva, 348.

[38] UCC §§3-406; Geva, 348.

[39] Geva, 408-409.

[40] Geva, 410-411.

[41] Geva, 348.

[42] Geva

[43] Geva, 348-349.

[44] Geva, 414.

[45] Geva, 424-425; *see generally*, F. Kessler, "Forged Indorsements," 47 Yale L.J. 863 (1938), at 863-871.

[46] Geva, 427.

[47] *See* UCC §§3-404, 3-405, and 3-406.

[48] Geva, 210-211. The European Union also has adopted a directive governing the transparency and minimum performance standards of Pan European cross-border credit transfers not exceeding 50,000 Euros. *Id.*, 211.

[49] *See supra*, note 5.

[50] 15 U.S.C. §1693 *et seq.* EFTA governs EFT's that result in a credit or debit to a consumer account, defined as an account held by an individual for personal, family or household purposes.

[51] 12 C.F.R. Part 205.