

Australian article round-up 2011: Finance

Continuing the Australian article round-up, readers may be interested in the following three articles raising points about finance:

- **Anthea Markstein, 'The Law Governing Letters of Credit' (2010) 16 *Auckland University Law Review* 138:**

Letters of credit are frequently used to effect payment in commercial transactions where parties are resident in different jurisdictions. While it seems prudent for parties to give careful consideration to the governing law of these contracts, in reality, letters of credit generally make no provision for a governing law. ... In attempting to find a governing law in keeping with the commercial expectations of the parties, the courts have endeavoured to apply the same law to all the contracts in the letter of credit transaction (with the exception of the underlying contract). ... This article argues that finding a governing law that provides legal certainty and has a close connection to the contract is vital in determining a governing law in the absence of choice in the letter of credit context. Achieving consistency in the governing law across all the contracts, however, is only important where commercial expectations require this outcome. This article suggests that commercial expectations do not require this outcome in the context of freely negotiable letters of credit, and sets out three alternative methods for determining the governing law of a freely negotiable letter of credit. Finding a consistent method with which to determine the governing law of a letter of credit contract is of particular importance given that it is likely to have implications for tortious and restitutionary claims arising in connection with a letter of credit contract.

- **David Chaikin, 'A Critical Examination of How Contract Law is Used by Financial Institutions Operating in Multiple Jurisdictions' (2010) 34 *Melbourne University Law Review* 34:**

Financial institutions operating in multiple jurisdictions are vulnerable to extraterritorial jurisdictional claims, especially under United States anti-money laundering and economic sanctions laws. A survey shows that banks licensed in

Australia have revised their standard form contracts so as to reduce the risks arising from the extraterritorial enforcement of foreign laws. Under the new contracts, customers have purportedly consented ex ante to banks supplying confidential information directly to foreign states and agreed to the freezing of their bank accounts based on a possible breach of foreign law. The contractual provisions are controversial because they circumvent the legal procedures that would otherwise apply in cases of international criminal, civil or regulatory assistance. The legal efficacy and policy implications of the contractual terms are analysed.

▪ **The Honourable J J Spigelman AC, 'The Global Financial Crisis and Australian Courts' (2010) 84 *Australian Law Journal* 615:**

Nearly two years after the collapse of Lehman Brothers, the effects of the global financial crisis are increasingly discernible in Australian courts. In this speech, Chief Justice Spigelman surveys the range of legal proceedings that have accompanied recent corporate collapses. The litigation discussed is characterised by its complexity, which is partly a consequence of the highly leveraged and interlocked nature of failed companies and investment schemes, and by the significance of cross-border issues. With respect to the latter, the crisis has highlighted the need for cross border judicial co-operation.