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A Conceptual Overview of Bank Secrecy

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1.1 Introduction

Banks in many countries have a legal obligation not to disclose customer information, referred to as ‘bank secrecy’ or ‘bank confidentiality’. This traditionally means that banks cannot reveal the state of a customer’s account or information that they come to know in the course of a customer’s banking relationship with them. However, bank secrecy is generally not an absolute obligation, and banks are allowed to reveal customer information in specific circumstances. The most common examples of exceptions to the duty of secrecy would be where there is customer consent, or where the law requires disclosure. Another example is where a bank is suing its customer. These exceptions have grown more prominent as banks have come under intense international pressure to reveal customer information in the fight against money laundering and terrorist financing, and to combat cross border tax evasion, as discussed in Chapters 4 and 5. The banking system is an indispensable, if generally unwitting, partner in the process of turning the proceeds of crime into ‘clean’ money, and in facilitating the financial support of terrorism. Offshore bank accounts provide safe havens for funds to be hidden from domestic tax authorities. Banks possess valuable information about their customers and their customers’ transactions that could lead to the prevention of crime and terrorism, the recovery of unpaid taxes and the apprehension of wrongdoers. These developments have resulted in banks being faced with positive duties to disclose information about their customers in a growing number

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of situations. These situations tend to be subsumed under the general umbrella of bank secrecy law, and tend to be discussed as exceptions to the bank's duty of secrecy. However, we should recognise that there is a second contrasting and equally compelling aspect of bank secrecy law which emphasises disclosure rather than secrecy, under which banks have a mandatory obligation to provide customer information to government authorities. These situations, in addition to just being classified as exceptions to the duty of secrecy, should appropriately have a separate label that emphasises that the bank has a duty of disclosure.

This chapter examines conceptual aspects of a bank's duty of secrecy to its customer, of the exceptions to that duty and of the bank's obligation of mandatory disclosure of customer information. It analyses the bank's duties in the context of protection of privacy on the one hand and mandatory state regulation on the other, and suggest this as an appropriate conceptual framework for understanding the law of bank secrecy. This analysis will necessarily be general, with examples given where appropriate. Analyses of the substantive legal rules are provided by the eight jurisdictional chapters in this book (covering China, Germany, Hong Kong, Japan, Singapore, Switzerland, the United Kingdom and the United States), which examine the law of bank secrecy in each relevant jurisdiction. This chapter draws upon these substantive principles of bank secrecy law that apply in these eight jurisdictions to support and illustrate its conceptual analysis. These are just examples, and the observations and conclusions in this chapter are meant to apply more generally, and are not confined to the eight jurisdictions.

1.2 Bank's Duty Not to Reveal Customer Information

1.2.1 *'Secrecy' versus 'Confidentiality'*

The focus of the law of 'bank secrecy' or 'bank confidentiality' is on a bank's duty not to reveal its customers' information. Exactly who is considered to be a customer or what type of information is protected by the bank's duty of secrecy will vary in different jurisdictions. In the most straightforward sense, a customer is someone who has an account with the bank, and customer information is information about the customer's account. But questions might arise whether one might be regarded as a customer before the account has been opened or after it has been closed, and whether customer information may extend beyond account deposit information to information that comes to the bank's knowledge in its capacity as banker. Further, the

obligation not to reveal information may extend, in some jurisdictions, beyond banks properly so called to cover also other types of financial institutions. These refinements of local law should be borne in mind when the terms ‘bank’ or ‘customer’ are used. The term ‘financial information’ will be used here generally as a convenient reference to information that is protected by the bank’s obligation of secrecy in a particular jurisdiction.

For current purposes, the point to be emphasised is that the label attached to the duty, whether it is ‘bank secrecy’ or ‘bank confidentiality’, may not necessarily reflect the relative level of strictness of the bank’s substantive duty not to reveal customer financial information.¹ These terms may be used interchangeably in some jurisdictions, while other jurisdictions may more commonly use one term rather than the other, probably as a matter of convention.² Although some may feel impressionistically that secrecy denotes a higher duty than confidentiality, this is not necessarily the case, as illustrated by the substantive chapters in this book. Indeed, the two words have the same meaning in the English language,³ and it is unfortunate that the term ‘bank secrecy’ has acquired a negative association with illicit activity, particularly international tax evasion. The strictness of the bank’s duty is in fact determined by the extent of the exceptions to the duty and the sanctions for its breach, and not by any difference in the terminology used. Further, foreign words that are used in various countries to refer to a bank’s duty not to reveal customer information may

¹ For example, the discussion on Singapore by Booyesen in Chapter 10 refers to ‘bank secrecy’, as did the heading in the Singapore Banking Act (Cap 19, 2008 Rev Ed Sing) before the coming into force of s 32(a) of the Banking (Amendment) Bill (No. 1/2016) (see *infra* note 2), whereas the discussion on Hong Kong by Gannon in Chapter 8 refers to ‘bank confidentiality’. If there is to be any difference in strictness of the bank’s duty based on the meaning of the two terms, one might expect this to be in the jurisdiction where the impressionistically stricter word ‘secrecy’ is used, but this is not the case. Instead, the exceptions in Schedule 3 of Singapore’s Banking Act are arguably wider than those that apply under the common law in Hong Kong.

² See, for example, the discussion of the United Kingdom by Stanton in Chapter 12, where the author uses the term ‘bank secrecy’ in his chapter, although the conventional reference in the United Kingdom is to ‘bank confidentiality’, on the grounds that there is no difference in meaning between the two. In Singapore, a bill to amend the Banking Act, *supra* note 1 was passed on 29 February 2016, whereby the heading of s 47, which sets out the bank’s obligation not to disclose customer information, was changed from ‘banking secrecy’ to ‘privacy of customer information’. See s 32(a), Banking (Amendment) Bill, *supra* note 1.

³ For example, the *Oxford English Dictionary*, 3rd edn (Oxford University Press, 2010) defines ‘secrecy’ as ‘the action of keeping something secret or the state of being kept secret’. It defines ‘confidentiality’ in a similar way, as being ‘the state of keeping or being kept secret or private’. The term ‘secret’ is defined as ‘something that is kept or meant to be kept unknown or unseen others’.

themselves be nuanced, but if that is the case, they may not be susceptible to exact translation into English. It would be unproductive to investigate whether the label ‘secrecy’ or ‘confidentiality’ should be used in translation when the two words bear the same essential meaning. Ultimately, as the jurisdictional chapters in this book show, a bank’s duty not to reveal customer information is not absolute, and countries that use either or both of these labels allow for exceptions to the bank’s duty.

As mentioned, the terms ‘bank secrecy’ and ‘bank confidentiality’ are also conventionally used to encompass the bank’s legal obligation to disclose customer information to the authorities in specific circumstances. This aspect of the bank’s duty will be discussed later in this chapter. It may be observed that the use of the terms ‘bank secrecy’ or ‘bank confidentiality’ in this context is not only inaccurate, but also misleading, as what is in fact required is the opposite: ‘bank disclosure’. Nevertheless, such wide usage of the two terms is well entrenched, and this chapter generally adopts it.

For consistency, the term, ‘bank secrecy’, will be used⁴ to include an interchangeable reference to ‘bank confidentiality’. This term will be used to refer to the bank’s holistic obligations in relation to customer information, i.e. encompassing both the bank’s traditional duty of secrecy/confidentiality as well as its growing duty of disclosure, or one or the other of these duties as the context requires. Where particular specificity is desired, this chapter refers either to the bank’s duty not to reveal information (or to its duty of secrecy) on the one hand, or to its duty to disclose information on the other.

1.2.2 *Conceptual Basis of Bank’s Duty of Secrecy*

1.2.2.1 Privacy and Confidentiality

The effect of the bank’s duty not to reveal customer financial information is that the customer’s privacy is protected. But is privacy protection the object of the imposition of this duty?

The Oxford English Dictionary defines privacy as ‘the state or condition of being alone, undisturbed, or free from public attention, as a matter of choice or right; seclusion; freedom from interference or intrusion.’⁵

⁴ This will also serve to minimise confusion between the term ‘duty of confidentiality’ and the term ‘relationship of confidence’ or ‘confidential relationship’ that will be introduced later in this chapter.

⁵ *Oxford English Dictionary*, *supra* note 3, online: www.oed.com/view/Entry/151596?redirectedFrom=privacy#eid

The Cambridge Dictionary Online defines it as ‘someone’s right to keep their personal matters and relationships secret’.⁶ Simple as the process of definition may seem to a layperson from a linguistic point of view, privacy is an amorphous concept which scholars have found difficult to define with precision. One legally oriented conception of privacy that is relevant to the present discussion is that it is the ‘claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others.’⁷ Another sees it in terms of the extent to which an individual has control over information about himself or herself.⁸ Both of these examples have been critiqued,⁹ underlining the difficulty in defining privacy with exactness or comprehensiveness.¹⁰ Another view¹¹ sees privacy as ‘a state of voluntary physical, psychological and informational inaccessibility to others to which the individual may have a right and privacy is lost and the right infringed when without his consent others “obtain information about [the] individual, pay attention to him, or gain access to him”’.¹²

I suggest that privacy is something that is desired by human beings generally, and this would apply also to organisations, although in the latter case such desirability is likely to be usually for economic reasons alone. Even the most open person or organisation will have some matters that he, she or it would prefer not to share with others. Scholarly arguments have been made that privacy serves some important functions; for instance, it engenders personal autonomy (avoidance of ‘manipulation or domination by others’); allows emotional release (removal of one’s ‘social mask’); facilitates self-evaluation and offers an environment where an individual can ‘share confidences and intimacies’ and ‘engage in limited and protected

⁶ Cambridge Dictionaries Online, online: <http://dictionary.cambridge.org/dictionary/english/privacy>

⁷ A.F. Westin, *Privacy and Freedom* (London: Bodley Head, 1967) at 7.

⁸ See e.g. C. Fried, ‘Privacy’, *Yale Law Journal*, 77 (1968) 475 and R. Parker, ‘A Definition of Privacy’, *Rutgers Law Review*, 27 (1974) 275 at 280–1.

⁹ See e.g. N. MacCormick, ‘Privacy: A Problem of Definition’, *British Journal of Law & Society*, 1 (1974) 75 and R. Gavison, ‘Privacy and the Limits of Law’, *Yale Law Journal*, 89 (1980) 421.

¹⁰ R. Gellman, ‘Does Privacy Law Work?’ in P. Agre and M. Rotenberg (eds.), *Technology and Privacy: The New Landscape* (Cambridge, MA: MIT Press, 1998). At 193, Gellman writes: ‘Lawyers, judges, philosophers, and scholars have attempted to define the scope and meaning of privacy, and it would be unfair to suggest that they have failed. It would be kinder to say that they have all produced different answers.’

¹¹ R. Pattenden, *Law of Professional-Client Confidentiality* (Oxford University Press, 2003) at 9.

¹² *R v. Department of Health, ex p Source Informatics* [1999] 4 All ER 185 at 195 (Latham J).

communication.¹³ Privacy is often spoken of as a right. This could be meant in various senses, for instance, as a constitutional right, a legal right, a human right, an ethical right or a moral right. An examination of the philosophical foundations of privacy is beyond the scope of this chapter, and I will approach the discussion from the point of view that, apart from the language of rights, privacy is at least a desired value or a desired state.

Closely related to the concept of privacy is the concept of confidentiality. Confidentiality overlaps with privacy but is not identical to it. Both are based on the individual living in a community, but privacy rights are more fundamental in that they precede the obligations of confidentiality. Pattenden¹⁴ explains it in this way: privacy rights require at least two people in a community, whereas confidentiality rights require at least three. Where A, B and C live in a community, confidentiality is achieved where A and B keep something from C, whereas privacy is attained where A is able to keep something from B and C. Confidentiality would require trust between individuals whereas privacy does not. 'Confidentiality requires some privacy, privacy requires no confidentiality.'¹⁵ Therefore, confidentiality is less all-encompassing and is narrower than privacy protection. Broadly speaking, a duty of confidentiality could be seen to be an obligation on a person (such as a bank) not to reveal facts that are told to him or that he comes to know about by virtue of his confidential relationship with another person (such as a customer). Because of its more circumscribed ambit, and the values of privacy and trust related to it, courts and legislatures have been more willing to protect confidential relationships than to protect privacy rights in a more general way. This point will be illustrated later in this chapter.

1.2.2.2 Legal Basis of the Bank's Duty of Secrecy and Relevance to the Concepts of Privacy and Confidentiality

This section explores the legal basis of the bank's duty of secrecy with a view to establishing a link to privacy protection or otherwise.

Private Law It would appear that a bank's duty not to disclose customer information is a generally applicable private law obligation. All eight jurisdictions covered in this book provide examples of banks' private law

¹³ These are the four functions identified by A.F. Westin and summarised in R. Wacks, *Privacy and Media Freedom* (Oxford University Press, 2013) at 21.

¹⁴ See *Law of Professional-Client Confidentiality*, *supra* note 11 at 6.

¹⁵ *Ibid.*

duties of secrecy, even if sometimes in limited circumstances, as in the case of China. There may, in some countries, additionally be a public law duty of secrecy that applies to banks. This section focuses on the bank's duty of secrecy in private law, leaving public law duties to be examined later. A breach of a private law duty attracts only civil remedies, for example damages or an injunction. The bank will be liable to its customer, but it will not be subject to penal or regulatory sanctions.

Contract Contract law is the most important source for the bank's duties of secrecy in private law. Where there is an express term in the contract between a bank and its customer requiring the bank not to reveal customer information,¹⁶ this is clearly motivated by the parties' concern with privacy protection, particularly on the part of the customer. Where the contract is silent about the bank's duty of secrecy, this duty is implied in many countries.¹⁷ Although the implied contractual duty approach is used in both common law and civil law countries, the common law analysis seems to be more developed and consistently applied across different common law jurisdictions, and will therefore be used to illustrate the connection with the concept of privacy.

The implied term approach in common law countries was first adopted in the influential UK case of *Tournier v. National Provincial and Union Bank of England*,¹⁸ which today continues to be the basis for the bank's duty of secrecy not just in the United Kingdom but also in other common law countries such as Hong Kong, Australia and Canada.¹⁹ It was also accepted by the Singapore courts before the Court of Appeal declared it to be supplanted by the statutory provision for bank secrecy in section 47

¹⁶ An example can be seen in Germany, where the general terms and conditions included in every bank–customer relationship called 'AGB Banken' provide that the bank 'has the duty to maintain secrecy about any customer-related facts and evaluations of which it may have knowledge'. The bank may only disclose information concerning the customer if it is legally required to do so or if the customer has consented thereto or if the bank is authorised to disclose banking affairs. See Hofmann in Chapter 7 at p. 199.

¹⁷ See the jurisdictional Chapters 6–13.

¹⁸ [1924] 1 KB 461.

¹⁹ See the discussion by Gannon on Hong Kong in Chapter 8 and Stanton on the United Kingdom in Chapter 12. See also chapters 2, 7, 13 and 19 in G. Godfrey (gen. ed.), *Neate and Godfrey: Bank Confidentiality*, 5th edn (London: Bloomsbury, 2015). *Tournier* was also accepted by the Singapore courts before the Court of Appeal declared in *Susilawati v. American Express Bank Ltd* [2009] 2 SLR (R) 737 at para. 67 that the statutory regime under s 47 of the Singapore Banking Act was the exclusive regime governing banking secrecy in Singapore. See the discussion by Booyesen in Chapter 10.

of Singapore's Banking Act.²⁰ In the United States, a similar implied term approach was adopted by *Peterson v. Idaho First National Bank*²¹ before it became overshadowed by the Right to Financial Privacy Act (1978) (RFPA),²² which will be discussed later. When implying terms into a contract, common law courts are trying to give effect to the unexpressed intentions of the parties. The principles used in the process of implying terms are relevant to our conceptual analysis. The precise requirements (or at least the articulation of these requirements) that courts apply for the implication of contractual terms may vary in different countries. In *Tournier*, the court applied the principles that were established in the leading English case on implied terms at that time, *In re Comptoir Commercial Anversois and Power*.²³ Although other newer cases are now more commonly used as standard authorities for the implied term approach in the United Kingdom, *In re Comptoir Commercial Anversois and Power* provides useful general guidance. There, the court was of the view that a term should not be implied merely because it would be a reasonable term to include if the parties had thought about the matter, but that it must be such a necessary term that both parties must have intended that it should be a term of the contract, and have only not expressed it because its necessity was so obvious that it was taken for granted.²⁴ In *Tournier*, Scrutton LJ referred to this principle and stated:

Applying this principle to such knowledge of life as a judge is allowed to have, I have no doubt that it is an implied term of a banker's contract with his customer that the banker shall not disclose the account, or transactions relating thereto, of his customer except in certain circumstances.²⁵

While it might seem that a customer would typically be more concerned about secrecy than the bank, it must be emphasised that an implied term is one which a court considers that both parties would necessarily have agreed upon. A finding of an implied duty of secrecy shows the importance that the court thinks both the customer and the bank must have ascribed to secrecy. In *Tournier*, Atkin LJ specifically stated that he was 'satisfied that if [the bank] had been asked whether they were under an

²⁰ *Susilawati v. American Express Bank Ltd* [2009] 2 SLR(R) 737 at para. 67. See the discussion by Booyesen in Chapter 10.

²¹ 367 P. 2d 284 at 290 (Idaho, 1961). See the discussion by Broome in Chapter 13.

²² 12 USC § 3402 (2013).

²³ [1920] 1 KB 868.

²⁴ *Ibid.* at 899–900, quoted in *Tournier*, *supra* note 18 at 483–4.

²⁵ *Tournier*, *supra* note 18 at 480–1.

obligation as to secrecy by a prospective customer, without hesitation they would say yes.²⁶

However, neither Scrutton nor Atkin LJ elaborated specifically upon why it was seen as necessary to imply a term of secrecy in *Tournier*.²⁷ This is probably because, like the implied contractual term approach, the underlying conceptual basis of the bank's implied duty of secrecy was so obvious to them that they had taken it for granted. Although the word 'privacy' was never mentioned in *Tournier*, it seems clear, from the discussion of the implied term analysis above, that protection of the customer's privacy was precisely the unspoken conceptual basis of the bank's implied duty of secrecy.²⁸ Based on this analysis, the finding that the bank had an implied contractual duty of secrecy meant that the court found that both the bank and the customer must have intended that the bank should not reveal customer information, at least without the customer's consent or in the absence of other specific circumstances. Such concern with maintaining secrecy must obviously be linked with the desirability of privacy protection (whether as a primary or ancillary aim) to the parties.

Tort Another potential source of the bank's duty of secrecy in private law is the law of tort. In Switzerland, for instance, Art. 28 of the Swiss Civil Code protects the privacy rights of any natural or legal person, and this has been recognised by the Swiss Supreme Court to include information relating to financial affairs.²⁹ An intrusion into these rights would also attract tortious liability under Art. 41 of the Swiss Code of Obligations.³⁰ A few other chapters of this book also mention tort law,³¹ sometimes in a

²⁶ *Ibid.* at 483–4.

²⁷ *Ibid.* at 474.

²⁸ Bankes LJ, the third judge in *Tournier*, came closest to explaining why secrecy was important, stating that the 'credit of the customer depends very largely upon the strict observance of that confidence.' *Tournier*, *supra* note 18 at 474. This may have been true on the facts of the case, where the breach of the duty of secrecy by the bank manager would have revealed the weak financial position of the customer, but it can hardly be taken as a general rule, as a disclosure of a high credit balance in a customer's account may very well enhance his credit. A better general explanation is that it is important to protect the privacy of a client as revelation of his financial affairs may affect him adversely.

²⁹ See Neate and Godfrey: *Bank Confidentiality*, *supra* note 19 at 920. See also Nobel and Braendli in Chapter 11.

³⁰ *Ibid.* at 920. See also Nobel and Braendli in Chapter 11. Nobel and Braendli state that the law of personal rights as set out in the Swiss Civil Code are a source of the client's rights to secrecy in the banking relationship, and explain that an infringement would lead to tortious liability.

³¹ See Booyesen in Chapter 10, where the torts of defamation, breach of statutory duty and misuse of personal information were suggested as possible ways for a customer to seek

tentative manner³² or as a matter of tangential relevance where the duties imposed are not specifically focused on bank secrecy.³³ Tort law imposes a duty on a person to respect certain interests of other persons, which does not depend on the existence of a contractual relationship. The interests protected by tort law have traditionally included, for example, bodily integrity (protected by the torts of assault and battery) and the interest in one's reputation (protected by the tort of defamation). Another example of interests protected under tort law would be those arising under certain statutes: where a statute imposes a duty on someone to do something, breach of this duty may sometimes be actionable as the tort of breach of statutory duty.³⁴ While a bank's disclosure of customer information could amount to the commission of the tort of defamation or the tort of breach of statutory duty (assuming that the requisite elements of the relevant tort are made out), these torts generally have limited or no connection with bank secrecy, and are not helpful to our conceptual analysis. We have seen that tort law in Switzerland protects the customer's privacy. Modern tort law in some common law countries has expanded also to include the protection of privacy, although this may not always be relevant to bank secrecy. For example, many US states recognise the tort of invasion of privacy, which encompasses the public disclosure of private facts.³⁵ Under this tort, the disclosure of customer information by a bank would not be a breach of its tortious duty if the information is not given publicly by being communicated to the public at large, but is told to one person or

redress against a bank. The tort of breach of statutory duty was also mentioned by Stanton in Chapter 12, albeit in relation to the more general UK Payment Services Regulations 2009, SI 2009/209, which are not specifically directed at bank secrecy.

³² Omachi in Chapter 9 states that in Japan, the legal basis for bank secrecy had not been much discussed lately, but that it was broadly understood that a bank would be liable in tort or for breach of contract.

³³ Wang in Chapter 6 suggests that in China, the Decision to Strengthen Network Information Protection made by the NPC Standing Committee and the Consumer Interests Protection Law both impose a tortious duty on banks to protect the personal information of the customers.

³⁴ An example is the UK Payment Services Regulations 2009, *supra* note 31 which requires an authorised payment institution to maintain arrangements sufficient to minimise the risk of loss through negligence or poor administration, and provides an action in tort for breach of statutory duty if this requirement is contravened. See Regs. 19(4) and 120. See the discussion by Stanton in Chapter 12, where it is suggested that a customer who loses money as a result of cybercrime (presumably because the bank has failed to keep its information secret) has an action in tort for its recovery under these regulations.

³⁵ See The American Law Institute, *Restatement (Second) of Torts*, § 652D.