

# Contents

Preface	v
Dedication	vi
Table of Statutes	xv
Table of Statutory Instruments	xvii
Table of Cases	xix
Treaties and Conventions	xxxv
EU Legislation	xxxvii
<b>Chapter 1 International Term Loan Agreements</b>	<b>1</b>
Introduction	1
The nature and mechanics of medium-term loan agreements	1
Some problems caused by the flexible structures	5
The structure of a loan agreement	6
The 'drawdown' period	6
Restrictions on the use or purpose of the loan	8
Restrictions imposed upon the borrower within the terms of the loan documentation	9
Remedies for breach of covenant	31
Internal remedies	32
External remedies	35
Restructuring	35
Introduction	35
The restructuring process	36
Conclusion	42
Other relevant agreements	43
'Floor/ceiling' agreements	43
Insurance law considerations	44
Documentation for 'collar' agreements	46
Security	47
Conflict of laws issues and security	48
Guarantees in international term loans	51
Legal problems	53
Other considerations with guarantees	53
Comfort letters	54
<b>Chapter 2 Primary Syndication</b>	<b>56</b>
Introduction	56
Arranging a syndicated loan	58
Arranging the loan mandate	59

## *Contents*

Arranging the syndicate	59
Exclusion clauses	69
Fiduciary duties	70
Precautions to be taken by the arranging bank	70
Due diligence	71
Will the information memorandum be construed as a regulated prospectus?	73
Negotiating the loan documentation	74
The arranging bank	75
No conflict	75
No profit rule	76
Duty to disclose	76
Execution of the agreement	77
The agent bank	77
The duties of the agent	77
Protecting the agent bank within the loan agreement	80
The functioning of the syndicate	80
Agent's responsibilities under the terms of the agreement	80
Claw back provisions	81
Replacement of the agent	81
Exclusion of liability	81
General indemnity for the agent bank	82
Are the duties extended in default?	83
The relationship between the syndicate members	83
Could the relationship be construed as a partnership or a joint venture?	83
The impact of the sharing clause	84
Disagreements	84
<b>Chapter 3 Secondary Syndication – Loan Transfer</b>	<b>89</b>
Introduction	89
Methods of sale	90
Novation	91
Legal assignment	94
Equitable assignment	98
Funded participation (sub-participation)	99
Risk participation (non-funded participation)	104
Trusts	104
English law considerations	105
Credit risk	105
Contractual restrictions	106
Confidentiality	107
Potential liability of seller to buyer	108
Local law	110
Taxation	112
Stamp Duty	112
Withholding tax	114
Expense or distribution?	114

Regulation of asset sales	115
Development of the market	115
Secondary market	115
Corporate investors	116
<b>Chapter 4 Primary Securitisation – Bond Issues</b>	<b>118</b>
Introduction	118
Negotiability	119
Types of bond	123
Domestic, Foreign and International bonds	123
Unlisted bonds	124
Listed bonds	124
Secured bonds	124
Bond issue by trust deed	125
Bond issue by fiscal agency arrangement	129
Documentation	130
The prospectus or offering circular	132
Subscription agreement	134
The trust deed	136
Paying agency agreement	137
Agent bank agreement	140
Note issuance facilities	140
The note market	141
Revolving underwriting facilities	141
External risk factors	142
Information memoranda and other offering material	142
Misrepresentation and negligence	143
Commercial paper	144
The dealer agreement	144
Forms of commercial paper	146
Sukuk (Islamic bonds)	146
Convertible bonds	147
Discount/interest bearing	148
Currencies	149
Guarantees	149
The regulatory and legal framework	149
Negotiable/debenture	150
Taxation issues	150
Bonds and syndicated lending – a comparison	151
<b>Chapter 5 Secondary Securitisation</b>	<b>153</b>
Introduction	153
History	154
Originating assets	157
The special purpose vehicle or entity	158
Special Purpose Vehicles (SPVs)	158
Special Purpose Entities (SPEs)	159
Multi-seller structures	159

Credit aspects	160
Liquidity aspects	161
Islamic securitisation	163
Salam structure	169
Wakalah structure	169
Murabahah structure	170
Asset backed or asset based?	172
Asset types	173
Types of sukuk	174
Choice of Law and Jurisdiction	176
Secondary Islamic bond markets	176
Credit Enhancement	178
Whole of business and synthetic securitisation	178
The rating process	181
Introduction	181
Disclaimer of onerous property	182
Rescission of contracts	182
Transactions at an undervalue	182
Preferences	184
Defrauding creditors	184
The credit rating itself	185
Collateral and cash flow risk	185
Legal and third party risks	188
Structural risks	189
The ratings	189
Short-term debt ratings	189
Long-term debt ratings used by all major agencies	189
Why securitise?	190
Accounting issues	193
Transfers from the originator to the SPV	193
Transfers of equitable title	193
Mortgage backed securities	194
Powers of attorney	195
How will the SPV sell bonds?	196
Other risk issues in the transfer of assets from the originator to the SPV	196
Charge or sale?	197
Conclusions	199
<b>Chapter 6 Derivatives</b>	201
Introduction	201
Futures	202
Options	203
Contracts for differences	203
Currency swaps	204
Interest rate swaps	205
Commodity swaps	205
Credit swaps	206

Swapping out	208
Forward rate agreements (FRAs)	209
Forward foreign exchange contracts (Fx forwards)	210
Caps, Floors and Collars	210
Issues arising	210
Capacity	212
Netting	217
Payment or settlement netting	218
Netting by novation	218
Close out netting	218
Multilateral netting	219
Cross-product netting	220
Documentation and master agreements	220
Confirmations and master agreements	220
ISDA Master Agreements	221
ISDA 2002 Master Agreement – Terms	223
The ISDA Master Agreement – Completing the Schedules	234
ISDA Credit Support Agreements	241
Derivatives Trading	242
Master agreements and insolvency issues	243
Gaming and potential unenforceability	247
<b>Chapter 7 Performance Bonds, Contract Guarantees and Standby Letters of Credit</b>	<b>249</b>
Introduction	249
The bonds or guarantees which may be given under English law	250
Bid or tender bonds	250
Performance bonds	251
Advance payment bonds	253
Retention money bonds	253
First demand or conditional?	253
Conditional bonds	256
The documentary bond	256
Remedies	258
Defences	259
Fraud	260
Illegality of the underlying contract	265
Illegality of the bond or letter of credit	266
Forgery	267
Nullity	267
The relationships created by first demand bonds	268
Autonomy from the underlying transaction	270
The importance of private international law	270
Safeguarding the position of the issuing bank	272
Obtaining counter indemnities	272
Syndication	272
Two recourse obligations	273
The recourse obligation imposed on the seller/contractor	273

Other provisions in the syndicated bond agreement	273
Safeguarding the position of the seller/contractor	274
Insurance support and the Export Credits Guarantee Department	274
Conclusions	277
<b>Chapter 8 Contractual remedies and issues arising</b>	<b>279</b>
Introduction	279
Clauses in the agreement	279
Events of default clause	279
Actual breach and anticipatory breach	282
Remedies on default	294
The internal remedies	294
Restructuring	295
Waiver	296
Acceleration	297
Default interest	297
General default indemnity	298
Set off	299
External remedies	299
<b>Chapter 9 Governing Law</b>	<b>301</b>
Introduction	301
Choice of law	302
Factors influencing choice of law	302
Will an express choice of law be recognised?	303
Rome I Regulation	304
Determination of the proper law	306
Effect of choice of law under the Rome 1 Regulation	313
Alternative heads of liability	314
Rome II Regulation and Tortious Claims	314
The common law approach	316
Alternative choice of law clauses	318
Freezing the proper law	319
Applicable law where no express choice is made	319
Is there an implied choice?	320
The closest and most real connection	321
Conclusion	322
What does the applicable law govern?	322
Those matters governed by the applicable law	323
Those matters not governed by the applicable law	324
Public international law	326
Sharia law	327
<b>Chapter 10 Jurisdiction</b>	<b>329</b>
Introduction	329
Jurisdiction of the English courts in respect of actions in personam where the Brussels 1 Regulation does not apply	330

The traditional bases of jurisdiction	331
Bases of jurisdiction under the Brussels 1 Regulation and Lugano Conventions where no jurisdiction clause is included in the agreement	335
General jurisdiction	336
Special jurisdiction	336
Exclusive jurisdiction	337
Jurisdiction clauses under the Brussels 1 Regulation	338
The wording of the clause	341
Submission before the courts of a contracting state	342
Legal restrictions on jurisdiction	344
Lis alibi pendens (dispute pending elsewhere)	344
Exclusive jurisdiction clauses	345
Floating jurisdiction clauses	346
The new international lis alibi pendens rule and forum non conveniens	347
Arbitration	348
Enforcement of foreign judgments	349
Where judgment is obtained in a jurisdiction which is not party to the Regulation	350
Distinction between recognition and enforcement	350
New proceedings or enforcement of the foreign judgment	350
Requirements for recognition and enforcement	351
Where judgment is obtained from a court within a Member State under the Brussels 1 Regulation or a contracting state under the Lugano Convention	353
The defendant need not be domiciled in the EU	354
Recognition	354
Enforcement by registration	355
Grounds for refusal	355
Conclusion	355
<b>Chapter 11 Sovereign Risk</b>	357
Sovereign risk	357
Recognition of states	357
General UK position	357
Liability of one regime for debts of another: state continuity	359
Sovereign immunity	359
The common law	360
State Immunity Act 1978	361
Constituent territories of federal states	367
Forms of clause waiving immunity	367
Changes to the law of the state in question	368
Expropriations	370
Summary	374
Availability of procedural remedies	376
Changes made to the capacity of an organisation to be sued	376
Statutes of limitation	378

## Contents

Exchange controls	379
<b>Chapter 12 Exchange Controls</b>	<b>380</b>
‘Exchange contracts’	382
‘Involve the currency of any Member’	384
‘Contracts shall be unenforceable’	385
‘Exchange control regulations’	386
‘Consistently with this agreement’	386
Overriding public policy?	387
Imposition of exchange controls	387
Types of exchange controls	388
Loan documentation and exchange controls	388
Specifying place and currency of payment	389
Consents and conditions precedent	389
Currency transfer agreements	389
Warranties, covenants and events of default	390
The euro	391
<b>Chapter 13 Legal Opinions</b>	<b>394</b>
Introduction	394
Conditions precedent	396
Opinions should cover matters of law only, not matters of fact	396
The jurisdictions in relation to which opinions should be obtained	397
From whom should the opinions be obtained?	398
Liabilities of the lawyer	398
Structure of a legal opinion	401
Addresses and description of transaction	401
Assumptions	402
Matters on which an opinion is given	402
Qualifications	411
Appendix 1 Sample Legal Opinions: (A) Loan Agreement	416
Appendix 2 Sample Legal Opinions: (B) Credit Default Swap	425
Appendix 3 Sample Legal Opinions: (C) Securitisation Opinion	433
<b>Appendix Loan Markets Association Multicurrency Term and Revolving Credit Agreement</b>	<b>461</b>
Index	629