

International
Financial
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国际金融法

Donggen Xu

徐冬根 著

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INTRODUCTION

International financial law is a framework of rules, standards and practices that govern international financial transactions and markets. The objective of this framework is to create international financial order and stability. This order and stability have to be created in an environment of national jurisdictions, each pursuing their own national interest and governance standards, and is constantly threatened by the consequences of increasing globalization, technological development and financial innovation. The framework and contents of this textbook on international financial law comprise the following eight chapters covering the whole range of law and practice of international financial transaction: international commercial loan and loan agreement, syndicated loan, loan participation and assignment, project finance, asset securitization, letter of credit, guarantee for international financial transaction, as well as legal opinion for international financial transaction.

It is the intent of this textbook to provide a comprehensive view of the law and practice related to international financial transaction, including but not limited to corporate financing and banking practice as the subjects. Laws play a significant role in the successful operation of international financial transaction. The relationship of law to financial transactions is an evolving and diverse process entailing a rich matrix of private and public laws, of domestic and international laws, and a mix of statutes, administrative regulations, and case law.^① Laws regulate financial behavior and transaction, which leads to a financial market that runs efficiently. Laws also supply ethical standards and expectations, while providing rules of conduct, measures to enforce those rules, and a means for settling disputes.^② It is important to note that without laws to govern the actions of participants involving international financial transaction, the financial market would not be able to function effectively, and the financial order would likely collapse. The recent financial crisis resulted in challenges for legislative bodies and government authorities to modify financial laws, regulation and rules so as to ensure stability of financial markets.^③ The essential relevance of private law aspects of international financial transaction will be of great importance. Private financial and commercial law aspects should be of increasing educational and practical importance in the teaching courses of law school. However, one of the observations of this textbook is that the private law dimension will have to be re-evaluated in the overall context of an expanding, interconnecting,

① Joseph J. Norton, "International Financial Law", An Increasingly Important Component of "International Economic Law"; A Tribute to Professor John H. Jackson, 20 Mich. J. Int'l L. 133, 136 (1999).

② Other functions of law include peacekeeping; checking government power and promoting personal freedom; facilitating planning and the realization of reasonable expectations; promoting economic growth through free competition; promoting social justice; and protecting the environment.

③ See Matthias Lehmann, The Role and Prospects of International Law in Financial Regulation and Supervision, 13 (3) J. I. E. L. 663, 663-682 (2010).

and converging regulatory framework for corporations, banks and financial transactions.

One mainline of this textbook is the law concerning international financing. Corporation needs funds to run their business and banks provide divers financial services to their clients in the financial market. Financing becomes the focus of intersection of demand of funding from corporations and the financial services provided by banks.

Two essential participants of the international financing are corporations as borrowers, and banks as lenders. Banks are active participants involving all kind of financial transactions. It has become an important issue to protect the legitimate interests of both borrowers/corporations and lenders/banks through legal instruments, mainly international commercial loan agreement. This textbook refers divers rights and obligations of both borrowers/corporations and lenders/banks in different situations and circumstances, depending on the different forms of transactions of which the borrowers/corporations and lenders/banks involved.

Three kinds of funding activities are considered as major forms of international financial transactions, which are commercial loan, multi-lenders loan and project finance. Chapter one of this textbook begins with comments on commercial loan which is the basic form of loan made by and between the corporation as borrower and bank as lender. As common practice, corporation raises the necessary funds by way of commercial loans. The typical legal aspects concerning international financial loan focus on loan agreement. While multi-lenders loan issues which involves at least two or more lenders in international financing are subjects of chapter two and chapter three. Chapter four of this textbook involves law and practice of project finance which refers the financial transaction of which the major participants are the banks and financial institutions as lenders and the project company set up by sponsor, as the single borrower.

The fourth form of international financial transactions referred in this textbook is the asset securitization, which constitutes the subject of chapter five.

Letter of credit is one of the forms of the international financing, and used frequently in international sale of goods. Chapter six presents legal issues and practice of letter of credit.

Chapter seven concerns the guarantees for international financial transaction. Financial transaction in the international arena involves an array of risks.^① One of these risks arises from variations in the legal landscape from one jurisdiction to the next.^② Effective risk appraisal and the formulation of risk-limiting strategies must take these variations into account.^③ It is desirable, and probably possible, that the legal risks of the international financial transaction are allocated and controlled by the arrangement of the mechanism of guarantee

① See Virginia Haufler, *Dangerous Commerce: Insurance and the Management of International Risk* 4-6 (1997) (describing types and nature of international business risks).

② See generally Cynthia D. Wallace, *Legal Control of the Multinational Enterprise* (1983) (providing a comprehensive treatment of the legal risks arising from doing business in multiple jurisdictions).

③ See Ralph H. Folsom, Michael Wallace Gordon & John A. Spanogle, Jr., *International Business Transactions* § 32.8-32.26 (2d ed. 2001) (explaining the necessary understanding of and techniques for managing risks associated with international transactions).

and similar legal arrangement.

Chapter eight discusses legal opinion for international financial transaction, including purpose of opinion, form and elements of opinion, liability of the opining lawyer, etc.

Although the general functions of laws appear to be simple, the interaction of laws and financial transaction in the area of international finance is rather complex. During the preparation of the course and manuscripts of international financial law at School of Law, Shanghai Jiao Tong University since 2002, we have read and reviewed numerous references published both in China and rest of the world. The footnotes of this textbook reveal the selected cases, reports, papers, documents, articles and books published all over the world, which rank among the most significant publications in this field over the past few decades, as well as international conventions, international customs and practice, laws, regulations and rules promulgated or released by divers international organizations, inter-government institutions, sovereign legislators or government authorities in relevant countries.

This textbook puts aside general principles of the international financial law-more essential and theoretical background of international financial law, and focus on the law and practice of international financial transaction. Because of the limited teaching hours of a regular course of international financial law in a semester, we have to make a rational choice between extent and depth. We have selected the latter and prefer to focus on the more compact framework of the course on law and practice of international financial transaction.

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OUTLINE

CHAPTER 1	INTERNATIONAL COMMERCIAL LOAN	1
§ 1	Commercial Loan and Loan Agreement	3
1.1	Commercial Loan	3
1.2	Loan Agreement	4
§ 2	Facility and Interest	4
2.1	Facility	4
2.1.1	Term Loan	4
2.1.2	Revolving Loan	5
2.1.3	Other Sub-Facility	5
2.2	Interest and Fees	6
2.2.1	How Interest Works?	6
2.2.2	LIBOR and Margin	7
2.2.3	From LIBOR to SHIBOR	9
2.2.4	Fixed Interest Rate and Variable Interest Rate	10
2.2.5	Calculation and Payment of Interest	10
2.2.6	Cost and Fees	11
§ 3	Conditions Precedent and Notice of Drawdown	16
3.1	What Are Conditions Precedent?	16
3.2	Legal Features of Conditions Precedent	20
3.3	Purposes of Conditions Precedent	20
3.4	Notice of Drawdown	21
§ 4	Representations and Warranties	22
4.1	What Are Representations and Warranties?	22
4.2	Aspects Covered by Representations & Warranties	23
§ 5	Special Covenants	27
5.1	Negative Pledge Clause	29
5.1.1	Negative Pledge Clause in Legal Sense	29
5.1.2	Negative Pledge Clause in Functionality	30
5.1.3	World Bank Negative Pledge Clause	32
5.1.4	Do Basic Negative Pledge Clauses Create Security Interests?	34
5.2	<i>Pari Passu</i> Clause	36
5.3	Financial Covenants	37

5.4	Restrictions on Disposals of Assets Clause	38
5.5	Waiver of Sovereign Immunity	38
5.6	Evidence Clause of Indebtedness	39
§ 6	Events of Default and Default Remedies	39
6.1	Events of Default	39
6.2	Typical Clauses of Events of Default	41
6.3	Consequences of the Occurrence of Events of Default	44
6.4	Default Remedies	44
§ 7	Miscellaneous	45
7.1	Dispute Resolution Provisions	45
7.1.1	Generality	45
7.1.2	Arbitration	46
7.1.3	Jurisdiction	46
7.2	Governing Law	47
CHAPTER 2	SYNDICATED LOAN	49
§ 1	Generality	51
1.1	What Are Syndicated Loans?	51
1.2	Reasons for Syndicated Loans	52
1.2.1	Benefits of Syndicated Loan for Borrowers	52
1.2.2	Benefits of Syndicated Loan for Lenders	53
1.3	Legal Structure of Syndicated Loan	54
1.4	The Syndication Process in Outline	55
1.5	Typical Case of Syndicated Loan	57
1.5.1	Shanghai Disney Resort: Overview	58
1.5.2	Ownership: Main Investors of the Shanghai Disney Resort	59
1.5.3	Business and Financing Schedule	60
1.6	Club Loan: Special Syndicated Loan?	60
§ 2	Legal Issues in Initial Stage of Syndicated Loan	61
2.1	Mandate	62
2.2	Functions of Arranger	62
2.2.1	Primary Functions of Arranger	62
2.2.2	Multiple Arrangers in Same Syndicated Loan	63
2.3	Information Memorandum	63
2.3.1	Is Information Memorandum Prospectus?	64
2.3.2	Arranger's Liability Because of Defect Information Memorandum	64
2.3.3	Avoidance of Arranger's Liability	67

2.3.4	Effect of Liability Disclaimers	68
2.4	Offer and Acceptance of Loan	68
2.4.1	Offer of Loan to the Borrower	68
2.4.2	Acceptance by Participants	69
2.5	Payment of Arranger Fees by Borrower	69
2.6	Does Arranger Owe Fiduciary Duties to Participants?	70
2.6.1	Fiduciary Duties under Common Law: Theory and Practice	70
2.6.2	View Denying Fiduciary Duties	71
2.6.3	“Fiduciary” Academic View	72
§ 3	Legal Issues Based on Syndicated Loan Agreement	74
3.1	Severalty	74
3.1.1	Several Obligation and Commitments of Participants	74
3.1.2	Defaulting Lender Issues	75
3.2	Majority Rule	76
3.2.1	Issues Decided by Majorities	76
3.2.2	Cases Accepted Majority Rule	77
3.2.3	Could Participant Claim Contrary Wishes of Majority?	78
3.2.4	Criticism on Majority Rule	79
3.3	Unanimous Consent	80
§ 4	Responsibilities and Roles of Agent Bank	80
4.1	Agent Bank: Partner to the Borrower	81
4.2	Agent Bank: Agent of Participants	81
4.3	Rights and Obligations of Agent Bank	82
4.4	Roles of Agent Bank	83
4.4.1	Certification of Compliance with Conditions Precedent	83
4.4.2	Payment Services	85
4.4.3	Monitoring Loan Covenants	86
4.4.4	Duty to Act on Occurrence of Default	87
4.5	Limitation on Liabilities of Agent Bank	89
4.5.1	Disclaimer of Liabilities	89
4.5.2	Ostrich Clauses	90
4.6	Fees and Expenses Paid to Agent Bank	91
CHAPTER 3	LOAN PARTICIPATION AND ASSIGNMENT	93
§ 1	Generality	95
1.1	What Is Loan Participation?	96
1.1.1	Borrower-Lead Bank Relationship	97
1.1.2	Lead Bank-Participant Relationship	98

1. 1. 3	Borrower-Participant Relationship	104
1. 1. 4	Loan Participation v. Syndicated Loan	104
1. 2	Why Choose Loan Participations?	105
1. 3	Retention by Lead Bank Risk of Loss	107
§ 2	Participations: Securities or Loans?	107
2. 1	Are Participations Securities?	109
2. 2	Participations Denied as Securities by Leading Cases	112
2. 3	Legal Features of True Participations	115
§ 3	Transfer Forms of Loan Participation	115
3. 1	Assignment	115
3. 2	Sub-Participations	116
3. 3	Novation	118
3. 4	Risk Participations	119
3. 5	Restrictions on Transfer of Loan Interest	120
§ 4	Classification of Loan Participations	121
4. 1	Transfer of Participation as Loan	122
4. 2	Transfer of Participation as Sale	124
4. 3	Transfer of Participation as Trust	126
4. 4	Proposal on Model Participation Agreement	129
§ 5	Mechanism for Participants Protection	130
5. 1	Reducing Legal Risk of the Participant from Legal Documents	130
5. 2	Participant's Remedies of Claim Against the Lead	135
5. 2. 1	Remedies Based on Lead's Misrepresentation Fraud	136
5. 2. 2	Remedies Based on Lead's Liable for Intentional Fraud	137
5. 2. 3	Remedies Based on Lead's Liable for Breach of Fiduciary Duty	138
5. 2. 4	Remedies Based on Fraud Claim Under Securities Law	139
CHAPTER 4	PROJECT FINANCE	140
§ 1	The Elaborate Structures	142
1. 1	What Is Project Finance?	142
1. 2	Project Company	145
1. 2. 1	Basic Forms for Ownership of Project	146
1. 2. 2	Social Responsibility of the Project Company	148
1. 3	Other Participants of the Project Finance	151
1. 3. 1	Host Government and Its Concession	152
1. 3. 2	Sponsor	153

1.3.3	Lenders	154
1.3.4	Construction Contractor	156
1.3.5	Operator	156
1.3.6	Product Offtaker	157
1.3.7	Feedstock Supplier	157
1.4	Law and Practice of Project Finance in China	157
1.4.1	Development of BOT Project Finance in China	157
1.4.2	Regulations and Rules of the BOT Project Finance in China	158
1.4.3	Laibin B Power Station BOT Project Finance	160
§ 2	Capital Structure of the Project Finance	163
2.1	Various Sources for Financing	163
2.2	Equity and Debt Ratios	164
2.2.1	Equity	164
2.2.2	Debt	165
2.3	The Advantages of the Project Finance	166
2.3.1	Limited Recourse Debt Financing	166
2.3.2	Highly Leveraged Debt	169
2.3.3	Off-Balance-Sheet Treatment	169
§ 3	Risk Identification and Allocation	170
3.1	Overview of Various Risks	170
3.1.1	Classification of Risks	170
3.1.2	Allocation of Risks	171
3.2	Political Risks	172
3.2.1	What Are Political Risks?	173
3.2.2	Political Risk Insurance	175
3.2.3	Political Risk Insurance Providers	175
3.3	Legal Risks	179
3.3.1	Changes in Law	180
3.3.2	Legal System Status	180
3.4	Risks During Construction	181
3.5	Risks During Operation	182
3.5.1	Operating Risks	182
3.5.2	Market Risks	182
3.5.3	Currency Devaluation Risks	183
§ 4	Major Contracts of the Project Finance	184
4.1	Project Finance Contract	186
4.2	Project Collateral Arrangements	187

4.2.1	Pledge on Project Company's Shares	188
4.2.2	Pledge on Project Company's Receivables	188
4.2.3	Floating Charge on Whole Project's Assets	189
4.2.4	Setting of Step-In Rights	191
4.2.5	Assignment of Rights	193
4.2.6	Other Project Collateral Arrangements	193
4.3	Concession Contract	194
4.4	Construction Contract & Completion Guarantee	194
4.4.1	Construction Contract	194
4.4.2	Completion Guarantee	196
4.5	Operating Contract	196
4.6	Product Offtake Contracts	197
4.7	Feedstock Supply Contracts	199
4.8	Insurance Contract	199
CHAPTER 5 ASSET SECURITIZATION		201
§ 1	Generality of Asset Securitization	203
1.1	What Is Asset Securitization?	203
1.2	Reasons for Development of Asset Securitization	205
1.3	Rate Is Lower than Commercial Loan?	206
1.4	Process of Asset Securitization	207
§ 2	Major Legal Subjects and Elements	209
2.1	Originator	209
2.2	Special Purpose Vehicle (SPV)	210
2.3	True Sale	210
2.3.1	Factors Affecting True Sale	211
2.3.2	True Sale Determination	212
2.3.3	Other Legal Requirements for Transfer of Assets	214
2.4	Bankruptcy Remote	215
2.4.1	Traditional Bankruptcy Attacks	215
2.4.2	Bankruptcy Remote Structure	216
2.5	Credit Enhancement	218
2.5.1	Third-Party Credit Enhancement	218
2.5.2	Internal Credit Enhancements	218
2.6	Rating Asset-Backed Securities	219
2.6.1	What Are Credit Rating Agencies?	219
2.6.2	Evaluation of General Credit Risk	221
2.6.3	Evaluation of Cash Flow and Collateral Valuation	221

§ 3 Securitized Assets: From Credit Revenues to Intellectual Property	221
3.1 Case of Ford Credit Securitization	222
3.1.1 How Ford Credit Earn Revenues?	222
3.1.2 Ford Shape-Shifting Asset-Backed Securities	223
3.2 Case of Bowie Bonds: Securitization of Intellectual Property	223
3.2.1 Expansion of Assets of Securitization to Intellectual Property	224
3.2.2 Bowie Bonds: the First Securitization of Music Copyrights' Future Royalties	225
3.2.3 David Pullman and "Pullman Bonds"	227
§ 4 Asset Securitization in China	229
4.1 Development of Securitization in China	229
4.2 Framework of China's Securitization Laws and Regulations	230
4.3 Rules About Majors Elements of Securitization in China	231
4.3.1 Originator of Asset-Backed Securitization	231
4.3.2 Credit Assets	232
4.3.3 SPV/Trustee	232
4.3.4 True Sale	232
4.3.5 Credit Rating	233
4.3.6 Issuance and Trading of Asset-Backed Securities	233
4.4 Case Analysis of Securitization of China Construction Bank	234
4.4.1 Introduction	234
4.4.2 Legal Structure	235
4.4.3 Key Participants	235
CHAPTER 6 LETTERS OF CREDIT	237
§ 1 Generality of Letters of Credit	239
1.1 What Is Letter of Credit?	239
1.1.1 As Instrument of Payment	243
1.1.2 As Sub-Facility of Loan	245
1.1.3 As Conditional Commitment	245
1.1.4 As Obligation Rather than Contract	246
1.2 Parties and Their Relationship	247
1.2.1 Parties Involving Letter of Credit	247
1.2.2 Legal Relationship Among Parties	250
1.3 Laws Applicable to Letter of Credit	254
1.4 Principle of Independence of Letter of Credit	256
1.4.1 Independent from Contract Between Beneficiary and Account Party	257
1.4.2 Independent from Relationship Between Issuer and Account Party	258
1.5 Types of Letter of Credit	258

1.6	Letter of Credit Process	261
§ 2	Strict Compliance	262
2.1	Principle of Strict Compliance	263
2.1.1	Strict Compliance Rule	263
2.1.2	Rule of Appearance	265
2.1.3	Justification for the Principle of Strict Compliance	266
2.1.4	Examination of the Documents	267
2.2	Different Interpretation of Strict Compliance Rule	268
2.2.1	Literal Compliance	269
2.2.2	Substantial Compliance	273
2.2.3	Opinions from the Banker, Importer and Exporter	275
2.3	Refusal of Letter of Credit Payment and Case of Voest-Alpine Trading	276
2.3.1	Introduction of the Case	277
2.3.2	Facts of the Case	277
2.3.3	The Court's Analysis	279
§ 3	The Fraud Exception Rule	280
3.1	What Are Fraud and Fraud Exception Rule?	282
3.1.1	Fraud: Exception from Principle of Independence	282
3.1.2	The Sztejn Case	284
3.2	Conditions for Application of Fraud Exception Rule	287
3.2.1	Fraud Committed by the Beneficiary	287
3.2.2	Established Fraud	288
3.2.3	Material Fraud	289
3.2.4	Clear and Obvious Fraud	289
3.3	Restriction of the Fraud Exception	290
3.3.1	Fraud Made by a Third Party	290
3.3.2	Does Breach of Contract Constitute a Fraud?	292
3.3.3	Does Soft Clause Constitute a Fraud?	293
3.4	Fraud Exception v. Breach of Warranty	294
§ 4	Uniform Customs and Practice for Documentary Credits	296
4.1	UCP and ICC Banking Commission	296
4.2	Background of UCP 600	299
4.3	Modification on Layout	299
§ 5	Choice of Law Rule for Letters of Credit	302
5.1	UCP as Governing Law	302
5.2	Choice of Law Rule Under the Convention	302

5.3	Choice of Law Rule Under Revised UCC Article 5	303
5.4	Conflicting Between UCP and UCC	305
CHAPTER 7 GUARANTEES FOR INTERNATIONAL FINANCIAL TRANSACTION		307
§ 1	Guarantee Under Common Law	310
1.1	What Is Guarantee?	310
1.1.1	Guarantee May Be Conditional	310
1.1.2	Guarantees May Be Limited and Indirect	312
1.1.3	Guarantees May Be Documentary	312
1.1.4	Guarantee May Be Primary or Secondary	313
1.1.5	True Guarantee	313
1.1.6	Parent Company Guarantee and Downstream Guarantee	314
1.2	Discharge of Guarantor	315
1.2.1	Implied Release and Variation of Underlying Principle Contract	315
1.2.2	Release of Collateral or Discharge of any Co-Guarantor	316
1.2.3	Failure to Perfect a Security Interest	317
1.2.4	Invalidity of the Principal Obligation	318
1.2.5	Anti-Discharge by Indulgence Clauses	318
1.3	Bond and Indemnity	321
1.3.1	Guarantee v. Bond	321
1.3.2	Guarantee v. Indemnity	322
1.4	Suretyship and Guaranty	323
1.4.1	Suretyship Agreements	324
1.4.2	Primary Liability of Surety	325
1.4.3	Creditor's Duty of Disclosure to Surety	327
1.4.4	Independent Legal Advice for Vulnerable Surety	328
1.4.5	Surety's Defenses and "Impairment of Suretyship" Doctrine	330
1.4.6	Guaranty Agreements	332
1.5	Interpretation of Guarantee and Case of Marubeni	336
§ 2	Demand Guarantees	339
2.1	Introduction	339
2.1.1	What is Demand Guarantee?	339
2.1.2	Risk Distribution Function of Demand Guarantee	342
2.1.3	Payment Guarantee in Form of Demand Guarantee	343
2.1.4	Model Form of the Agreement on Demand Guarantee	344
2.2	Independence Principle and Fraud Exception	346
2.2.1	Independence Principle of Demand Guarantee	346
2.2.2	Rationales Behind the Independence Principle	347
2.2.3	Fraud Exception of the Independence Principle	348

2.3	New Exceptions to the Independence Principle	350
2.3.1	Unconscionability	350
2.3.2	Illegality	354
2.4	Parties and Governing Law of Demand Guarantees	356
2.4.1	Parties Involved in the Demand Guarantee	356
2.4.2	The Governing Law of Demand Guarantees	356
§ 3	Performance Bond	357
3.1	Introduction	357
3.1.1	What Is Performance Bond?	357
3.1.2	A Simple Hypothetical	359
3.2	Form of Performance Guarantee	360
3.3	Interpretation of Performance Bond	362
3.3.1	Performance Bond as Guarantee	362
3.3.2	Performance Bond Given by Noncommercial Entities Interpreted as Conditional Bond	364
3.3.3	Performance Guarantee as On-Demand Bond	364
3.4	The <i>Edward Owen</i> Case	366
3.4.1	Fact	366
3.4.2	Court's Analysis and Decision	367
3.5	Performance Bond v. Letter of Credit	368
§ 4	Standby Letter of Credit	369
4.1	What Is Standby Letter of Credit?	369
4.2	The Main Uses of Standby Letters of Credit	371
4.3	International Rules for Standbys	372
4.4	Standbys v. Independent Guarantees	373
CHAPTER 8	LEGAL OPINION FOR INTERNATIONAL FINANCIAL TRANSACTION	376
§ 1	Introduction of Legal Opinion	378
1.1	What Is Legal Opinion	379
1.1.1	Legal Opinion to the Client/Lender	380
1.1.2	Third-Party Legal Opinions	381
1.1.3	Opinion not as Form of Insurance	383
1.2	Purpose of Opinion	384
1.2.1	For Condition Precedent Requirement	384
1.2.2	For Due Diligence Review	385
1.2.3	For Closing of a Transaction	385
1.2.4	For Comfort to the Parties	385
1.2.5	For Efficiency	386

1.3	Assumptions	386
1.4	Facts and Law	387
1.5	Due Diligence for Legal Opinion	389
§ 2	Form and Elements of Opinion	391
2.1	Recitation of Opinion	391
2.1.1	Description of Role of Counsel	392
2.1.2	Jurisdictional Limitations	392
2.1.3	Documents and Matters Examined	393
2.1.4	Specific Qualifications or Exclusions	393
2.2	Contents of Opinion	394
2.2.1	Due Incorporation and Qualification	394
2.2.2	Power and Authority	394
2.2.3	No Conflict	394
2.2.4	Binding Effect	395
2.2.5	No Litigation	395
2.2.6	Creation and Perfection of Security Interest	396
2.2.7	Mortgages	396
2.2.8	Governing Law	396
§ 3	Liability of the Opining Lawyer	397
3.1	Contractual Liability	397
3.2	Liability to Third-Party Beneficiary	399
3.2.1	Intended Third-Party Beneficiary and Duty of Care	399
3.2.2	Fiduciary Duty to a Third-Party Beneficiary	401
3.3	Liability to Adverse Party	402
3.4	Liability in Tort of Negligence	403
3.4.1	Release of Privity for Negligent Misrepresentation Claim	405
3.4.2	Third Party's Justifiable Reliance	408
3.5	Liability in Tort of Fraud	410
3.5.1	Fraud or Omitting Material Fact from Disclosure	410
3.5.2	False Information as Misrepresentations	414
3.5.3	Material Misstatements of Fact	414
3.6	Could Disclaimers Exempt Attorney from Professional Liabilities?	417
§ 4	Experiences Refined from Cases and Practice	417
4.1	Rules of Legal Opinions	417
4.2	How Legal Opinions Form and Work	419
4.3	How to Reduce Professional Liability	420
4.4	Sample of Legal Opinions	422

CHAPTER 1

INTERNATIONAL COMMERCIAL LOAN

Chapter Outline

§ 1 Commercial Loan and Loan Agreement

- 1.1 Commercial Loan
- 1.2 Loan Agreement

§ 2 Facility and Interest

- 2.1 Facility
 - 2.1.1 Term Loan
 - 2.1.2 Revolving Loan
 - 2.1.3 Other Sub-Facility
- 2.2 Interest and Fees
 - 2.2.1 How Interest Works?
 - 2.2.2 LIBOR and Margin
 - 2.2.3 From LIBOR to SHIBOR
 - 2.2.4 Fixed Interest Rate and Variable Interest Rate
 - 2.2.5 Calculation and Payment of Interest
 - 2.2.6 Cost and Fees

§ 3 Conditions Precedent and Notice of Drawdown

- 3.1 What Are Conditions Precedent?
- 3.2 Legal Features of Conditions Precedent
- 3.3 Purposes of Conditions Precedent
- 3.4 Notice of Drawdown

§ 4 Representations and Warranties

- 4.1 What Are Representations and Warranties?
- 4.2 Aspects Covered by Representations & Warranties

§ 5 Special Covenants

- 5.1 Negative Pledge Clause
 - 5.1.1 Negative Pledge Clause in Legal Sense
 - 5.1.2 Negative Pledge Clause in Functionality
 - 5.1.3 World Bank Negative Pledge Clause