

COMMERCIAL LENDING
LAW AND DOCUMENTATION
IN THE UNITED STATES

美国商业贷款 法律实务操作指南

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江西南丰人，深圳大学政治经济学硕士。专注于法律和财经类翻译超过 10 年。为提高法律翻译技能，曾自学完成法律课程学习，获得北京大学法律本科学历。与尹颖律师共同将本书的英文原稿译为中文。

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Dedication

献 辞

This book is based on a course that I teach in the Boston University Law School's Graduate Program in Banking and Financial Law. Ying Yin, once my student and now my friend and colleague, had the idea to expand my lecture materials into a book. Ying and I believe that as China increasingly asserts itself in international trade and investments, Chinese banks will have many opportunities to provide US dollar funding to the US operations of Chinese companies and the US companies in which Chinese investors are investing. This book is intended (1) to familiarize Chinese lawyers, bankers and business men and women with the legal and regulatory framework within which US commercial lending is conducted; and (2) to present and explain the key provisions typically found in US commercial loan agreements.

这本书是根据我在波士顿大学法学院“银行业与金融法”研究生项目中教授的一门课程所著。尹颖,作为我曾经的学生以及现在的朋友和同事,提议将我的课程讲义扩展成为一本书。尹颖和我相信,随着中国越来越多地参与到国际贸易和投资中来,中国的银行将有很多机会为中国公司在美国的运营以及中国投资者所投资的美国公司提供美元融资。这本书旨在:(1)使中国的律师、银行家和企业家长们熟悉与开展美国商业借贷相关的法律和监管体系;(2)展现和诠释美国商业贷款协议中常见的关键条款。

I dedicate this book to my wife of thirty-six years, Dr. Margaret Ann Farrell Daingerfield. She is the love of my life and the perfect companion for this very imperfect man.

谨以本书献给已陪伴我 36 年的太太——玛格丽特·安·法雷尔·丹杰菲尔德博士。她是我的终生挚爱,也是我这个并不十分完美男人的完美伴侣。

Richard Daingerfield

理查德·丹杰菲尔德

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致 谢

I would like to thank Qi Zhou, who is dedicated in translating legal and financial documents during the past ten years, for her input in the Chinese translation.

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感谢白晨航、张一鸣、苏蒂西娜·特拉维蒂、詹娜·费格雷乌斯、特里·L. 盖革、罗琳·E. 卡普兰和尼娜·S. 何雷本库、程岳、杨曼青、王硕在这本书成书期间给予的宝贵帮助。

I dedicate this book to my father, my mother, my mother-in-law, my husband and my child for their love, encouragement and support.

我把这本书献给我付出了爱、鼓励和支持的我的父亲、我的母亲、我的婆婆、我的丈夫和我的孩子。

Ying Yin

尹 颖

Preface

序

This book is important for a number of reasons, not the least of which is that it is the first of its kind as the collaboration between a graduate and a professor of the Graduate Banking and Financial Law LL. M. Program at Boston University. The faculty and students of the Graduate Banking Program are practicing lawyers who often lack the time to focus on research or the publication of legal books or treatises. That is why the effort of Ms. Ying Yin, in collaboration with Professor Richard Daingerfield, is such an important event in the 30-year history of the Banking Program. It is an extension of what happens in the classroom, a series of conversations between a senior lawyer who has spent many years practicing in a particular financial services area and one of a group of more junior lawyers who will be involved in advancing this area of law to new forms of transactions and across a broader global reach. It is a collaboration in which the questions and diverse backgrounds of the junior lawyers are as important as the knowledge and experience of the senior lawyer. This work is important as an indication that the collaboration among lawyers participating in the Graduate Banking Program need not be limited in time to the time before graduation. It can continue to flourish for as long as graduates and faculty continue to converse and collaborate.

这本书之所以重要有许多原因,但绝不仅仅是因为这本书开创了波士顿大学法学院银行业与金融法硕士项目中硕士研究生与教授合作的先例。银行业与金融法硕士项目的老师和学生都是执业律师,他们通常都没有时间来关注研究或者出版法律书籍或论文。这也是为什么尹颖女士与理查德·丹杰菲尔德教授的合作成为银行业与金融法研究生项目30多年历史中一件极为重要的事件的原因。这是就课堂上所学知识,一位多年从事某一特定金融服务领域的资深律师与一群即将致

力于推动该法律领域采用新的交易形式以及横跨更为广阔的全球范围且相对初级的律师中的一员之间的一系列对话的延伸。在这种合作中,这些初级律师们所提出的问题以及他们的不同背景与资深律师的学识和经验同样重要。这本书是个重要的标志,表明参加银行业与金融法硕士项目的律师之间的合作在时间上不必局限于毕业之前。只要毕业生和学校继续对话和合作,一样可以继续开花结果。

In addition, this book, as a description of the practical side of U. S. commercial lending law and loan documentation, is important substantively. It is a practical publication, useful to lawyers and business people to understand the area. Mr. Daingerfield and Ms. Yin have produced a work that is consistent with the Graduate Banking Program's emphasis on useful legal tools rather than more abstract theory. In addressing a financial services area that seems likely only to increase in importance for both China and the United States, Mr. Daingerfield and Ms. Yin offer a structure that will not only inform their intended audience but provide an impetus for additional efforts to enhance a practical approach to teaching financial services law.

此外,这本书作为美国的银行商业信贷法律和文件在实践领域的描述,实质上是很重要的。这是一本实用性的出版物,对律师和商务人士理解这一领域很有帮助。理查德·丹杰菲尔德先生和尹颖女士编著的这本书秉承银行业与金融法硕士项目着重于有用的法律工具而非抽象理论的理念。在阐述金融服务这个对中国和美国来说都只可能越来越重要的领域时,理查德·丹杰菲尔德先生和尹颖女士提供了一种构想,这种构想将不仅面向他们的目标读者,而且还提供一种动力来付出额外努力以改进在金融服务法教学中的实践方法。

Finally, this is a work with importance that exceeds the number of its pages because it represents a unique and important linking of U. S. academic learning in LL. M. programs to the real world practice of law. It allows the benefit an individual student receives in extended conversations with experienced faculty to be shared with a range of colleagues. As one of the authors and an experienced Chinese lawyer, Ms. Yin has the knowledge, legal skills and language proficiency to interpret these conversations so as to allow this technical commercial lending information to be more readily understood by lawyers, lenders and business people in China. Quite apart from the substance, this is a very promising approach to expanding legal financial services knowledge between two

leading nations in this area. Mr. Daingerfield and Ms. Yin through their dedication, talent and effort have produced a unique and useful book that brings honor to them and to the Graduate Banking Program at Boston University.

最后,这本书的重要性已经超越了其页数,因为它代表着一种独特而又重要的联系,将美国法学硕士项目中的学术知识与真实世界中的法律实践相连接。这本书也使单个学生在与资深律师的深入交谈中的收获可以与众多同行一起分享。作为本书的作者之一以及一名经验丰富的中国律师,尹颖女士具有诠释这些对话的知识、法律技能以及语言能力,以使这些商业借贷的技术领域信息更易于被中国的律师、贷款人和商务人士理解。抛开这个事实不提,这本书也开辟了在这一领域中两个重要国家之间传播法律金融服务知识的一种新途径。理查德·丹杰菲尔德先生和尹颖女士通过他们的专注、才智和努力撰写了这一本独特又实用的书籍,为他们带来了荣誉,也为波士顿大学的银行业与金融法研究生项目带来了荣誉。

James Scott

Director

Graduate Program in Banking and Financial Law

Boston University School of Law

詹姆斯·斯科特

主任

银行业与金融法硕士项目

波士顿大学法学院

Introduction

前言

1 Process and Languages

1 成书过程与语种

The *Commercial Lending Law and Documentation in the United States* starting from a practice perspective, will help the readers understand how financing may be made through the domestic banks of the U. S. The book's manuscript in English was jointly compiled and wrote by Mr. Richard Daingerfield, the consultant on the American laws to Guantao Law Firm, an American attorney and banker who is teaching in the Graduate Program in Banking and Financial Law of Boston University School of Law, and his student, Ying Yin, a Partner in Guantao Law Firm. To make the reading easier and more convenient for most domestic readers, Ying Yin, attorney-at law and her working partner Ms. Qi Zhou translated the manuscript into Chinese (Mandarin). This book-to-be-published will be presented in English and in Chinese translation, with English interspersed with Chinese phrase for alternating paragraphs.

《美国商业信贷法律实务操作指南》从实务角度出发,帮助读者了解如何向美国境内的银行融资。这本书的英文原稿系由观韬中茂律师事务所美国法律顾问、执教于美国波士顿大学法学院银行业与金融法(the Graduate Program in Banking and Financial Law)的美国律师与银行家理查德·丹杰菲尔德(Richard Daingerfield)先生与其学生、观韬中茂律师事务所合伙人尹颖律师共同编著;为便于广大国内读者阅读,尹颖律师与搭档周琦女士将该英文原稿翻译为中文。本书此次发行的版本,为中英文双语版本,并且采用英文与中文穿插的方式,即在每一段英文原稿的下方放置该段落的中文译文。

2 Characteristics of This Book

2 书籍特点

Besides demonstrating a complete process of a loan's life cycle(including the external process,i. e. ,the transaction process between the borrower and the lender,and the internal process,i. e. ,the lender's internal approval process for the potential loan) ,case analyses and discussions in a horizontal way,the book is strongly highlighted for its article-by-article analysis of the commercial lending documents. Among them,a particularly prominent feature is the article-by-article analysis of a U. S. syndicated loan agreement that was made in the 1980s and has been used for decades and amended from time to time. The analysis covers the 87 articles in the whole 98 articles under the agreement, and to make the readers understand the connections of the concepts set forth in Article 1 Definitions and their applicable articles,explicit analysis of such concepts is made in the applicable articles based on the context. In terms of analytical method,such article-by-article analysis is seldom in the professional publications in China;in terms of the analytic process and content,the analysis of the U. S. banks' lending documentations,especially the U. S. syndicated loan agreement,shows the panoramic feature but also the detailed features of the U. S. bank loans. Mr. Richard Daingerfield and Ying Yin attorney-at-law wish that such demonstration will be helpful to the readers including the top management of Chinese-funded enterprises that may have business relationships with America's banks or the banks' branches in the U. S. ,the domestic bankers and bankers located in the U. S. of Chinese-funded banks,and the Chinese lawyers who are dedicating in in the investment and financing transactions between China and the U. S. parties.

除了横向展示一个贷款周期的完整流程(包括外部流程,即借款人与贷款人之间的交易流程,以及内部流程,即贷款人对潜在贷款的内部审核流程)、案例分析讨论等特点外,本书最大的特点是对商业贷款文件的逐条分析。其中尤为突出的,是对一份制定于20世纪80年代,并经多年沿用与不时修订的美国银团贷款协议所做的逐条分析。本书的分析覆盖了整部协议98个条款中的87个条款,对该协议定义条款所定义的概念,也在其所主要适用的条款中,根据上下文为读者做了细致的分析。从分析方法而言,这种逐条分析方法,在国内专业性出版物上较为少见;就分析的过程和内容而言,对美国银行贷款文件尤其是美国银团贷款文件的分析,展现出

美国的银行贷款的全景特点与细节特色。理查德·丹杰菲尔德先生与尹颖律师期待,这种展现能够对在实务工作中有可能与美国的银行或者在美的银行分支机构发生业务关系的中资企业的高层管理者、中资银行在国内及美国境内的银行家,以及中美投融资交易中的中方律师等读者有所助益。

3 Outline of This Book

3 基本内容

This book consists of six chapters, covering the main aspects of the U. S. banks' commercial lending:

这本书共有六章,覆盖了美国银行商业信贷的主要方面:

Chapter One: Overview. This chapter introduces the primary loan facilities, the basic types of lenders, the complete cycle of a commercial loan (referred to as "the life cycle of a commercial loan" in this book) and the main characteristics in various segments, states the sources of law in the U. S. (including enacted law and caselaw) and elaborates the fundamental documentations in this cycle.

第一章:概述。介绍了主要的贷款工具、贷款人的基本类型、商业贷款的完整周期(本书称为商业贷款的生命周期)及其各个环节的主要特点,阐述了本书主要援引的美国法律渊源(包括制定法与判例法),并详述了商业贷款的主要文件。

Chapter Two: Early Stage. This chapter is divided into three sections. Section One is about how a borrower finds and preliminarily chooses lender(s) in the early stage of a commercial loan (mainly refers to the credit shopping and negotiation in pre-closing phase) and the importance of the negotiation in faith between a borrower and a lender. Section Two describes the early-stage documents, namely, letters of intent, term sheets, commitment letters and confidentiality agreement, and makes "blanket" analysis from the headline to the signature of a sample letter of intent and a sample mutual confidentiality agreement (in other words, article-by-article analysis). Section Three introduces the internal approval process of banks for potential loan transactions.

第二章:初期阶段。本章分为三节。第一节介绍了在商业贷款初期阶段(主要是指交割前的接触阶段和过渡阶段)借款人如何寻找并初步确定贷款人,以及借贷

双方诚信磋商的重要性。第二节则是对初期阶段的文件,即意向书、条款清单、承诺函和保密协议做了介绍,并对一份意向书范本和一份保密协议范本进行了从标题到落款的“地毯式”分析(换言之,逐部分逐条分析)。第三节则介绍了银行就潜在贷款交易的内部审批流程。

Chapter Three: Credit Agreement. As mentioned above, the credit agreement employed in this chapter is a sample syndicated loan agreement that's quite typical in commercial lending sector of the U. S. This agreement comprehensively covers the basic and main considerations of a syndicated loan with a completed structure, applies typical loan facilities(such as term loan, revolving loan, letters of credit as a sublimit of revolving loan), fluctuating rate and LIBOR, and establishes a well-organized mechanism of yield maintenance and protection. Analysis to articles and definitions of this agreement does not merely focus on concerns of each article in perspective of lenders, such as the determination, selection and conversion of interest rate, and the burden of taxes, but also covers the origins or progress of significant systems related to the concerns, such as the marketization of interest rates in the U. S. , and to the adjustment of LIBOR's governing body caused by the LIBOR scandal, as well as the summary and analysis to the internal mechanisms of a credit agreement, such as the analysis of yield maintenance mechanism and the three-phase breach system.

第三章:信贷协议。有如前述,本章使用的信贷协议是美国国内商业信贷领域相当有代表性的一份银团贷款协议模板。该协议结构完整,全面覆盖了银团贷款中基本和主要的考量点,应用了典型贷款工具(比如定期贷款、循环贷款以及作为循环贷款次级限额的信用证)、浮动利率与 LIBOR,并设置了周密的贷款人收益维持和保障机制。对这份协议条款和定义的分析,则不仅是站在贷款人立场分析每个条款的考量点,如利率的确定、利率的选择与转变、税费的承担等,也对相关重要制度的源起或者变化做了分析,如对美国利率市场化过程的介绍、对 LIBOR 丑闻导致的 LIBOR 管理机构调整的介绍等,还有对信贷协议内在机制的归纳和分析,如对收益维持机制的分析、对违约体系三阶段的介绍等。

Chapter Four: Syndicated Loan. The most essential characteristics of a syndicated loan compared with a bilateral loan comprise this chapter. It intuitively and explicitly states the important mechanisms of syndicated loans and introduces the development of

syndicated loans in the U. S. loan market growth.

第四章:银团贷款。本章将银团贷款相较于双边贷款而言最为本质的特点提炼出来,独立成章,直观、鲜明地阐述了银团贷款的重要机制,并对银团贷款在美国的发展进程做了介绍。

Chapter Five: Contractual Security. As a mechanism for the secondary sources of repayment of commercial loans, contractual securities have their own icons. This chapter mainly introduces the collateral and guaranties of personal property, while the mortgage over real property and hypothecation are also involved.

第五章:合同担保。作为设立和确保商业信贷第二还款来源的机制,美国的合同担保制度自有其特色。本章主要对动产抵押和保证做了介绍,对不动产按揭、抵押契约等制度也有涉及。

Chapter Six: Interest Rate Derivatives: A Method to Protect Interest Rate. An interest rate protection contract is one of the measures taken by lenders or imposed on a borrower for purpose of mitigating the risks to the lender's loan proceeds due to the interest rate fluctuations. Interest rate swap is a most commonly used measure and the specific introduction on it is made in this chapter.

第六章:利率衍生工具:一种保护利率的方法。利率保护合同是贷款人为降低其贷款收益受利率波动因素影响的风险,而采取或者施加于借款人的保障措施之一。利率掉期为其中最为经常使用的措施。本章对此做了有针对性的介绍。

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