

*Law and Practice of
International Finance*

Comparative Law of Security and Guarantees

PHILIP R WOOD



Sweet & Maxwell

LAW AND PRACTICE OF INTERNATIONAL FINANCE

COMPARATIVE LAW OF SECURITY AND GUARANTEES

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LAW AND PRACTICE OF INTERNATIONAL FINANCE

SERIES SUMMARY

Comparative Financial Law

This work classifies and provides a snap-shot summary of financial law in nearly all the jurisdictions of the world – more than 300 of them. There are also chapters on the conflict of laws governing financial contracts and on jurisdiction on a comparative basis, as well as a comparative study of money transfers and payment systems. The book contains the texts of European conventions on contractual applicable law and on jurisdiction.

Principles of International Insolvency

An advanced study of substantive bankruptcy law in the major jurisdictions of the world in the context of international financial transactions. The work contains a classification of global jurisdictions and comparative studies of the law of preferences, of trusts and custodianship, of the impact of insolvency on contracts, of judicial reorganisation proceedings, of the liabilities of corporate directors and shareholders on insolvency, of lender liability, the conflict of laws of insolvency, and the law and practice of private restructuring agreements and work-outs.

International Loans, Bonds and Securities Regulation

This work covers term loan agreements, loan syndications, loan transfers and participations, bond issues (as well as convertible issues and issues of eurocommercial paper and medium term notes) and includes a survey of the duties of syndicate agents and the review of bond trustees and bondholder representation on a comparative basis. There are several chapters on international securities regulation together with a summary of bank regulation and chapters on legal opinions. There are outline summaries of documents, precedents and advice on negotiation.

Comparative Law of Security and Guarantees

This work contains an international and comparative survey of the law of security, including floating and universal business charges, security over contracts and receivables, charge-backs, security over investment securities including those held by custodians such as Euroclear, a comparative study of ship and aircraft finance, and a review of guarantees, standby letters of credit, comfort letters and the like. There are check-lists, summaries and precedents.

Title Finance, Derivatives, Securitisations, Set-off and Netting

This work comprises a review of title finance, including finance leases and sale and repurchase agreements, chapters on the techniques of securitisation as well as country notes, a comparative study of set-off and netting including a summary of the netting laws of the world's major jurisdictions, and finally a review of swaps and derivatives. The work contains summaries of documents.

Project Finance, Subordinated Debt, and State Loans

This work contains a review of the techniques and structures for project finance internationally, chapters on subordinated debt including mezzanine finance and subordinated capital issues, and a detailed review of the law and practice of state loans, sovereign immunity, state insolvency, state rescheduling agreements, state succession, state recognition and lending to international organisations. There are extensive outlines of project finance documentation, and check-lists and precedents in relation to subordinated debt and state loans.

COMPARATIVE LAW OF SECURITY AND GUARANTEES

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LAW AND PRACTICE OF INTERNATIONAL FINANCE

**COMPARATIVE LAW OF
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To my wife Marie-elisabeth, my twin sons
John Barnaby and Richard,
my daughter Sophie and my son Timothy

PREFACE

This book is one in a series of six works on international financial law which, taken together, are the successor to my *Law and Practice of International Finance* which was published in 1980 and which was reprinted eight times.

The works now cover a much broader range of subjects, with substantial additions in the fields of comparative law, insolvency, security, set-off, payments, and title finance, as well as specialist subjects like netting, securitisations and swaps and derivatives. But the works have the same objectives as the original book. However great a gap there may be between the aim and the actuality, the objectives I have sought to achieve are to be practical as well as academic, to provide both a theoretical guide and legal source-book as well as a practitioner's manual, to be international, to provide serious comparative law information, to get to the point as quickly as possible, to simplify the difficulties, to find the principles underlying the particularity, to inform, and, most of all, to be useful.

The six works are separate but they are nevertheless related. Together the books are intended to form a complete library for the international banking and financial lawyer, as well as for specialists in related areas such as insolvency, leasing, and ship and aircraft finance. The topics covered by each volume are summarised on the inside of the front cover.

These books offer what I hope is a fundamentally new approach to comparative law in this area and, for the first time perhaps, provide the essential keys to an understanding of the world's jurisdictions, the keys to unlock the dark cupboard of financial law so that the light may shine in. These keys are not merely functional; they are also ethical and they are driven by history. The ideas are really quite simple, once discovered, but this should not obscure the difficulty of their application to the variety of circumstances. The core of the first book, entitled *Comparative Financial Law*, is a classification and snap-shot of virtually all the jurisdictions in the world – more than 300 of them – according to various financial law criteria. These criteria are developed in succeeding books in the series and applied to particular transactions. I believe that this also is the first time that a classification of this type has been done in this detail; but it has to be done because comparative law is no longer an academic luxury: it is a practical necessity if we are to have an orderly international legal regime.

My hope is that my voyage of discovery into what is really going on in world financial law will help to mitigate international legal surprises and legal risks and, in the wider context, that jurisdictions will be better

equipped to make essential choices as to what their legal systems should achieve. This is particularly important in view of the fact that at least 30 per cent of the world's population live under legal systems which are still emerging and that the remainder live in jurisdictions divided into camps which often do not agree on basic policies. There is no reason why we should not agree on the basic policies: we do not have to have a muddle. The law is our servant, not our master. It must set us free, not tie us down. It must satisfy our sense of justice.

This book on the comparative law of security and guarantees is an attempt to sort out the (dangerous) international shambles which pervades this area of the law – an area which is of increasing importance in global financial transactions. Thus financial trading by a single institution can be collateralised on investment securities from 40 or 50 jurisdictions quite commonly. But jurisdictions differ diametrically in their attitude to security and I hope that this work will help to identify what the problems are so that we can do something about them. To achieve this, I have kept to the high road so that the points are not obscured by thickets of detail. The work also contains a comparative survey of the law of ship and aircraft finance. Ship finance in particular has played a major role in the development of the comparative law of security because the asset roams the world. In addition there is a study of guarantees and the like.

The books also contain lists of about 250 research topics in total which might be appropriate for further research and which I hope will be useful to prospective writers.

I am acutely conscious of the fact that, in writing about legal systems other than my own (which is England), I will often have committed some real howlers and I hope that my foreign colleagues will be tolerant of my ignorance. Obviously one must always confirm the position with competent local lawyers.

As regards style, I have endeavoured to be as economical as possible in these works. The citation is selective: there are now millions of cases and it is hopeless to try and list even a proportion of them. I am easily terrorised by footnotes and therefore, if material is good enough to go in the footnotes, it is good enough to go in the text: as a result there are no footnotes in these works. At least one does not have to read the text in two places at once. Table of cases and statutes seemed less sensible in a work endeavouring to cover hundreds of jurisdictions where there is an avalanche of names and numbers and dates and acts and statutes and decrees, and, in view of this, I decided to omit them.

I have endeavoured to reflect the law roundabout the middle of 1994 based on the international materials then available to me, although some subsequent changes were introduced in the course of publication.

Philip R Wood
One New Change
London

Request for Information

Works on the law in the jurisdictions of the world must rely heavily on information from private sources. With a view to improving the information in any subsequent editions there may be, I would be very pleased to receive papers of all kinds on subjects covered by this and other works in this series – seminar papers, essays, articles, client briefings by law firms, memoranda, notices of book publications, and the like. Material should be sent to me at the following address:

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I owe to many a debt of gratitude in the help they gave me in preparing this work.

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None of the above is of course responsible for the defects in this work.

I am most grateful to my secretary Sue Wisbey and to the Allen & Overy word processing department and checkers who laboured so magnificently to produce this work.

I am thankful to my publishers for their hard work and patience in bringing this work – and the other books in this series, to fruition and also for their support through all the years.

My brother John, my sister Melanie and my mother all encouraged me and were tolerant of my efforts.

My late father Leslie Wood, who was also a lawyer, first inculcated in me a fascination for the law while I was a boy in Northern Rhodesia, now Zambia.

Finally, I owe an enormous debt to my wife and children and can only express my affection for them by the token of dedicating this book to them.

ABBREVIATIONS

ABGB	Austrian General Civil Code
Art	Article
BA	Bankruptcy Act
BC	Bankruptcy Code
BGB	German Civil Code
BL	Bankruptcy Law
c	chapter (of laws)
CC	Civil Code
CCP	Code of Civil Procedure
CO	Code of Obligations
ComC	Commercial Code
Conflicts Restatement	Restatement of the Law, Conflict of Laws 2d, by the American Law Institute
Dicey	Lawrence Collins (general editor), <i>Dicey and Morris on the Conflict of Laws</i> (12th ed 1993) Sweet & Maxwell
EISO	Philip Wood, <i>English and International Set-off</i> (1989) Sweet & Maxwell
IA	Insolvency Act
ICSID	International Centre for the Settlement of Investment Disputes
IR	Insolvency Rules (England)
Mann, Money	FA Mann, <i>The Legal Aspect of Money</i> (5th ed 1992) Clarendon Press, Oxford
Ord	Order
PILA	Private International Law Act 1987 (Switzerland)
Restatement	Restatement of the Law by the American Law Institute
RSC	Rules of the Supreme Court (England)
s	section
Sched	Schedule
UCC	Uniform Commercial Code (United States)
ZPO	Code of Civil Procedure (<i>Zivilprozessordnung</i>)
Zweigert/Kötz	K Zweigert and H Kötz, <i>An Introduction to Comparative Law</i> (2nd ed 1987)

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