Book Review: *The Law Relating to International Banking* - Andrew Haynes - 2nd edn, Bloomsbury Professional 2018 (ISBN 978 1 78043 219 9)

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The second edition from Andrew Haynes, *The Law Relating to International Banking*,[1] is a refined, extended and updated version based on several areas of international banking and capital markets transactions which Haynes considered in his first text.[2] As was the case in Haynes's first edition, the material presented is intended for practitioners, academics, bankers and (post graduate) students.[3] Regulatory issues are not investigated in this text as Haynes has covered that area in a separate textbook.[4] This text covers commercial activities involving the international banking sector.

Readers may want to consider other publications from Haynes on financial services[5] or financial services regulation[6] to widen their understanding in this field. Alternatively, other authors that the reader may want to consider is Cranston *et al.*,[7] particularly Part IV that discusses securitisation; or in a wider capacity of financial services then Walker, Purves and Blair.[8]

The beauty of this text is that one does not need to read it in its entirety and can be read in part, whatever relevant chapter(s) are desired. For clarity the first seven chapters are in relation to capital markets instruments and processes, the remaining six chapters referring to legal issues arising. The structure of this text is as follows:

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[1] A Haynes, *The Law Relating to International Banking* (2nd edn, Bloomsbury Professional 2018).
[2] A Haynes, *The Law Relating to International Banking* (Bloomsbury Professional 2010).
[3] Haynes (n1) v.
[4] See, for example, A Haynes, *Financial Services Law Guide* (4th edn, Bloomsbury Professional 2014).
[5] Ibid.
[6] A Haynes and S Bazley, *Financial Services Authority Regulation and Risk-Based Compliance* (2nd edn, Bloomsbury Professional 2006) 3rd edn to be published 2020.
[7] R Cranston, E Avgouleas, K van Zwieten, C Hare and T van Sante, *Principles of Banking Law* (3rd edn, OUP 2018)
[8] G walker, R Purves and M Blair, *Financial Services Law* (4th edn, OUP 2018).

Chapter 1 begins with international term loan agreements. Haynes provides a general overview of international term loan agreements and this is a good starting point for this text as many aspects of loan agreements are discussed throughout the remaining chapters. A key point discussed here is the structure of a loan agreement which then enables the chapter to identify remedies for breach of covenant, restructuring and other relevant agreements among further considerations.[9] A most useful part of this chapter is in reference to the Loan Market Association[10] (LMA) and that most firms will use or in varying degrees adapt the document(s)[11] put forward by the LMA.[12] Although, as Haynes purports, '…the circumstances of term loans vary so widely that significant changes will normally be made'.[13] For reference, Haynes includes a loan agreement template in the appendix[14] which is beneficial.

Chapter 2 moves onto primary syndication and considering that the previous chapter explored international term loan agreements and the LMA, it is fitting that primary syndication is the next point of enquiry. In brief, syndicated loans arose due to loans becoming so big that it was not feasible for financial institutions to manage or would want to lend the sums of money involved. Furthermore, there may be restrictions in terms of legislation or a bank's own limits put in place[15] which can cause issues[16] and may detract financial institutions from lending. In this instance, syndicates are formed to assist with these problematic points. Haynes illustrates key points for consideration such as the arranging of a syndicated loan, the arranging bank, the agent bank, and the functioning of the syndicate. At each point Haynes provides concise analysis to describe these different elements.

Chapter 3 continues with syndication but in the form of secondary syndication.[17] Haynes initially describes how secondary loan markets have developed over time and have become more important due to the sovereign debt crisis in the 1980s and more recently with the financial crisis 2008.[18] The former related to banks wanting to reduce their exposure and the latter relating to bank's wanting to reduce their balance sheet.[19] A key part of this chapter discusses the methods of sale: novation, legal assignment, equitable assignment, funded participation, risk participation and trusts.[20] This part of the chapter highlights the ways in which a bank can sell a loan and the methods of sale are highlighted in order of how frequent they are used, which is a prudent and helpful read for those not familiar.

Chapter 4 moves onto primary securitisation. Haynes discusses securitisation and bond issues which, as Haynes states, '…is a piece of paper issued by a borrower to lenders stating

[9] Namely: Other relevant agreements, Insurance law considerations, Documentation for 'collar' agreements, Security and Guarantees in international term loans.
[10] The Loan Market Association is concerned with primary and secondary syndicated loan markets not only in Europe, but also the Middle East and Africa.
[11] Multicurrency Term and Revolving Facilities Agreement.
[12] It provides a simple guideline for firms to use in constructing their loan agreements.
[13] Haynes (n1) 1.
[14] Haynes (n1) 461.
[15] Haynes (n1) 56.
[16] Such as legislation or a bank's own regulation such as capital adequacy, for example.
[17] Secondary loan markets.
[18] Haynes (n1) 89.
[19] It is clear as to why secondary syndication has become so popular. The benefits include exposure to sovereign debt, it can maximise profits, or it can be used to conform to certain capital adequacy requirements such as the Basel regulations; currently this is Basel III.
[20] Haynes (n1) 91-105.

the terms of the loan, the interest charged and the terms of issues'.[21] A simple and easy to understand description is given of the different types of bonds normally issued ranging from domestic, foreign and international bonds, to bonds issued by fiscal agency arrangement.[22] There are other key points identified such as documentation which is used that brings all parties together; additionally an alternative and interesting analysis is given on Islamic bonds, although it is just a brief overview due to it being discussed in more detail in Chapter 5.

Chapter 5 explores secondary securitisation which naturally leads on from the previous chapter. The simplest form of securitisation, which was discussed in Chapter 4, now moves onto a more advanced and developed form. Haynes provides a useful definition from Feeney[23] and in a nutshell Haynes describes secondary securitisation as the '…issuing of bonds from a second company, the interest on which and repayment of which are paid by the income stream of the original company'.[24] Due to the complex nature of such, Haynes provides a useful piece on the history of securitisation before moving onto originating assets, special purpose vehicles and entities. Consideration circles back to a previous topic discussed in Chapter 4 (Islamic bonds) at which point Haynes considers Islamic securitisation. Other key points are also explored such as the rating process, after all the main three rating agencies Standard & Poor's, Moody's and Fitch[25] rate companies, banks and in this context bond issues. It is, therefore, logical that Haynes would discuss at this stage.[26]

Chapter 6 moves forward to derivates.[27] Key points covered include futures, options, contracts for differences in which Haynes discusses several versions,[28] issues arising and netting. Perhaps most importantly, and to bring it altogether, is the latter part of this chapter where Haynes discusses the ISDA Master Agreements.[29] The quality of including the ISDA Master Agreements[30] is essential as the agreement covers all (or is designed to) derivate transactions.

Chapter 7 considers performance bonds, contract guarantees and standby letters of credit. In this chapter Haynes explores the aforementioned that are usually used in international supply and construction agreements. For example, construction contracts will be implemented to provide a level of certainty and safety when it comes to a contractor being able to fulfil their obligation. There is a focus on bonds and guarantees, the terms of which (contract bond and contract guarantee) are used as the same and are applied by English bankers.[31] Standby letters of credit can be traced back to the U.S. It is, therefore, set out that the main part of this chapter concentrates on bonds and guarantees under English law with a concise discussion

[21] Haynes (n1) 118.
[22] Haynes (n1) 123-130.
[23] Haynes (n1) 153 quoting P W Feeney, *Securitisation – Redefining the Bank* (St Martin's Press 1995).
[24] Haynes (n1) 153.
[25] S Ramakrishnan and P Scipio, 'Big Three in Credit Ratings Still Dominate Business' https://www.reuters.com/article/uscorpbonds-ratings-idUSL2N17U1L4 accessed 17 October 2018.
[26] Haynes (n1) 181-190.
[27] A derivative is a financial instrument. Its value is evaluated by the value of the commodity or interest rate or other financial value for example.
[28] Currency swaps, interest rate swaps, commodity swaps, credit swaps, swapping out, forward rate agreements, forward foreign exchange contracts, caps floors and collars.
[29] Haynes (n1) 221-246.
[30] See https://www.isda.org/ for further information.
[31] Haynes (n1) 249.

toward the end of the chapter on standby letters of credit.[32] Haynes provides a clear account of different bonds used, as well as remedies for non-performance[33] and defences on calls for guarantees.[34] Haynes also considers private international law which aids the rights and obligations of parties as well as safety mechanisms in place to protect issuing banks.

Chapter 8 and the remaining chapters change the focus of this text to now consider the legal issues arising.[35] Haynes begins by examining contractual remedies and issues arising. The main two points covered in chapter 8 fall under 'Clauses in the agreement'[36] and 'Remedies on default'.[37] The purpose of this chapter is to explain that if a dispute arises between the borrower and lender, then there are different options to follow. Haynes adds that sometimes disputes can arise in derivate and bond issues, hence it is important as to the wording of the original agreement.[38]

Chapter 9 (and 10 for that matter) is pivotal in that it reaches a point where the governing law of international banking and capital market transactions is explored. It is important because transactions occur in many countries. It does, as Haynes puts it, '…inevitably impinge upon the laws of more than one country'.[39] Haynes considers the choice of law and factors that may influence the parties involved as to what governing law they have preference too and the different approaches taken; in particular Rome I Regulation,[40] Rome II Regulation,[41] the common law approach,[42] and applicable law where they may be no governing law.[43] In addition to these, Haynes looks at public international law and gives a brief account of Sharia law as transactions are increasing in this area; thus adding more depth to this chapter.

Chapter 10 follows from chapter 9 whereby Haynes considers the issue of jurisdiction. The reason being is that even though a governing law has been decided and agreed on by the parties involved, it does not mean that the courts of the chosen governing law has jurisdiction.[44] Haynes focuses on English private law because this area on jurisdictions is so vast. Accordingly, and because the UK is still part of the European Union, attention is given to two governing documents: Brussels 1 Regulation[45] and the Lugano Convention.[46] Haynes provides a good account of both, but more emphasis is given to Brussels 1 Regulation.[47] It is concluded that questions of this nature i.e. jurisdiction, should be decided before the agreement between parties is executed.[48]

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[32] For the reason stated above and that standby letters of credit derive from the U.S.
[33] Haynes (n1) 258-259.
[34] Haynes (n1) 259-265.
[35] In contrast to the first seven chapters which considered capital markets instruments and processes.
[36] Which includes events of default clause, actual breach which covers areas such as breach of covenant, cross default and material adverse change.
[37] Which includes internal remedies, restructuring, waiver, acceleration default interest, general default indemnity, set off and external remedies.
[38] Haynes (n1) 279.
[39] Haynes (n1) 301.
[40] Rome I governs the choice of law in the European Union. See Regulation (EC) No 593/2008.
[41] Rome II governs the choice of law applicable to non-contractual obligations. See Regulation (EC) No 864/2007.
[42] This is where Rome I does not apply.
[43] This is where the English courts would have to consider what law is relevant due to the omission of an express clause.
[44] What this means in practice is that often is the case that a clause is inserted into the contract which expressly states which country should govern the agreement.
[45] See Regulation (EU) 1215/2012
[46] See L339/3 21.12.2007
[47] Most likely due to it replicating Brussels 1 Regulation.
[48] Haynes (n1) 355.

Chapter 11 moves onto sovereign risk which follows prudently from the last chapter in that when establishing a jurisdiction, an issue resulting can be in the form of sovereign risk. The problem here, as Haynes stipulates, '…in relation to determining jurisdiction…what view the courts of that state will take if one of the parties to the action is a sovereign state or state entity'.[49] Haynes breaks this chapter into three parts making it easy to comprehend the issues present. Haynes considers, 'has the state been recognised; sovereign immunity; and changes in the law of the state in question';[50] and explores these in turn providing a simple path to follow for the reader.

Chapter 12, the penultimate chapter, deals with exchange controls[51] and how this affects the lender. Before a transaction is made the lender will assess as to whether the state in question has exchange controls in place. The main issue here and that is pointed out from the outset, is that exchange controls are normally introduced during times of financial crisis and this means that the borrower will (may) be unable to repay the lender. It is prudent to examine exchange controls because for the lender, if they are not repaid due to exchange control restrictions, then repercussions can be felt far and wide.[52]

Chapter 13, the final chapter, ends with discussion around legal opinions.[53] Key points covered include the premise that opinions should be matter of law not fact, jurisdictions in which opinion(s) should be obtained, and most importantly the structure of a legal opinion.[54] Even though this is the final chapter it is still a key part of this text in which Haynes explores the area of lenders requiring legal opinions on the validity of the agreement put in place between the lender and borrower. It is, consequently, imperative for the lender to confirm that the documentation of the agreement is legally valid.

This text is a refined, extended and updated version on what was already an excellent contribution to this field of study. There have been some additions and updates of material, for example secondary securitisation now includes Islamic securitisation and the Multicurrency Term and Revolving Facilities Agreement has been updated from what was 2010 in the first edition, to the recent and much extended version of 2017. It remains a user friendly and insightful text which will be of tremendous assistance to practitioners, bankers, academics and (post graduate) students. It is highly recommended.

[49] Haynes (n1) 357.
[50] Ibid.
[51] The restriction of the host currency being exchange for others.
[52] For a short history (in a U.K. context) see Bank of England, 'The U.K. Exchange Control: A Short History' https://www.bankofengland.co.uk/-/media/boe/files/quarterly-bulletin/1967/the-uk-exchange-control-a-short-history.pdf?la=en&hash=3B07714B860C293BE041E438F1932BDF6B818D98 accessed 18 October 2018, for further insight.
[53] Lender should seek legal opinions when it comes to the legal validity of the documentation in relations to the agreements between parties.
[54] Haynes (n1) 401-415.