

## Contents

Preface to the Second Edition .....	v
Preface to the First Edition .....	vii
Table of Cases .....	xxv
Table of Statutes .....	xxxix

## PART I: LEGAL ENVIRONMENT OF PROJECT FINANCE

<i>Chapter One: Introduction</i> .....	1
1.1 Concept of project finance .....	1
1.2 Hong Kong building projects .....	2
1.3 Project risks and legal documentation .....	4
(1) The basis of the loan .....	4
(2) Operation of the project .....	5
(3) Marketing of flats in the project .....	6
(4) Non-commercial risk .....	6
<i>Chapter Two: Ownership of land and flats in Hong Kong</i> .....	7
2.1 Nature of land ownership .....	7
2.2 Tenure and estate of leaseholds .....	9
2.3 Legal and equitable leases .....	9
2.4 Grant of land: Conditions and leases .....	10
(1) Government leases and Conditions: their differences .....	10
(2) Premium and rent .....	14
(3) Duration .....	15
(4) Re-grant of Government leases and Conditions .....	16
(5) Renewal and extension .....	17
(6) Modification of lease covenants .....	19
(7) Breach of lease covenants .....	19

(8) Apportionment of Government rent and premium .....	21
2.5 Ownership of a flat and the deed of mutual covenant .....	23
(1) A 'flat' .....	23
(2) Undivided shares in the land and building .....	24
(3) Right of exclusive possession .....	25
(4) Deed of mutual covenant as title .....	27
(5) Terms of the deed of mutual covenant .....	30
2.6 Land registration .....	31
<i>Chapter Three: Disposal of flats in a building project</i> .....	33
3.1 Sale of uncompleted flats: the Consent Scheme .....	34
(1) From consumer protection to speculation control .....	34
(2) Scope of the Scheme .....	35
(3) Anti-avoidance of the Scheme .....	37
(4) Criteria .....	38
(5) Procedure .....	40
(6) Terms of consent .....	42
(7) Legal representation .....	50
3.2 Consent Scheme documentation .....	51
(1) Statutory declaration .....	51
(2) Standard sale and purchase agreement .....	53
(3) Deed of mutual covenant .....	56
(4) Sale brochures .....	56
(5) Advertisement .....	57
(6) Sale report and monthly return .....	57
3.3 Financing aspects of the Consent Scheme .....	57
(1) The developer's financial commitment .....	57
(2) Source of repayment: deposits of flats .....	58
(3) Building mortgage and floating charge .....	58
(4) Unsecured loan .....	61
(5) Self-financing: ear-marking of deposit .....	62
(6) Bank guarantee .....	62

3.4 Sale of uncompleted flats: the Non-Consent Scheme .....	63
(1) Background .....	63
(2) The Scheme's requirements .....	64
(3) Variation .....	66
(4) Separate representation as an alternative .....	66
3.5 Completed building .....	68
<i>Chapter Four: Lender liability and legal risks</i> .....	69
4.1 Liability and vitiating factors .....	69
4.2 The lender's liabilities to the borrower .....	70
(1) Lending obligations .....	70
(2) Advisory obligations .....	71
(3) Fiduciary obligations .....	72
4.3 Vitiating factors and third party securities .....	74
(1) Economic duress .....	74
(2) Undue influence .....	75
(3) Unconscionability .....	76
(4) 'Oppression' by the borrower on the third party security providers .....	77
4.5 The lending process and documentation .....	79
(1) Process vs documentation .....	79
(2) Know your customers .....	80
(3) Independent legal advice .....	80
(4) Choice of legal advisers .....	81
(5) Exceptional terms or harsh transactions .....	81
(6) Advice to take advice .....	82
(7) Content of the legal advice .....	82
(8) Lender's disclosure .....	83

## PART II: MECHANICS OF THE LOAN

<i>Chapter Five: Lending for the project</i> .....	85
5.1 The facilities .....	85
(1) Bridging facility .....	85
(2) Overdraft facility .....	85

(3) Bullet instalment loan .....	86	6.7 Compliance certificates by the borrower's officers .....	108
(4) Term loan .....	86	6.8 Fulfilment to be satisfactory .....	109
5.2 The contractual obligation of the lender .....	88	6.9 Borrowing procedure .....	109
5.3 The purpose of the loan .....	89	6.10 Failure to borrow .....	110
5.4 Lenders in the Hong Kong market .....	90	<i>Chapter Seven: Funding practice and interest payment</i> .....	113
5.5 Syndication .....	91	7.1 Fixed and floating rates of interest .....	113
(1) Mandate .....	91	7.2 The best lending rate .....	114
(2) Lead manager and managers .....	91	(1) The best lending rate as an index .....	114
(3) Several commitments and underwriting .....	92	(2) Illustration .....	114
(4) Agent .....	92	(3) Characteristics .....	115
(5) Reference lenders .....	92	7.3 The Hong Kong Inter-bank Offered Rate (HIBOR) .....	116
(6) Pro-rata sharing .....	93	(1) Illustration .....	116
(7) Claw-back .....	93	(2) Funding practice .....	117
<i>Chapter Six: Drawdown of the loan</i> .....	95	7.4 Capitalisation of interest in project loans .....	119
6.1 Conditions of drawdown .....	95	7.5 Computation methods .....	120
(1) Types of conditions .....	95	(1) 365/365 .....	120
(2) Obligations to procure .....	96	(2) 360/360 .....	121
6.2 Conditions for all loans: assemblage of legal documents .....	97	(3) 365/360 .....	121
6.3 Conditions to each loan .....	99	7.6 Default interest .....	121
6.4 Consent of the Director of Lands .....	102	(1) Illustration .....	121
6.5 The architect's opinion and certificates .....	102	(2) Interest period applicable on default .....	122
6.6 Legal opinion and independent legal advice .....	103	(3) A higher rate of interest on default .....	122
(1) General .....	103	(4) Compound interest .....	123
(2) Assumptions and qualifications .....	104	(5) Absence of express default interest provisions .....	123
(3) Status and good standing .....	105	(6) Interest after judgment .....	124
(4) Consent and licence .....	106	(7) Bankruptcy and winding up .....	125
(5) Title of the project site .....	106	7.7 Interest rate and the Money Lenders Ordinance .....	125
(6) Status of securities .....	106	(1) Excessive rate prohibition .....	125
(7) Valid, binding and enforceable .....	107	(2) Extortionate rate .....	126
(8) Corporate capacity .....	107	(3) Conflict of laws .....	127
(9) Due execution .....	108	(4) Commitment fees .....	128
(10) Independent legal advice to the guarantors .....	108		

<i>Chapter Eight: Yield protection</i> .....	129
8.1 Interest rate index, risk and yield .....	129
8.2 Tax grossing up and indemnities .....	131
(1) Illustration .....	131
(2) Payment free and clear .....	131
(3) Grossing up .....	132
(4) Tax indemnities .....	132
(5) The borrower's approach .....	132
8.3 Indemnity for increased costs .....	133
(1) Purpose of indemnity provisions .....	133
(2) Illustration .....	133
(3) The borrower's approach .....	134
8.4 Indemnity for broken funding .....	134
(1) 'Broken funding' .....	134
(2) Indemnity .....	135
8.5 Expenses and stamp duty .....	135
(1) Initial expenses .....	136
(2) Publicity costs .....	136
(3) Stamp duties and registration fees .....	136
(4) Administration and enforcement expenses .....	136
(5) Interest .....	137
(6) Money Lenders Ordinance .....	137
8.6 Currency indemnity .....	137
(1) Illustration .....	137
(2) Comments .....	138
8.7 Prepayment premium and cancellation fee .....	139
(1) Prepayment premium .....	139
(2) Cancellation fee .....	140
<i>Chapter Nine: Funding interruption</i> .....	141
9.1 Market disaster clause .....	141
(1) Illustration .....	141
(2) Crystallisation .....	143
(3) Effect of crystallisation .....	144

(4) Practice .....	144
9.2 Illegality clause .....	145

*Chapter Ten: Commitment fees, front-end fees and the Money*

<i>Lenders Ordinance</i> .....	147
10.1 Commitment fees .....	147
10.2 Front-end fees .....	148
10.3 Agency fees .....	149
10.4 Implications of the Money Lenders Ordinance .....	150

*Chapter Eleven: Repayment, prepayment, cancellation and payment arrangements* .....

11.1 Repayment .....	153
11.2 Prepayment .....	154
(1) Voluntary prepayment .....	154
(2) Adversity prepayment .....	156
11.3 Cancellation .....	156
11.4 Payment arrangements .....	157
(1) Payment provisions .....	157
(2) Claw-back provisions .....	158

**PART III: THE PROJECT PROVISIONS**

<i>Chapter Twelve: Representations and warranties</i> .....	159
12.1 Representation, warranties and conditions: their legal nature .....	159
12.2 Functions of representations and warranties .....	160
12.3 Legal warranties .....	163
(1) Status and ownership .....	163
(2) Capacity, powers and corporate proceedings .....	164
(3) Official consents .....	164
(4) Non-violation of law .....	165
(5) Other legal warranties .....	165
12.4 Commercial and financial warranties .....	165

(1) Financial condition .....	165	(3) Exceptions of the negative pledge .....	189
(2) No litigation .....	167	(4) Effect of a breach of the negative pledge .....	190
(3) No default .....	168	(5) Automatic security .....	192
(4) No change in condition generally .....	168	(6) Restrictions on disposal of assets .....	192
12.5 Project warranties .....	169	(7) Restrictions on borrowing .....	194
(1) Information memorandum .....	169	(8) Restrictions on guarantee .....	194
(2) Cost estimate .....	170	(9) Pari passu clause .....	195
(3) Title to the project site .....	170	13.9 Sale of project flats .....	196
(4) Premium fund .....	171	(1) Terms of sale .....	196
(5) Completion schedule .....	171	(2) Pricing .....	197
12.6 Repetition and qualification of warranties .....	172	(3) Further security .....	197
<i>Chapter Thirteen: Covenants and development provisions</i> .....	175	(4) Monitoring progress of sale .....	198
13.1 Covenants generally .....	175	13.10 Sale proceeds and stakeholders' account .....	198
(1) Functions .....	175	(1) Stakeholders' account .....	198
(2) Affirmative and negative comments .....	176	(2) Withdrawal from stakeholder's account .....	199
13.2 Covenants on utilisation of facilities .....	177	(3) Account operation agreement .....	200
13.3 Development provisions .....	178	<i>Chapter Fourteen: Defaults</i> .....	201
(1) Development of the project .....	178	14.1 Functions and negotiation of a default clause .....	201
(2) Compliance with Government grant and law etc .....	178	14.2 Payment defaults .....	202
(3) Maintenance of building erected .....	179	14.3 Misrepresentations .....	203
(4) Cost overrun .....	179	14.4 Covenant defaults .....	204
13.4 Insurance .....	180	14.5 Project defaults .....	204
13.5 Monitoring covenants .....	182	(1) Breaches of security documents .....	205
(1) Financial and business information of the borrower .....	183	(2) Breach of Government grant and resumption .....	205
(2) Project information .....	183	(3) Termination or breach of major contracts .....	205
13.6 Preservation of the status of the borrower and the project .....	184	(4) Delay and building disruption .....	206
13.7 Financial covenants .....	186	(5) Invalidity of consents etc .....	206
13.8 Negative pledge and restrictions on disposal of assets and borrowing .....	187	14.6 Insolvency and analogous defaults .....	207
(1) Functions of negative pledge .....	187	(1) Insolvency .....	207
(2) Illustration .....	188	(2) Creditors' process .....	208
		(3) Dissolution of the borrower .....	208
		(4) Enforcement of security .....	208

14.7	Cross defaults .....	208
14.8	Changes affecting management and operation .....	209
14.9	Events of default occurring to other parties to the transaction .....	210
14.10	Material adverse changes .....	210
14.11	Default remedies .....	211
	(1) Express default remedies .....	211
	(2) Termination .....	213
	(3) Damages .....	213
	(4) Rescission .....	213
	(5) Liquidation .....	213
	(6) Set-off .....	214
	(7) Cumulative remedies .....	215
14.12	Waiver of defaults .....	215
	(1) Nature and problems .....	215
	(2) Documenting a waiver .....	216

#### PART IV: ASPECTS OF PROJECT SECURITY

<i>Chapter Fifteen: Project security: functions and limitations</i> .....	217	
15.1 Security devices and their functions .....	217	
	(1) Piercing the corporate veil .....	218
	(2) Second source of repayment .....	218
	(3) Control .....	219
	(4) Shield against other creditors .....	219
15.2 Corporate problems of taking security .....	219	
	(1) Corporate capacity and the ultra vires doctrine .....	220
	(2) Abuse of powers .....	224
	(3) Companies Ordinance: sections 157H-157J .....	228
	(4) Registration and searches .....	231
15.3 Limitations of security for the project .....	231	
15.4 Inter-creditor arrangements .....	232	

<i>Chapter Sixteen: Financial and completion guarantees</i> .....	235	
16.1 General nature of a guarantee .....	235	
16.2 Functions of a guarantee in a project loan .....	237	
	(1) Piercing the corporate veil .....	237
	(2) Monitoring the sponsors financially .....	237
	(3) Second source of repayment .....	238
16.3 Terms of a financial guarantee .....	238	
	(1) Recital .....	238
	(2) Consideration .....	239
	(3) Operative clause .....	239
	(4) Primary obligor .....	242
	(5) Release of security .....	243
	(6) Invalidity and unenforceability .....	243
	(7) Representations and warranties .....	244
	(8) Covenants .....	244
	(9) No counter-security .....	244
	(10) Payment 'free and clear' .....	245
	(11) Exclusion of subrogation .....	245
	(12) Suspense account .....	246
	(13) Conclusive evidence .....	246
	(14) Voidable for fraudulent preference .....	246
	(15) Successors and assigns .....	247
16.4 Comfort letters .....	247	
16.5 Nature and terms of a completion guarantee .....	248	
	(1) Completion .....	249
	(2) Overrun finance .....	249
<i>Chapter Seventeen: Subordination of sponsors' loans</i> .....	253	
17.1 Subordination in the project context .....	253	
17.2 Subordination devices and their associated problems .....	254	
	(1) Undertaking not to collect the subordinated debt .....	255
	(2) Accounting the subordinated debt to the project lender .....	255

(3) Ranking of dividends on dissolution .....	257
(4) Undertaking not to prove in the borrower's winding up .....	258
(5) Accounting the dividends received in winding up to the project lender .....	259
17.3 Provisions of a subordination agreement .....	260
<i>Chapter Eighteen: Project assets as security</i> .....	263
18.1 Assets as security in general .....	263
18.2 Forms of mortgage and their characteristics .....	263
(1) Legal mortgage of legal estate .....	264
(2) Informal equitable mortgage .....	265
(3) Formal equitable mortgage .....	265
(4) Equitable charge .....	266
18.3 Mortgage remedies .....	267
(1) Foreclosure .....	268
(2) Sale .....	269
(3) Possession .....	272
(4) Receivership .....	272
(5) Practice: the Consent Scheme .....	273
18.4 The floating charge over project assets .....	273
(1) The nature of a floating charge .....	273
(2) Prohibition against subsequent charges .....	274
(3) Automatic crystallisation .....	275
(4) Floating charge: the Hong Kong practice .....	275
(5) Disadvantages and advantages .....	277
<i>Chapter Nineteen: Charge on shares of the borrower</i> .....	279
19.1 Taking shares of the project company as security .....	279
19.2 Creation of a legal mortgage of shares .....	280
19.3 Creation of an equitable mortgage or charge on shares .....	281
19.4 Legal and equitable mortgages compared .....	282
19.5 Realisation of the shares of the project company .....	284
19.6 Terms of a memorandum of deposit of shares .....	287

<i>Chapter Twenty: Registration and priority</i> .....	291
20.1 Some general points .....	291
20.2 The basic priority rules at law and in equity .....	292
(1) Superiority .....	292
(2) First in time .....	293
(3) Equities .....	293
(4) Sheltering .....	294
20.3 Priority provisions of the Land Registration Ordinance .....	294
20.4 Cases on land registration .....	296
(1) Kwok Siu Lau v Kan Yang Che .....	296
(2) Tsang Chuen v Li Po Kwai .....	298
(3) Ho See Shing v Wan Ying Him .....	298
(4) Consolidated Sales v Turner C Lynn .....	301
(5) Ho King Yim v Lau King Mo .....	302
(6) Financial and Investment Services for, Asia Ltd v Balk Wha International Trading Co Ltd .....	302
(7) Kai Sun Investments Ltd v Dah Sing Bank Ltd .....	304
(8) Ng Kam-ha v Vincent Sina Traders (HK) Ltd .....	304
20.5 Some observations on land registration .....	305
(1) Registrable instruments .....	305
(2) Nature of registration: the problem .....	306
(3) Priority: penalty for non-registration .....	307
(4) Statutory lacuna .....	309
(5) Priority dates .....	310
(6) Equities: bona fide, notice and fraud .....	310
(7) Equities: volunteer .....	312
(8) Losing priority through registration .....	312
(9) Sheltering .....	313
(10) Constructive notice .....	313
20.6 Interaction of law, equity and the Land Registration Ordinance .....	314

(1) Registered/Registered .....	314
(2) Registered/Unregistered .....	314
(3) Registered/Unregistrable .....	314
(4) Unregistered/Registered .....	315
(5) Unregistered/Unregistered .....	315
(6) Unregistered/Unregistrable .....	315
(7) Unregistrable/Registered .....	315
(8) Unregistrable/Unregistered .....	316
(9) Unregistrable/Unregistrable .....	316
20.7 Registration requirements of the Companies Ordinance .....	316
(1) Requirements of section 80 .....	316
(2) Effect of registration .....	319
(3) Constructive notice .....	320
(4) Effect of non-registration .....	322
(5) Extension of time .....	323
20.8 Conflict of statutes .....	325
(1) Case 1 .....	325
(2) Case 2 .....	326
(3) Case 3 .....	328
(4) Case 4 .....	330
20.9 Conclusions .....	332
Appendix .....	333
Glossary .....	385
Index .....	393

## TABLE OF CASES

A Tettenborn, (1982) 41 .....		Andrews v Belfield (1857) 2 .....	
CLJ 58 .....	191	CBNS 779 .....	109
AL Underwood Ltd v .....		Anfrank Nominees Pty Ltd v .....	
Bank of Liverpool [1924] .....		Connell [1990] 1 .....	
1 KB 775 .....	226	ACSR 365 .....	257
ANZ v James (1986) .....		Angelic Star, The [1988] .....	
ALR 347 .....	72	1 Lloyd's Rep 122 .....	213
ANZ Bank (NZ) v Gibson .....		Anglo-Oriental Carpet .....	
[1981] 2 NZLR 513 .....	115	Manufacturing Co, .....	
ANZ Executors & Trustee .....		Re [1903] 1 Ch 914 .....	324
Co Ltd v Qintex Australia Ltd .....		Annesley v Muggridge .....	
(1990) 8 ACLC 980 .....	228	(1816) 1 Madd 593 .....	199
AWA Ltd v Daniels (1992) 7 .....		Anstalt Nybro v Hong Kong .....	
ACSR 759 .....	72	Resort Co Ltd [1978] .....	
Aberdeen Railway Co v .....		HKLR 414 .....	305
Blaikie Brothers (1854) .....		Anstalt Nybro v Hong Kong .....	
1 Macq 462 .....	74	Resort Co Ltd [1980] .....	
Abrahams & Sons, Re [1902] .....		HKLR 76 .....	305, 327
1 Ch 695 .....	323	Ashmore Benson Pease .....	
Adour Holdings Pty Ltd v .....		& Co Ltd v AV Dawson Ltd .....	
Commonwealth Bank (1991) .....		[1973] 2 All ER 856 .....	90
ATPR 41-147 .....	71	Associated Japanese Bank .....	
Agra Bank Ltd v .....		(International) Ltd v .....	
Barry (1874) LR 7 .....		Credit du Nord SA [1989] .....	
HL 135 .....	299, 310, 311	1 WLR 255 .....	236
Alex Lawrie Factors Ltd v .....		Astor Properties Ltd v .....	
Modern Injection Moulds Ltd .....		Tunbridge Wells Equitable .....	
[1981] 3 All ER 658 .....	124	Friendly Society [1936] .....	
Amadio (1983) 151 CLR .....		1 All ER 531 .....	88
447 .....	83	Atel Johnson Petroleum AV .....	
Amalgamated Investment & .....		v MG Mineral Group AG .....	
Property Co Ltd .....		(1992) 2 All ER 163 .....	214
(In Liquidation) v Texas .....		Attorney General v .....	
Commerce International .....		Tong Yu [1968] .....	
Bank Ltd [1981] 1 .....		HKLR 603 .....	34
All ER 923, affd [1981] .....		Australia & New Zealand .....	
3 All ER 577 .....	239	Banking Group Ltd v .....	
Andre et Cie, SA v Ets Michel .....		Beneficial Finance Corp .....	
Blanc & Fils [1979] 2 Lloyd's .....		Ltd (1983) 44 ALR .....	
Rep 427 .....	162	241 .....	238, 240