

Third Edition

Corporate Finance Law

Principles and Policy

Louise Gullifer and
Jennifer Payne



CORPORATE FINANCE LAW

The third edition of this acclaimed book continues to provide a discussion of key theoretical and policy issues in corporate finance law. It has been fully updated to reflect developments in the law and the markets. One of the book's distinctive features is its equal coverage of both the equity and debt sides of corporate finance law, and it seeks, where possible, to compare and contrast the two.

This book covers a broad range of topics regarding the debt and equity-raising choices of companies of all sizes, from SMEs to the largest publicly traded enterprises, and the mechanisms by which those providing capital are protected. Each chapter provides a critical analysis of the present law to enable the reader to understand the difficulties, risks and tensions in this area, and the attempts by the legislature, regulators and the courts, as well as the parties involved, to deal with them.

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PREFACE AND ACKNOWLEDGEMENTS

There have been a great many changes in corporate finance law since the first edition of this book was published in 2011. At that time the 2008 financial crisis had obviously had significant effects on the markets, especially the market for debt, and the increase in regulation which has been a feature of the post-crisis period was beginning to be seen. Since 2011 there have been numerous legal and regulatory changes designed to deal with the aftermath of the crisis, as well as addressing new challenges that have come to the fore in this period, including the impact of technology on the market. Within the EU, there have continued to be developments in the regulatory regime for the capital markets, including the Prospectus Regulation, the Shareholder Rights Directive II and the Central Securities Depository Regulation, but the pace of regulatory change has slowed somewhat from the immediate post-crisis period. In addition, the CJEU has continued to decide relevant cases, which are discussed in this volume, such as *Private Equity Insurance Group SIA v Swedbank AS*.

There have also been changes at a domestic level that have important effects in this area, although parliamentary attention in recent years has been distracted by the prospect of the UK leaving the EU, with the result that important measures such as the proposals for changes to the debt restructuring regime are still waiting for parliamentary time to be available to implement them. Relevant legislative changes discussed in this book include the Business Contract Terms (Assignment of Receivables) Regulations 2018 and new rules concerning peer-to-peer lending platforms. Case law developments have nevertheless continued apace, with significant cases such as *BTI 2014 LLC v Sequana, Panel v King, PST Energy 7 Shipping LLC v OW Bunker Malta Ltd, Bibby Factors Northwest Ltd v HFD Ltd* and the Court of Appeal decision in *Titan Europe 2006-3 plc v Colliers International UK plc*, the first instance judgment in which was discussed in the second edition of this book. These judgments have important implications for the material discussed in this book, as well as many other cases applying the principles in different situations. The debt material, in particular, is also affected by cases concerning general contract and trusts law, including the ongoing development of the process of interpretation of contracts in *Arnold v Britton* and *Wood v Capita Insurance Ltd*, the implication of contract terms in *Marks and Spencer v BNP Paribas*, and *Ukraine v The Law Debenture Trust Corporation Plc*, and the law relating to penalty clauses in *Makdessi v Cavendish Square Holdings BV*. This process of caselaw development continues with some important cases coming too late to be included in the book, including *SL Claimants v Tesco plc* [2019] EWHC 2858 (Ch) in which the High Court dismissed a strike out application made by Tesco plc in the group litigation brought by its shareholders under section 90A FSMA. Market practice has inevitably evolved too, with new forms of financing emerging, such as crowdfunding and peer-to-peer lending, as well as adaptations to existing structures as a result of economic conditions and legal and regulatory developments, such as covenant-lite leveraged loans by non-bank lenders. It has been an exciting time to be thinking about, researching and teaching corporate finance law.

In this edition we have thoroughly updated the text to deal with these myriad, often very significant, changes and to reflect developments both in our own thinking and that of other academics. This book aims to state the law and major policy developments as at 1 August 2019.

Where relevant, we have included in the text work done by the FCA and others to prepare for the UK's exit from the European Union, although, at least up to the end of the transition period, it is clear that in most areas, the position will broadly remain the same. We updated both the text and relevant footnotes late in the proof stage when it became clear that the UK was going to leave the European Union on 31 January 2020. In that respect this book states the law as it will be up to the end of the transition period. We have not sought to address in detail the position after that date, largely because so much remains undecided; including the future relationship between the UK and the European Union.

As with the first and second editions, many of the issues discussed here have been shaped and developed by the Corporate Finance Law course which we taught together in Oxford during the period that we were writing this book, and we would like to acknowledge and thank those alongside whom we have taught the course, and argued these points, especially Ed Greene, Chris Hare, and Richard Salter and the BCL/MJur/MLF classes who have taken the course. Special thanks are due to Chris Hale, Emma Watford and William Paul for continuing to share their knowledge and expertise on Private Equity with us and with the students.

In writing this book we were assisted by a great many people, to whom we have a continuing debt, namely friends and colleagues in Oxford and beyond with whom we have continued to discuss corporate law and the issues arising out of this book, and we would like to acknowledge their advice and assistance. Particular thanks are due to Hugh Beale, Michael Bridge, Roy Goode, Niamh Moloney and Kristin van Zwieten. In preparing this third edition we have also been assisted by a number of excellent research assistants: Clara Martins Pereira, Hin Liu, Mick Yang and Sean Butler. We would also like to thank Hart Publishing, and in particular Sinead Moloney for overseeing the production of this book through its various stages with great care and skill.

Finally, we would like to thank our families for their unfailing patience and support during the writing of this book, and in particular to thank Robert and Nick (respectively) who have been sources of inspiration and encouragement and without whom this project could not have been completed. This third edition, like the previous two, is dedicated to them.

Louise Gullifer and Jennifer Payne
Oxford, December 2019

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