

The Law of Finance

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Synopsis

Preface
Introduction

Book One **Principles of the Law of Finance**

PART 1: AN ORDERING OF THE LAW OF FINANCE

Part 1 aims to set out what is meant by “the law of finance” and the manner in which the rest of the book is structured. This includes an analysis of the synthesis between substantive law and regulatory norms, such that the latter informs the development of the former.

Chapter 1: The components of the law of finance

The ambit of finance

The definition of “finance”

Finance as the wherewithal to act

From domestic banking to cross-border transactions

Constructing a law of finance

Contract, property and tort

A synthesis of law and regulation

The scope of substantive statute and case law

Domestic and international legal norms

Law supplemented by market practice

The six categories of finance

The usefulness of the division

Banking

Lending

Stakeholding

Refinancing

Proprietary finance

Collective investment

Themes in the international law of finance

Risk

Power

Globalisation

Dematerialisation

Privatisation of dispute resolution

[15 pages]

Chapter 2: The legal nature of money and of financial instruments

- The nature of money
 - Cash
 - Money in bank accounts
 - The particular context of electronic bank accounts
 - Telegraphic bank transfers across borders
- Money as a means of establishing value
 - Market value
 - The foreign exchange context
 - Intrinsic value
- Financial instruments
 - What is a financial instrument
 - Financial instruments as property

[10 pages]

Chapter 3: The relationship between substantive law and financial regulation

- The distinction between law and regulation
- How regulatory norms may inform legal norms
 - The actions of the reasonable banker
 - What bankers can be deemed to know
 - Bankers' liability for clients' wrongdoing
- The importance of this synthesis in the development of the law of finance

[10 pages]

PART 2: SUBSTANTIVE LEGAL CONCEPTS IN THE LAW OF FINANCE

Part 2 sets out the fundamental concepts on which the law of finance will be built: in effect a marriage between contract, property and tort (and other wrongs). Of particular significance is the discussion of “fiduciary fund management” which will cover the liabilities fund managers generally, portfolio investment strategies, and other activities by intermediaries. The law relating to fiduciaries – including the general law on trustees' and agents' obligations – is particularly significant in this context. Finally, the core principles of private international law, as they relate to global financial markets, are set out. All of these discussions are intended to facilitate the teaching of finance law by setting out core principles at the outset; they are intended to assist practitioners by collecting core principles in one place and so to facilitate ease of reference. This beginning is then continued in Parts 4 through 6.

Chapter 4: Fundamental legal concepts: contract, property and wrongs

- That English law is built on fundamental concepts applied in particular contexts
- The law of contract
- The law of property
- The law of tort and of wrongs more generally

[10 pages]

Chapter 5: Fiduciary fund management

- Definition of a “fiduciary”
- The context of portfolio fund management

Circumstances in which financial institutions may be fiduciaries	
The obligations of fiduciary officers in general terms	
Rule against unauthorised profits	
Constructive trust of secret profits	
Bribes	
Authorisation	
Confidential information	
Corporate opportunity doctrine	
Self-dealing principle	
Conflicts of interest of market makers	
The obligations of trustees	
The irreducible core content of trusteeship	
The investment obligations of trustees under the Trustee Act 2000	
The general power of investment	
The statutory duty of care	
Standard investment criteria	
The obligation to take professional advice	
Express trust provisions	
Delegation of trustees' responsibilities	
The limitation of trustees' liabilities	
The obligations of agents	
The nature of agency	
The liability of the principal for the acts of the agent	
Actual and ostensible authority	
The limitation of agents' liabilities	
Themes in fiduciary fund management	
	[30 pages]

Chapter 6: Conflict of laws

The significance of private international law in global financial markets	
Choice of law	
Proper law of a contract	
Actions in relation to movable property	
Jurisdiction	
	[20 pages]

PART 3: COMPLIANCE WITH REGULATORY NORMS IN FINANCE

Part 3 considers the principal regulatory norms established by the Financial Services and Markets Act 2000 and the FSA Rulebooks which govern financial activity in the UK in general. This book does not propose to deal with regulation in detail – instead it is a book which focuses primarily on substantive law – but it will outline the key concepts in this Part 3. There is also a contextual discussion of EC and International initiatives to regulate financial activity as it informs the practice of that activity.

Chapter 7: The Financial Services and Markets Act 2000 regime	
The economic objectives of the FSMA 2000	
The establishment of the Financial Services Authority	
The general duties of the FSA	
The powers of the FSA	
Regulated activities under FSMA 2000	
	[10 pages]
Chapter 8: Client management	
FSA Conduct of Business Rules	
The need to allocate clients into appropriate categories	
Suitability	
Suitability of the treatment of a client	
Suitability of the product for the client	
Client money	
	[15 pages]
Chapter 9: Money laundering	
The context of money laundering regulation	
“Know your client” regulation	
Recovery of laundered money under substantive law	
	[15 pages]
Chapter 10: Financial promotion	
The context of marketing investment products	
The FSMA Financial Promotion regime	
Liability for unlawful financial promotion	
	[10 pages]
Chapter 11: Market abuse and insider dealing	
The FSMA Market Abuse regime	
The FSMA Tribunal	
Insider dealing	
	[10 pages]
Chapter 12: EC regulation	
The principles underpinning EC regulation	
Banking Co-ordination Directives	
Investment Services Directives	
Solvency Ratio Directives	
Capital Adequacy Directives	
	[10 pages]
Chapter 13: International regulation	
The context of international financial regulation	
Basle	

BIS
IOSCO
Specific market regulation

[10 pages]

PART 4: CONTRACT

Part 4 marries the discussion in Parts 2 and 3 and then considers them in terms of the substantive law of contract. Most of the substantive law relating to financial transactions is concerned with the law of contract in some way. The discussion is organised in such a way that legal principles are identified as relating to specific problems in the practice of the law of finance: this will enable discussions of specific financial products in Book Two to refer back to these principles and so keep those later discussions concise.

Chapter 14: Formation of contracts

The contractual negotiation process
 Between market counterparties
 Between professional and retail client
Offer and acceptance
Consideration
Hierarchies of express contractual terms
Implied terms
Good faith in the creation of contracts
Time and place of the creation of a contract
Standard form contractual terms

[40 pages]

Chapter 15: Validity of contracts

Invalidating factors at general law
 Mistake
 Misrepresentation
 Fraud
 Illegality
 Gaming contracts
 Insurance contracts
Capacity and powers of the parties
 Individuals
 Companies
 Partnerships
 Trusts
Contracts conducted through agents
Unfair contract terms
Unconscionable bargains

[35 pages]

Chapter 16: Performance of contracts

- Proper performance of contractual obligations
- Frustration of contract
- Specific performance of contracts
- Remedies for breach of contract
- Payment netting

[25 pages]

Chapter 17: Termination of contracts

- Express contractual provisions effecting termination
- Recovery of payments made
 - Actions for money had and received
 - Actions for damages
 - Actions for compensation
- Rescission
- Recovery of property
 - Actions to assert title
 - Tracing claims (cf. Ch. 21)
- Recovery of loss in general terms

[35 pages]

PART 5: PROPERTY

As with Part 4, only Part 5 considers specifically the manner in which the substance of financial transactions will constitute property in themselves and, particularly significantly, how participants in financial transactions take security. This latter topic is of particular importance in practice and remains a key feature of many postgraduate courses.

Chapter 18: Ownership of money

- The legal nature of money
- The particular problem of taking proprietary rights in electronic money
 - Certainty of subject matter
 - Loss of the right to trace
- Calculating loss in relation to currency

[10 pages]

Chapter 19: Ownership of financial instruments

- Financial instruments as choses in action
- Complex financial instruments as bundles of choses in action
- Taking title in choses in action
- Taking title in the benefits to flow from a financial instrument

[10 pages]

Chapter 20: Taking security and insolvency in financial transactions

- The fundamental techniques of taking security in financial transactions

Retention of title
Fixed charge
Floating charge
Charges over book debts
Express trust
Quistclose trust
Pledge
Collateralisation and pre-payment (cf. Ch 41)
Guarantee
The nature of insolvency English law (in outline)
Set-off on insolvency

[40 pages]

Chapter 21: Tracing and proprietary claims

Actions to recover property or to claim substitute property
Specific restitution
Tracing at common law
Tracing in equity
Equitable claims and remedies
 Constructive trust
 Lien
 Equitable charge
 Subrogation

[30 pages]

PART 6: WRONGS

As with Part 4, only in relation to tort and to other wrongs (such as breach of trust and equitable fraud).

Chapter 22: Fraud and constructive fraud

Deceit
Fraudulent misrepresentation
Undue influence
Duress

[25 pages]

Chapter 23: Negligence

Negligent misstatement
Mispredictions
Liability of financial intermediaries

[25 pages]

Chapter 24: Breach of trust

Breach of fiduciary duty
 Liability of trustee for breach of trust

Breach of trust as a fund manager	
Breach of fiduciary duty generally	
Personal liability to account for participation in a breach of trust	
The two heads of liability	
Extent of the liability to account	
Requirement of a breach of trust	
Dishonest assistance in a breach of fiduciary duty	
Assistance	
Dishonesty	
Knowing receipt of property in breach of fiduciary duty	
Receipt	
Knowledge	
Liability for breach of trust generally in the corporate context	
Liability of a financial institution for the actions of an employee	
Liability of employee for actions of another	
Tracing (cf Ch. 21)	
	[30 pages]
	<u>[Maximum 480 pages in total in this Book One]</u>

Book Two

Modern Financial Techniques in Legal Context

PART 7: BANKING

Part 7 is concerned with what might be termed traditional English banking law, together with a consideration of the particular issues which arise in relation to cross-border banking. The discussion divides between the relationship between banker and customer (including the maintenance of accounts), then the nature of assets used by banks, then the various methods by which payments are made in banking transactions, and finally cross-border banking.

Chapter 25: Banker and customer relationship

The nature of the contract between banker and customer
The debtor-creditor relationship
Implied terms
Exclusion clauses
The banker's duty of confidence
The banker as a trustee
Bank accounts
Current accounts
Deposit accounts
Issues relating to joint accounts
Overdrafts and loan accounts
Banker's rights relating to the treatment of moneys
The banker's lien

Rights of appropriation
Combination of accounts

[40 pages]

Chapter 26: Negotiable instruments, cash and bills of exchange

Negotiable instruments
Cash
Bills of exchange

[15 pages]

Chapter 27: Payment methods

Payment methods
Cheques
Debit cards
Credit cards
Electronic payment systems

[30 pages]

Chapter 28: Corporate cross-border banking

Letters of credit
Regulation of banks acting across borders
Protection of customers
 Access to assets in different jurisdictions
 Injunctions in the international context

[25 pages]

PART 8: LENDING

Part 10 considers a range of transactions concerned with lending of money, whether under an ordinary contract of loan or by means of the issue of a security in relation to that loan. Lending in this context relates to ordinary bank lending as well as to syndicated lending from a number of lenders. Foreign exchange transactions considers the particular context of lending money in different currencies from sterling.

Chapter 29: Ordinary lending

The contract of loan
Loan covenants

[15 pages]

Chapter 30: Syndicated lending

The nature of syndicated lending
Documentation issues

[15 pages]

Chapter 31: Bonds

- The commercial nature of bond and Eurobond issues
- Eurobonds admitted to the Official List
 - Official listing of securities (cf Ch 35)
 - The role of the Eurobond trustee
- Covenants in Eurobond issues
- The nature of debentures

[20 pages]

Chapter 32: Foreign exchange transactions

- Issues relating to loans in foreign exchange markets
- Cross-currency borrowing
- Cross-currency swaps

[15 pages]

PART 9: STAKEHOLDING

Part 11 is concerned with the situation in which an individual acquires an ownership stake in the asset acquired – the specific example considered here being the ownership of shares in an ordinary company.

Chapter 33: Rights of shareholders in ordinary companies

- The legal personality of a company
- The purposes of shareholders in ordinary companies
 - Institutional fund managers
 - Return on capital by way of dividend
 - Speculative return on sale of the capital asset
 - Shell and holding companies
- The rights of shareholders in ordinary companies
 - The right to participate on a winding-up
 - The right to receive a dividend
 - The competence of directors in relation to the conduct of the company's affairs
 - The vires of the company
 - The rights of minority shareholders and the rule in *Foss v Harbottle*

[20 pages]

Chapter 34: Issues of shares

- The manner in which shares are issued
 - Types of share issue
 - Marketing securities
 - Promoters
- Civil liability for the preparation of a prospectus
 - The golden rule in relation to prospectuses
 - Rescission in relation to issues of shares
 - Compensation under s 90, FSMA 2000
- Criminal liability for the preparation of a prospectus

Offers of unlisted shares
Offers of listed shares (cf. Ch 35)
Allotment of shares

[20 pages]

Chapter 35: Official listing of securities

The offer of securities to the public
EC Directives on the listing of securities
Listing Rules and the role of the Competent Authority
Admission to listing
 The application procedure
 Sponsors and listing agents
 Refusal of listing
 Admission to the Official List
Listing particulars
 The requirement for a prospectus or listing particulars
 Publication of the prospectus
 The contents of a prospectus
 The obligation of disclosure
 Authorisation to omit information
 Persons responsible for the prospectus
Obligations imposed on the issuer by the Listing Rules
The Model Code
Discontinuance and suspension of listing

[30 pages]

PART 10: REFINANCING

Part 12 is dubbed “refinancing”, as will be explained in Ch 1, on the basis that it enables the contracting parties to alter some existing financing obligation. So, for example, interest rate swaps (in the financial derivatives discussion) permit the recalibration of obligations to pay interest, and asset securitisation enables the borrower to use income receivables to generate a capital gain.

Chapter 36: Financial derivatives

The basic techniques of derivatives
 Forwards
 Options
 Swaps
 Innovation based on these techniques
The commercial purposes of derivatives
The documentation architecture
 Confirmations
 Master Agreements
 Events of default and termination events
 Taking security (cross-reference to Ch. 41)
Liability of sellers of complex derivatives products

Case study: the local authority swaps cases

[40 pages]

Chapter 37: Asset securitisation

The structure of a securitisation transaction

Loan to acquire receivables

Credit

Saleability

True sale

Further legal limitations on securitisations

Documentation

Funding loan documentation

Transfer agreement

Administration agreement

Credit enhancement structure

Security trust deed

Specific legal issues

Assignability of the receivables

Characterisation of the security for the transaction

The solvency of the seller

[30 pages]

PART 11: PROPRIETARY FINANCE

Part 13 considers a range of financial transactions which are loosely organised around the acquisition of identified items of property, where the “finance” refers to the wherewithal to acquire that asset by means of mortgage or asset financing; or alternatively to the use of assets to provide speculative or other return, as with stock-lending or repo transactions; or the use of assets to provide security for some underlying transactions, as with collateralisation or margin credit.

Chapter 38: Mortgages

The nature of a mortgage

Mortgages of land under the Law of Property Act 1925

Mortgages of chattels (cf. Ch 39)

Equitable mortgage

The equity of redemption

Mortgagee’s remedies

Possession

Sale

Undue influence

Misrepresentation

Actual undue influence

Presumed undue influence

Vitiated consent or unconscionability

Setting aside the mortgage

Unconscionable transactions

[35 pages]

Chapter 39: Asset leasing

- The nature of asset leasing
- The similarity to mortgages and problems with re-characterisation
- Retention of title
- Sale and leaseback
 - Structure of sale and leaseback transaction (cf Ch 40)
 - Documentation
- Finance leasing
 - Regulation
 - Warranties by manufacturer of asset
 - Leveraged leases
 - Guarantees
 - Sub-leasing
 - Documentation
- Hire purchase (in outline)

[15 pages]

Chapter 40: Stock-lending and “repo” transactions

- The nature and purpose of stock-lending transactions
- The possible structures of stock-lending or “repo” transactions
 - Outright transfer with right to receive property of like kind
 - Obligation to maintain specific asset transferred
 - Outright transfer with credit enhancement or collateralisation
- Documentation

[15 pages]

Chapter 41: Collateralisation

- The structure of collateralisation agreements
 - Trust
 - Pledge
 - Registrable charge
- Issues with the use of securities as collateral
 - The nature of securities issued under a global note
 - Settlement of securities
 - Delivery of securities
 - Certainty of subject matter
- The netting and risk management benefits of collateralisation structures
- The efficacy of collateral agreements as security arrangements

[10 pages]

PART 12: COLLECTIVE INVESTMENT ENTITIES

Part 14 is concerned with the entities used by ordinary retail clients when seeking to invest their own money. In essence, it cherry-picks these areas from my *The Law on Investment Entities* (Sweet & Maxwell, 2000). The theory is that all investment entities are built on combinations of property rules (especially trusts) and contract rules (e.g. partnerships) to construct means of holding investment capital in common. This has led to ordinary companies, unit trusts, friendly societies and co-operatives in English law.

Chapter 42: The use of trusts, partnership and companies in investment

- The nature of “investment”, as opposed to the conduct of a business
- The use of contract and property to achieve investment goals
- The distinction between investment, property management and a business
- The development of companies from trust and partnership
- The rights and liabilities associated with trusts
- The rights and liabilities associated with partnerships
- The rights and liabilities associated with companies

[15 pages]

Chapter 43: Collective investment schemes

- The definition of “collective investment schemes”
 - The UCITS Directive
 - The FSMA 2000
- Unit trusts
 - The commercial structure of the unit trust
 - The unit trust as a trust
 - The obligations of the scheme manager
 - The obligations of the trustee
 - The rights of participants
- Open-ended investment companies
 - The commercial structure of the open-ended investment company
 - The obligations of the Authorised Corporate Director
 - The obligations of the depositary
 - The rights of participants
- Overseas schemes

[30 pages]

Chapter 44: Friendly societies

- The historical development of friendly societies
- Unincorporated associations in general terms
 - Founded on contract, not trust
 - The ownership of scheme property
 - Winding up unincorporated associations
- The commercial development of friendly societies
- Unincorporated friendly societies
 - The definition of a “friendly society”

- The relationship between the members and the society
- The management of friendly societies
- Winding up
- Incorporated friendly societies after 1992
 - The process and effect of incorporation
 - Conversion of existing friendly societies
 - The purposes and powers of a friendly society
 - Winding up a friendly society
- Registration as a friendly society
- Regulation of friendly societies by FSA
 - The ambit of FSA regulation
 - The maintenance of prudent management
 - The conduct of investment business
 - The conduct of insurance business

[15 pages]

Chapter 45: Co-operatives and credit unions

- Industrial and provident societies
 - IPS as co-operatives
 - The requirement of activities for the benefit of the community
 - The rights of members
 - The duties of officers
- Credit unions
 - The nature of a credit union
 - The common bond
 - The rights of members
 - The duties of officers
- Control of assets by members without ownership of any thing
- The future for co-operatives and credit unions

[15 pages]

Chapter 46: Occupational pension funds

- The nature of an occupational pension fund scheme
- The relationship between the parties
 - The rights of the beneficiaries
 - Beneficiaries are not volunteers
 - The relationship of the employer to the beneficiaries
 - The relationship of the employer to the trustees
- The obligations of the trustees
 - The obligations to perform the trust
 - The duty to act in the best interests of the beneficiaries
 - The duty to act with reasonable care
 - Duties in relation to the management of the scheme
 - The duty to invest
- The Minimum Funding Requirement
- Equal treatment

Title to surpluses
Penalties for mismanagement
The role of OPRA
Powers of amendment
Termination of an occupational pension scheme

[30 pages]

[Maximum 480 pages total for this Book Two]