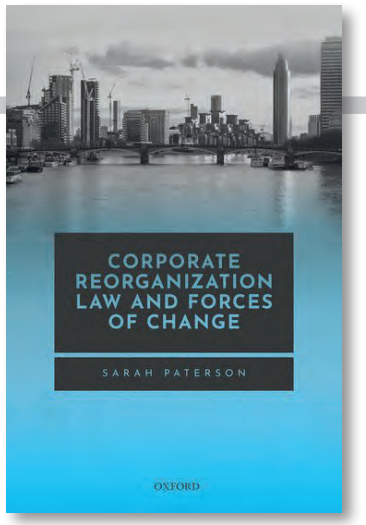
Corporate Reorganisation Law and Forces of Change



Edition First **Author** Sarah Paterson **Publisher** Oxford University Press
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A lot of practitioners have views, often strong, on the topics that Sarah Paterson's newly published book *Corporate Reorganisation Law and Forces of Change* examines. The book aims to fill the gap between 'how the concepts that are engaged in the corporate reorganisation law debate connect with the real world of corporate reorganisation'. We created laws to solve a set or problems and we have to use them to solve different problems with different stakeholders involved. Understand this and we can better reform the law. As practitioners isn't this a *cri de coeur*? The tools we've been given don't do the job as well as we would like.

Paterson's approach is comparative, between corporate reorganisation law in the US and the UK. In the US there is an active, if not febrile, debate about reforming Chapter 11 driven by a comprehensive report of the American Bankruptcy Institute on its inadequacies and the very different position taken by the Loan Syndications and Trading Association. In the UK we have introduced changes that shift our law towards a much more Chapter 11-ish character so that we can do better in the annual World Bank rankings, a trend that's reflected in Europe, Singapore and beyond.

From the beginning of the book the author makes sure the reader keeps in mind the fundamental, ideological tug-of-war in the legislature, the courts and the academy between the 'economists' and the 'progressives'. The economists see the purpose of the law as to stop a frantic struggle between creditors to seize assets from a failing company and then to ensure the allocation of the debtor's resources to the highest and best use. The progressives are all for intervention to stop the race for assets but then favour the weakly adjusting creditors and are much more conscious of the economic and social felicity of saving a company rather than devouring its assets in a Darwinian survival of the fittest.

One of Paterson's most interesting points is that there are archetypes in the reorganisation world. Traditionally one thinks of the unsecured creditor, far down the priority of repayment waterfall, as ill-informed and inadequately resourced to protect its interests. While once this may have been true, and is still accurate when one considers some trade creditors, it is a mental picture that doesn't fit with a specialist hedge fund buying into distressed, unsecured bond debt.

Paterson describes the rise of leverage, the growth in debt trading, the extent of secured credit and the appearance of specialist investors in distressed debt. These changes are facts on the ground with which practitioners have to wrestle, courts reconcile and academics rationalise. The laws we have made to solve reorganisation problems have to be mobilised and adapted to meet the needs of a world not pictured just a few decades ago. A friend of mine, a lawyer, Mike Lacey, has described the challenge for lawyers as not to think outside the box but inside the box. What clients don't want is for their advisers to take them on an expensive adventure to invent new law. The goal has to be to use the laws and techniques we know and that work to find solutions.

In the US, Paterson observes, the s363 sale and the exchange offer have become means of achieving things a Chapter 11 can't do or can't achieve as cheaply and for which in its design there wasn't perceived to be the need. In this way the highly leveraged capital structure of a debtor can be flexed or changed. Some may accuse the author of a nationalistic chauvinism but the charge doesn't stand scrutiny because of her meticulous research and fully fleshed argument. She recognises the comparative success of the English scheme of arrangement as a low-cost means to de-lever a highly borrowed company.

The book also considers other changes that were not envisaged by the drafters of Chapter 11 or English reorganisation laws and which are even more recent; insider dealing, transparency and false markets. These are factors that weigh heavily on the freedom of investors and their ability to participate in reorganisation negotiations while also being free to buy and sell interests in the debtor. And Paterson presciently recognises in the book that our reorganisation regimes will need to cope with the economic consequences of the current pandemic.

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The reader, whether progressive- or economist-minded, is going to reach the ineluctable view that developed economies need corporate reorganisation mechanisms responding to grownup stakeholders in complex capital structures, strongly adjusting, sophisticated investors and the need is for the mechanism to work before the financial contagion reaches the operating companies. This isn't a text book; it's a book for people who work in and with the restructuring world. Because it is a book, it is able to fill out the arguments that Paterson has discussed in previous articles and talks and allows her to deploy the evidence that support and make her arguments. It is an important contribution to a discussion we need to continue as we consider how we can use the legal tools to deal with the problems business and the economy now face. □

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