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Briefing note

International Regulatory Update

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If you would like to know more about the subjects covered in this publication or our services, please contact:

International Regulatory Group Contacts

Chris Bates +44 (0)20 7006 1041

Nick O'Neill +1 212 878 3119

Marc Benzler +49 69 7199 3304

Steven Gatti +1 202 912 5095

Mark Shipman + 852 2826 8992

Donna Wacker +852 2826 3478

International Regulatory Update Editor

Joachim Richter +44 (0)20 7006 2503

To email one of the above, please use firstname.lastname@cliffordchance.com

Clifford Chance LLP, 10 Upper Bank Street, London, E14 5JJ, UK
www.cliffordchance.com

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EMIR: EU Commission to endorse amended draft Delegated Regulation on risk-mitigation techniques for OTC derivative contracts not cleared by a CCP

The EU Commission intends to endorse, with amendments, a draft Delegated Regulation under the European Market Infrastructure Regulation (EMIR) with regard to regulatory technical standards (RTS) for risk-mitigation techniques for OTC derivative contracts not cleared by a central counterparty (CCP).

The Commission has indicated in a letter to the Joint Committee of the European Supervisory Authorities (ESAs) that it intends to endorse an amended version of the draft RTS submitted by the ESAs. The Commission intends to make a number of clarifications and restructure the legal text, with the most important changes relating to:

- the introduction of a recital containing the reasoning for a delayed phase-in of the requirements for equity options;
- the clarification that EU CCPs wishing to obtain an intragroup exemption from the requirements may submit the relevant application after the entry into force of the RTS;
- the clarification that cash initial margin may be held, in addition to credit institutions authorised in accordance with the Capital Requirements Directive (CRD 4), with equivalent third country institutions; and
- the clarification that requirements concerning FX derivative contracts should start to apply from the date of application of the relevant Delegated Act under the MiFID2 framework, as opposed to the date of entry into force of this draft Delegated Regulation.

The ESAs may amend the draft RTS within six weeks on the basis of the Commission's proposed amendments and resubmit it in the form of a formal opinion to the Commission.

CRD 4: EU Commission reports on remuneration rules for credit institutions and investment firms

The EU Commission has published a report on the remuneration rules for credit institutions and investment firms under the Capital Requirements Directive (CRD 4) and Regulation (CRR).

The Commission reports that the rules have been generally effective, but that in some cases the cost and burden of applying the rules may outweigh their prudential benefits. The report found that this is particularly the case when:

- the rules on deferral and pay-out in instruments are applied in small and non-complex institutions or to staff with low levels of variable remuneration; and
- listed institutions are required to use shares to remunerate their staff.

In light of these findings, the Commission plans to conduct an impact assessment to examine options for making the rules more proportionate and less burdensome, in particular for smaller and less complex institutions. This assessment will form part of the wider revision of the CRD and CRR, currently under consideration.

The report does not draw any conclusions on the rule setting a maximum ratio between variable and fixed remuneration, as the rule was recently introduced and its impact cannot yet be sufficiently evaluated.

UCITS V: Implementing Regulation on standard procedures and forms for submitting information published in Official Journal

A Commission Implementing Regulation (EU) 2016/1212 setting out the procedures and forms national competent authorities (NCAs) must use when submitting information on penalties and measures imposed under the Directive on Undertakings For Transferable Securities (UCITS V) to ESMA has been published in the Official Journal.

The Implementing Regulation will enter into force on 15 August 2016.

Interchange Fees Regulation: EBA publishes final draft RTS

The European Banking Authority (EBA) has published final draft regulatory technical standards (RTS) under the Interchange Fees Regulation (2015/751 - IFR).

The RTS specify the requirements with which payment card schemes and processing entities must comply to ensure accounting, organisational and decision-making independence as well as requirements related to:

- the use of shared services and shared information management systems;
- the treatment of sensitive information;
- a code of conduct; and
- the separation of annual operating plans.

Due to concerns raised by several respondents to the EBA consultation on the draft RTS, particular aspects have been re-considered in the final draft standards.

CRR: EBA publishes final draft RTS on preferential treatment in cross-border intragroup financial support

The EBA has issued its final draft RTS on criteria for the application of a preferential treatment in cross-border intragroup credit or liquidity lines, or within an institutional protection scheme (IPS), under the CRR. The RTS also reference the additional criteria listed in the context of the liquidity coverage ratio (LCR) Delegated Act for the application of the preferential treatment.

The RTS cover criteria that include:

- the liquidity provider and receiver shall present a low liquidity risk profile which will be objectively determined by compliance with the LCR and the Pillar 2 requirements as well as by the outcome of the latest supervisory review and evaluation process;
- there are legally binding agreements and commitments between group entities regarding the credit or liquidity line including a legal opinion approved by the credit institutions' management body; and
- the liquidity risk profile of the liquidity receiver has been adequately taken into account in the liquidity risk management of the liquidity provider.

EBA consults on guidelines on connected clients

The EBA has launched a consultation on draft guidelines on the treatment of connected clients for large exposures under the CRR. The draft guidelines review and update the guidelines on the implementation of the revised large exposures regime issued by the Committee of European Banking Supervisors (CEBS) in December 2009. The draft guidelines reflect developments in the area of shadow banking and large exposures both at EU and international level.

In the draft guidelines, the EBA suggests that institutions in the EU should make use of their clients' consolidated financial statements to assess connections based on control and provides a non-exhaustive list of indicators of control that should be used by institutions for assessing those clients to which EU accounting rules do not apply. Guidance is also provided on the use of an alternative approach for assessing the existence of groups of connected clients of entities directly controlled by or directly interconnected with central governments.

Comments are due by 26 October 2016.

EBA consults on guidelines on credit risk management practices and accounting for expected credit loss

The EBA has launched a consultation on draft guidelines on credit risk management practices and accounting for expected credit loss (ECL). The draft guidelines are intended to build on guidance published in December 2015 by the Basel Committee on Banking Supervision (BCBS) on credit risk and accounting for ECL.

The draft guidelines are intended to be read in conjunction with provisions of CRD 4 and include four main sections setting out:

- general considerations on the application of the principles of proportionality and materiality, and the use of information by credit institutions;
- eight principles related to the main elements of credit risk management and accounting for ECL and detailed guidance for the application of each principle;
- guidance reporting by credit institutions under the International Financial Reporting Standards (IFRS); and
- three principles specifically addressed to competent authorities on the supervisory evaluation of credit risk management practices, accounting for ECL and overall capital adequacy.

The EBA guidelines are intended to be in line with requirements in IFRS 9 – financial instruments, which will replace IAS 39 – financial instruments: recognition and measurement for accounting periods beginning on or after 1 January 2018, and should be read as a supervisory approach to support the appropriate application of those standards.

Comments on the draft guidelines are due by 26 October 2016.

BRRD: EBA consults on target level basis for resolution funds

The EBA has published a draft report for consultation on the appropriate reference point for setting the target level for resolution financing arrangements (resolution funds) under the Bank Recovery and Resolution Directive (BRRD). In particular, the draft report considers whether total liabilities constitute a more appropriate basis than covered deposits.

The draft report sets out various options and based on the assessment of the advantages and disadvantages of each, the EBA has recommended a change in the basis for the target level of resolution financing arrangements to either:

- total liabilities (excluding own funds) less covered deposits;
- total liabilities (including own funds); or
- total liabilities (excluding own funds).

The EBA views a change to one of these options as justified by the consistency with the regulatory framework and contributions methodology, simplicity and transparency.

Comments on the draft report are due by 2 September 2016. The final report will be submitted to the EU Commission in order to assess whether to submit a legislative proposal on the basis for the target level for resolution financing arrangements by 31 December 2016.

MAR: ESMA publishes final draft ITS on sanctions and measures

The European Securities and Markets Authority (ESMA) has published final draft implementing technical standards (ITS) on sanctions and measures under the Market Abuse Regulation (MAR).

The draft ITS state that national competent authorities (NCAs) should notify ESMA annually of the investigations they conduct and the sanctions and measures imposed in their Member States under MAR. MAR provides for two types of submission of information to ESMA:

- annual aggregated information regarding measures imposed in accordance with Articles 30, 31 and 32 of MAR and any investigations undertaken in accordance with those articles; and
- any measures that are disclosed to the public by NCAs.

MiFID: ESMA publishes updated Q&A and warning on CFDs

ESMA has published an updated version of its question and answer document (Q&A) on the application of the Markets in Financial Instruments Directive (MiFID) to the marketing and sale of financial contracts for difference (CFDs) and other speculative products to retail clients.

The Q&A includes nine new questions and answers which address the following topics:

- the information provided to clients and potential clients about how CFDs and other speculative products work and the risks involved;
- the assessment of a retail client's ability to understand the risks involved; and
- factors for supervisors to consider when firms offering CFDs or other speculative products to retail clients enter into commercial arrangements with other authorised firms.

ESMA has also published a warning about CFDs, binary options and other speculative products for retail investors. The warning raises awareness of an increase in the marketing of these products and a rise in the number of complaints from retail investors who have suffered significant losses.

EMIR: ESMA publishes updated Q&A

ESMA has published an updated Q&A document on the implementation of EMIR. The update includes a new answer on trades cleared by a clearing house which is not a CCP under the EMIR definition.

Brexit: Michel Barnier appointed EU Commission's Chief Negotiator

The President of the EU Commission, Jean-Claude Juncker, has appointed Michel Barnier as Chief Negotiator in charge of the preparation and conduct of the negotiations with the UK under Article 50 of the Treaty on European Union (TEU).

The Chief Negotiator will report directly to President Juncker and, prior to the Article 50 process being triggered, will work on internal preparations for negotiations between the EU and UK. Among other things, Mr. Barnier is a former Member of the European Parliament (MEP), EU Commissioner in charge of regional policy and the reform of European institutions and Commissioner, and then Vice-President, in charge of the Internal Market and Services.

Mr. Barnier will take up his post on 1 October 2016.

MiFID2: FCA launches second implementation consultation

The Financial Conduct Authority (FCA) has launched its second consultation (CP16/19) on the implementation of MiFID2. The consultation sets out necessary changes to the FCA's Handbook relating to:

- commodity derivatives, including a proposal for a new section of the Market Conduct Sourcebook (MAR);
- Supervision (SUP);
- prudential standards;
- Senior Management Arrangements, Systems and Controls (SYSC), including proposals for a new section on remuneration requirements for sales staff and proposals for a single chapter on whistleblowing requirements under MiFID2 and domestic legislation;
- the Client Assets Sourcebook (CASS);
- complaint handling, including proposals for a new section in Dispute resolution: Complaints (DISP); and
- the Fees Manual (FEES) in relation to firms who wish to apply to operate an Organised Trading Facility (OTF), or vary their permission to do so, or a Multilateral Trading Facility (MTF), as well as the onboarding fee for firms wishing to connect to the FCA's Market Data Processor (MDP).

Alongside the consultation the FCA has announced that it intends to consult on changes to the Conduct of Business sourcebook (COBS), material on product governance and further changes to the Perimeter Guidance Manual later in 2016.

The consultation is based on draft legislation included in the HM Treasury consultation on MiFID2 implementation published in March 2015. HMT is expected to publish a final policy statement in due course before presenting the final legislation to Parliament. The FCA is likely to publish a single policy statement covering all aspects of MiFID2 implementation following all three consultations in 2017, once the legislation has been finalised by HMT.

Comments on the consultation are due by 28 October 2016.

PRA consults on implementation of systemic risk buffer

The Prudential Regulation Authority has published a consultation paper (CP27/16) on a draft statement of policy setting out its approach to the implementation of the systemic risk buffer (SRB).

CP27/16 includes the following policy proposals:

- the PRA expects that it will, in the exercise of sound supervisory judgement, deviate from the SRB rates derived from the Financial Policy Committee's framework only in exceptional cases;
- for building societies in scope of the framework, the applicable basis of the framework will be the group consolidated basis for building societies that are the parents of consolidation groups and the individual basis for all others;
- the initial SRB rates will be set and announced by the PRA in early 2019 and will apply three months after being set; and
- following the application of the initial SRB rates, rates will be set and announced annually.

Comments are due by 28 October 2016.

PRA consults on reporting requirements for operational continuity in resolution

The PRA has launched a consultation (CP28/16) on proposals for reporting requirements in relation to operational continuity in resolution. The consultation is relevant to UK banks, building societies and UK designated investment firms that provide functions that are critical to the economy and that need to be continued in resolution.

The consultation sets out proposals for firms to report on the activities and financial resources of their group providers in connection with the final PRA policy on operation continuity set out in supervisory statement SS9/16 and the General Organisational Requirements and Outsourcing Parts of the PRA Rulebook. The reporting requirements are intended to help the PRA monitor the financial resources available to a group provider to ensure the continuation of the provision of critical services to recipient entities in the event of stress or resolution. The PRA proposes that in-scope firms should submit the required information annually, on a calendar year basis, with the first reports due to be submitted 45 business days after the first reporting period ending 31 December 2019 and the first submissions due in March 2020.

Comments on the consultation are due by 28 October 2016.

PSR reports on ownership and competitiveness of payment infrastructure provision

The Payment Systems Regulator (PSR) has published the final report from its market review into the ownership and competitiveness of infrastructure provision, which was launched in June 2015. The final report follows an interim report published in February 2016 and sets out the final findings and certain additional evidence received from stakeholders.

Overall, the PSR found no effective competition for the provision of UK payments infrastructure for the three main interbank payment systems (Bacs, Faster Payments Service (FPS) and LINK) and identified a lack of incentives for operators to look for alternative infrastructure providers that could better meet the needs of their service-users. The PSR also identified barriers to entry that prevent or deter central infrastructure providers from competing to provide these services.

As a result of the findings, the PSR has sets out a series of possible changes to remedy the current situation for consultation, in particular:

- undertaking competitive procurement exercises to increase competition in the provision of central infrastructure services;
- establishing a common international messaging standard for Bacs and FPS in order to enhance interoperability by addressing the barrier to entry due to lack of common international messaging standards in the UK; and
- divestment by the four largest Vocalink shareholders of their interest in Vocalink, which is the infrastructure provider for Bacs, FPS and LINK.

Comments on the high-level options for potential remedies set out in the final report are due by 22 September 2016.

Fair and Effective Markets Review publishes implementation report on supporting fair and effective FICC markets

The Fair and Effective Markets Review (FEMR) has published its implementation report on developing fair and effective wholesale fixed income, currency and commodity (FICC) markets. The report details the progress that has been made to implement recommendations made in the FEMR’s June 2015 report, including:

- the coming into force of the Senior Managers and Certification Regimes (SM&CR), and its extension to all authorised financial firms with the Bank of England and Financial Services Act 2016. The SM&CR aims to support better decision-making at firms and ensure that senior managers can be held accountable for breaches of regulations by the firms;
- the FCA and PRA are in the process of finalising rules on the mandatory form for regulatory references;
- the establishment of the FICC Markets Standards Board (FMSB) to improve the quality, clarity and market-wide understanding of wholesale FICC trading practices, to produce guidelines and standards to promote good conduct and to periodically review wholesale FICC markets for emerging risks; and
- the launch of initiatives by international authorities to raise standards globally, including the Bank for International Settlements (BIS) producing a single Global FX Code, and the International Organization of Securities Commissions (IOSCO) aiming to publish a report including a toolkit to address conduct in wholesale markets by the end of 2016.

The report suggests that despite the progress, improvements can still be made. The FEMR aims to continue to catalyse reform where appropriate, and the authorities intend to work closely with industry and international counterparts to promote initiatives that improve the fairness and effectiveness of FICC markets.

Treasury Committee calls on government to re-examine possible separation of enforcement function from FCA

The House of Commons Treasury Committee has published a report on lessons for regulators arising from the failure of HBOS in 2008. The report draws together findings from the FCA's and PRA's review into the failure of HBOS, Andrew Green QC's review of the enforcement decisions taken by the regulator, the independent review of these two reports by the Treasury Committee's advisers and oral evidence taken from the publishers of all three reports.

Among other things, the report makes the case for placing the FCA's enforcement function in a separate body, a proposal made by the Parliamentary Commission on Banking Standards (PCBS) in 2013, which the Committee suggests merits re-examination by HM Treasury in light of the Green Report. In particular, the Committee argues that a new enforcement body could:

- sit equidistant between the FCA and PRA;
- enhance the perception of the enforcement function's independence and facilitate the objective scrutiny of supervisors' actions by enforcement staff; and
- ensure clarity over the objectives of the FCA, PRA and the separate enforcement body.

The Committee has recommended that HMT appoint an independent reviewer to re-examine the case for a separate enforcement body.

The report also sets out conclusions relating to the Financial Services Authority's (FSA's) approach to supervision, regulatory accountability, the Financial Reporting Council (FRC) and individual responsibility at the regulator.

Autorité des Marchés Financiers introduces concept of 'premarketing' of funds in France

As part of the ongoing work of the FROG (French [Routes & Opportunities] Garden) working group, the Autorité des Marchés Financiers (AMF) has adjusted its policy to encourage innovation, make it easier to launch new funds in France and give participants legal protection, by introducing the concept of 'premarketing' and adapting its definition of the act of marketing units or shares in undertakings for collective investment in transferable securities (UCITS) or alternative investment funds (AIF) in France.

Until now, certain types of presentations or exchanges with investors may have been considered as marketing practices triggering the application of rules poorly suited to the early stages of a product's development. From now on, for example, the practice of management companies contacting up to a maximum of 50 investors (professionals or individuals whose initial subscription would be at least EUR 100,000) to assess their interest prior to the launch of a UCITS or AIF will not constitute an act of marketing, provided that the investors are not given a subscription form and/or documentation containing definitive information on the fund's characteristics. However, any subsequent subscription by the investors contacted will be considered to constitute an act of marketing.

The AMF has also clarified the characteristics of several situations that would not trigger the application of marketing rules in France and updated its guide to regimes for marketing UCITS and AIFs (DOC-2014-04) to reflect the new policy.

BaFin publishes draft General Administrative Act on prohibition of marketing, distribution and sale of credit-linked notes in retail market

The German Federal Financial Supervisory Authority (BaFin) has published the draft of a General Administrative Act pursuant to section 4b para 1 of the German Securities Trading Act on the prohibition of the marketing, distribution and sale of credit-linked notes to retail clients.

BaFin has provided market participants the opportunity to submit their comments on the draft General Administrative Act in writing until 2 September 2016.

The press release was preceded by a market-wide survey BaFin sent to issuers of credit-linked notes gathering information on how retail clients are being informed of the risks of credit-linked notes. Among other things, the survey covers the scope of the credit-linked notes issued, the size of the average coupon and the origin of the credit risks used in the structuring.

Law of 23 July 2016 on reserved alternative investment funds published in Luxembourg official gazette

The Luxembourg law of 23 July 2016 on reserved alternative investment funds (RAIF Law) has been published in the Luxembourg official gazette (Mémorial) and will enter into force on 1 August 2016.

The purpose of the RAIF Law is to introduce a new type of Luxembourg investment vehicle that is reserved to Luxembourg alternative investment funds (AIFs) managed by an authorised external alternative investment fund manager (AIFM) within the meaning of the Alternative Investment Fund Manages Directive (AIFMD). To a large extent, the RAIF vehicle offers similar structuring flexibilities as Luxembourg specialised investment funds (SIFs). However, in contrast to SIFs, RAIFs are not subject to supervision by the CSSF; but a RAIF will nevertheless be indirectly supervised by the competent supervisory authorities of its authorised AIFM under the AIFMD.

Japanese FSA announces new transitional measures on segregation of initial margin

The Japanese Financial Services Agency (JFSA) has issued a new Supplementary Provision to the JFSA's margin requirement regulations for non-centrally cleared OTC derivatives. The JFSA has explained that by adding the Supplementary Provision (a temporary measure 'for the time being', to deal with the delayed implementation of EU margin regulations) the segregation requirement of IM can be satisfied by using a 'method similar to a trust'. The JFSA has also mentioned the use of a custodian as one example of a 'method similar to a trust'. The Supplementary Provision, together with the new margin regulations, will become effective on 1 September 2016. As a result of the addition of the Supplementary Provision, for the time being, the pledge with third party custodian structure can be used for IM under the Japanese margin regulations.

The measures taken by the Supplementary Provision are temporary and it is not clear from the Supplementary Provision how long 'for the time being' means. However, the Supplementary Provision may remain effective until the EU implements the margin regulations.

Reforms to Singapore's bankruptcy framework to take effect from 1 August 2016

The Ministry of Law has announced that reforms to Singapore’s bankruptcy framework will come into force on 1 August 2016. The reforms are intended to create a more rehabilitative environment for bankrupts and encourage creditors to exercise financial prudence when extending credit. The reforms are in line with the recommendations made in the Insolvency Law Review Committee’s report submitted in 2013 and given legal effect through the Bankruptcy (Amendment) Bill passed in Parliament in July 2015.

While the reforms apply only to bankruptcy applications filed on 1 August 2016 or later, the Insolvency Office will manage existing cases, where appropriate, to ensure some parity of treatment for existing bankrupts.

Some of the key framework changes to be effected include:

- increased debt threshold – the bankruptcy debt threshold, or minimum debt amount that needs to be owed before a person may be made bankrupt, will be increased from SGD 10000 to SGD 15000;
- expedited bankruptcy application – after a demand for payment has been issued to a debtor, the creditor will no longer have to wait for a 21-day period to lapse before filing a bankruptcy application provided the creditor is able to show a serious possibility that the debtor’s property or its value will be significantly diminished before the 21-day period ends;
- mandatory appointment of private trustees by 'institutional creditors' – institutional creditors will be required to nominate private trustees to be appointed to administer the bankruptcy estate when applying to make a debtor bankrupt; and
- introduction of differentiated discharge regime – the new differentiated discharge framework will create a more rehabilitative regime that sets out fixed exit points for bankrupts to be discharged.

MAS issues new guidelines on outsourcing risk management

The Monetary Authority of Singapore (MAS) has issued revised guidelines on outsourcing following industry and public consultation. The guidelines replace the previous outsourcing guidelines and circular on information technology outsourcing.

The guidelines provide expanded guidance to the industry on prudent risk management practices for outsourcing, including cloud services, which have been adopted by a growing number of financial institutions. Key changes to the guidelines include:

- the introduction of a new section on cloud computing that sets out the MAS’ stance on cloud computing;
- the removal of the expectation for financial institutions to pre-notify the MAS of material outsourcing arrangements; and
- the revision to the definition of 'material outsourcing arrangement' to include, under certain circumstances, an arrangement that involves customer information.

CFTC proposes amendments to conditions for exemption from registration for certain foreign persons

The US Commodity Futures Trading Commission (CFTC) has announced that it is seeking comments on proposed amendments to CFTC Regulation 3.10(c). The proposed amendments, which are available for review on the CFTC website, would amend the conditions for exemption from registration for certain foreign persons in connection with commodity interest transactions solely on behalf of persons located outside the US, or on behalf of certain international financial institutions.

Comments on the proposed amendments will be received for 30 days following the proposal’s publication in the Federal Register, which is expected shortly. All comments will be posted on the CFTC’s website.

CLIFFORD CHANCE BRIEFINGS

ESMA issues more advice on extending the AIFMD passport to non-EU managers

The Alternative Investment Fund Managers Directive passport (AIFMD passport) could be extended to managers in some non-EU countries, enabling them to market and manage funds throughout the European Union. Such is the advice from ESMA to the European Parliament, the Council and the Commission, issued on 19 July 2016, on the application of the AIFMD passport to non-EU alternative investment managers (AIFMs) and alternative investment funds (AIFs) in 12 non-EU countries.

This briefing paper discusses ESMA's advice.

https://www.cliffordchance.com/briefings/2016/07/esma_issues_moreadviceonextendingtheaifm.html

Implementing PRIIPs – the uncertainty persists

It is now less than six months until PRIIPs, the EU Regulation on Packaged Retail and Insurance-based Investment Products, comes into force and much remains to be done in preparation for its implementation.

This briefing paper discusses some of the key issues which have created uncertainty for firms striving to implement the regulation by the December 2016 deadline.

https://www.cliffordchance.com/briefings/2016/07/implementing_priipstheuncertaintypersists.html

Asia Pacific Puts Sanctions Due Diligence to the Test

The Iran Joint Comprehensive Plan of Action (JCPOA) is opening new commercial opportunities while underscoring the importance of due diligence in the context of economic sanctions. This should be a familiar topic to companies doing business in Asia, where Myanmar and North Korea pose similar challenges owing to the large number of specially designated nationals (SDNs) and the presence of front companies operating on behalf of SDNs. Knowing and verifying the identity of commercial counterparties is essential to managing this risk on a proactive footing.

This briefing paper discusses some of the key issues around due diligence of commercial counterparties for firms doing business in the Asia Pacific region.

https://www.cliffordchance.com/briefings/2016/07/asia_pacific_putssanctionsduediligencetoth.html

Brexit – implications for loan documentation: keep calm and carry on

Since the Brexit referendum, some parties have been wondering whether any provisions need to change in their English law loan documentation.

This briefing paper discusses some of the potential implications and, although there is considerable uncertainty as to how and when Brexit might occur and therefore how it could impact documentation, whether any changes to practice should be considered now.

https://www.cliffordchance.com/briefings/2016/07/brexit_implicationsforloandocumentation.html

Brexit – What next for UK pensions?

One month on from the UK's vote to leave the EU, what's next for UK pensions? Our briefing published on the day after the result considered in general terms the impact of a Brexit on UK pensions. This briefing paper looks in more detail at the key issues pension schemes and employers should be thinking about both now and in the long-term, pending the UK's formal withdrawal from the EU. In particular, the briefing covers the following:

- employer covenant;
- funding;
- investment (including investment strategy, investment documentation, collateral and passporting);
- IORP II;
- corporate transactions and the powers of the UK Pensions Regulator; and
- Scottish independence.

https://www.cliffordchance.com/briefings/2016/07/uk_pensions_updatejuly2016-brexitwha.html

Foreign investors permitted to own 100% of companies operating in the wholesale and retail trading sectors in Saudi Arabia

Saudi Arabia has approved and published the licensing conditions to permit foreign investors to own 100% of companies operating in the wholesale and retail trading sectors in Saudi Arabia.

This briefing paper explains the rules and conditions that foreign investors are required to comply with in order to own a 100% ownership interest in entities undertaking wholesale and retail activities.

https://www.cliffordchance.com/briefings/2016/07/foreign_investorspermittedtoown100o.html

The Singapore High Court sets aside arbitral award in JVL Agro Industries Ltd v Agritrade International

In JVL Agro Industries Ltd v Agritrade International Pte Ltd [2016] SGHC 126, the High Court was faced with an application by the plaintiff, JVL Agro Industries Limited (JVL), to set aside an arbitral award on the basis that there had been a breach of the rules of natural justice in connection with the making of the award (amongst other grounds).

The High Court granted the application on the basis that JVL had been deprived of the opportunity to present its case. The decision is significant because it shows that although the grounds on which a court may set aside an award are few in number and narrow in scope, the courts will not hesitate to act when the circumstances justify doing so. Singapore's reputation as an arbitration friendly jurisdiction does not mean that tribunals have carte blanche to base their decisions on matters not submitted or argued before them.

This briefing paper discusses the decision.

https://www.cliffordchance.com/briefings/2016/07/the_singapore_highcourtsetsasidearbitra.html

CFTC presses its case to expand conduct punishable as manipulation

In a brief filed in New York federal court on 13 July 2016, in support of an enforcement action, the US Commodity Futures Trading Commission (CFTC) pressed again its controversial view that a trader can be guilty of attempted price manipulation without the specific intent to create an 'artificial price'. Rather, the CFTC, contesting an industry amicus curiae brief that cited more than 30 years of contrary CFTC and judicial precedent, insists that proof of attempted price manipulation can be based upon a trader's acts intended to simply influence price, regardless of the trader's belief, or the reality, that his or her act was in furtherance of achieving a true value of the traded instrument.

Distinguishing unlawful price manipulation from legitimate market activity by the specific intent to create an artificial price represents a critical protection to traders whose bids, offers, and trades may be expected to move markets. This safeguard was clearly articulated by the CFTC in its early years when it dismissed charges of alleged price manipulation in its oft-cited 1982 Indiana Farm Bureau decision, in which the CFTC clearly stated that 'it is not enough to prove simply that the accused intended to influence price.' The CFTC's present arguments indicate that they are now backing away from that more measured view.

This briefing paper discusses the case.

https://www.cliffordchance.com/briefings/2016/07/cftc_presses_itscasetoexpandconduc.html

CFTC Bitfinex Enforcement Action

On 2 June, the Commodity Futures Trading Commission (CFTC) issued an Order against Hong Kong based cryptocurrency exchange BFXNA Inc. doing business as Bitfinex for violating the Commodity Exchange Act (CEA). Under the Order, the CFTC accepted Bitfinex's settlement offer, including a civil monetary penalty of USD 75,000. The Order expands the CFTC's regulation of bitcoin and other cryptocurrencies into spot markets under certain conditions.

This briefing paper discusses the Order and its implications.

https://www.cliffordchance.com/briefings/2016/07/cftc_bitfinex_enforcementaction.html

Update – The Law on Penalties

The High Court of Australia on 27 July 2016 delivered its decision in Paciocco v Australia and New Zealand Banking Group Ltd, its latest consideration of the penalties doctrine.

The majority of the High Court found that in assessing whether a clause is a penalty, the court is to have regard to the legitimate interests of the innocent party in the enforcement of the clause. This echoes the approach taken recently by the UK Supreme Court and emphasises the freedom of parties to conclude bargains which include mechanisms for the protection of commercial interests in accordance with their risk appetites and without being constrained by the requirement to prove financial loss.

In respect of the late payment fee charged by the bank, the majority found that the costs of provisioning for losses, regulatory capital and collection were legitimate interests of the bank. This justified the late payment fee. It was not determinative that the late payment fee was disproportionate to the actual loss suffered and did not represent a genuine pre-estimate of damages.

Whilst the decision is clear, the reasoning may give rise to further debate as the High Court delivered five separate judgments which seek to reconcile the decision in Paciocco with the previous authorities in relation to penalties, including the seminal decision of Dunlop, the High Court's own decision in Andrews and the landmark decision of the UK Supreme Court in Cavendish v Makdessi (a case in which Clifford Chance acted).

This briefing paper discusses the decision in Paciocco.

https://www.cliffordchance.com/briefings/2016/07/update_the_law_onpenalties.html