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Please do not hesitate to contact any of the named people for further information on the items set out below. We would also like to hear whether you wish to receive this update more regularly or have other suggestions for its improvement. Please e mail your comments to Emily Lew or your relationship partner.
DEVELOPMENTS OF GENERAL INTEREST

1. BREXIT

1.1 A year to go before negotiations conclude

There is just a year to go before Brexit negotiations are due to conclude in October or November 2018. The first phase of negotiations, which focuses on withdrawal issues, continues, and its progress will be assessed at the next European Council meeting in December. Only once the Council considers that sufficient progress has been made on the first phase can the second phase of negotiations, on transitional arrangements and the framework for the future relationship between the UK and the EU, commence. The most recent of our new series of blog posts examining the negotiations from a Brussels viewpoint is available here.

The UK Government has recently announced that a new Bill will be released which will, once passed, enshrine the Withdrawal Agreement between the UK and the EU into UK law. This new Bill will ensure that the major policy decisions made in the Withdrawal Agreement are scrutinised by Parliament before being made into UK law. It would include, for example, the final position on citizens’ rights, any financial settlement and the details of any transitional period agreed between both sides.

The EU Withdrawal Bill (previously known as the Great Repeal Bill) continues its passage through Parliament, with votes taking place during November in the House of Commons. In addition, the UK Government is publishing various pieces of Brexit related legislation to require all companies of a significant size to disclose their corporate governance arrangements in their directors’ report legislation to require all companies of a significant size to disclose their corporate governance arrangements in their directors’ report. The FRC is expected to announce its fundamental review of the Companies Act 2006.

The peculiarity of the Article 50 process – with its two-year ticking clock – makes preparatory work for business more urgent. If no alternative relationship or even temporary transitional arrangement were to be agreed between the UK and the EU before the two years run out, the EU treaties would cease to apply to the UK, with nothing to replace them in terms of the remaining EU’s obligations.

Such a “cliff-edge” scenario is not necessarily the most likely outcome of the negotiations, but as time passes business will be recalibrating plans based on reassessing assumptions and what is a proportionate response in relation to maintaining cross-border activities post-Brexit.

If you would like to keep up to date with our latest Brexit analysis, please subscribe here to our Brexit blog. It includes a page collating the key new EU and UK materials here.

Should you wish to discuss how Brexit affects you and what to do in response, please contact Paul Butcher, Dorothy Livingston or Gavin Williams.

2. CORPORATE

2.1 Corporate governance – Government sets out corporate governance reforms


The key steps that the Government intends to take forward itself, or with the assistance of other bodies, include:

- **Report on stakeholder issues** – Public and private companies of a significant size will be required to explain annually how their directors comply with the requirements of section 172 of the Companies Act 2006.

- **Stakeholder voice in the boardroom** – The Financial Reporting Council (FRC) is invited to consult on a new UK Corporate Governance Code principle establishing the importance of strengthening the voice of employees and other non-shareholder interests at board level. This would include consulting on a specific provision requiring premium listed companies to adopt, on a comply or explain basis, one of three employee engagement mechanisms: (i) a designated non-executive director; (ii) a formal employee advisory council; or (iii) a director from the workforce.

- **Register of companies encountering shareholder opposition** – The Investment Association will launch (by the end of 2017) a public register of listed companies that have received shareholder votes against of 20% or more on a shareholder resolution.

- **Pay ratios** – Listed companies will be required to publish the ratios of their CEOs’ pay against average employee pay.

- **Private company governance principles** – The FRC is invited to develop a voluntary set of corporate governance principles for large private companies. The Government will also introduce secondary legislation to require all companies of a significant size to disclose their corporate governance arrangements in their directors’ report and on their website.

The FRC is expected to announce its fundamental review of the Governance Code shortly.

The Government intends the reforms to be effective by June 2018.

For further information, please contact Carol Shutkever or Gareth Sykes.

2.2 Changes to the Listing Regime

The FCA published a Policy Statement (PS17/22) in October 2017 setting out changes to the Listing Rules in three areas: eligibility for premium listing; class transactions and the calculation of the class tests; and reverse takeovers.

The key changes include:

- **Eligibility for listing** – The requirement for an applicant for listing and the continuing obligation in connection with having an independent business are clarified and certain additions and clarifications to the concessionary routes to a premium listing are introduced.

- **Relaxing the profits test in the class test rules in Listing Rule 10** – A premium listed company may disregard the profits test, without having to consult the FCA, in certain limited circumstances, including where the result of the profit test is 25% or more but all other class test results are under 5%.

- **Reverse takeovers** – The “rebuttable presumption of suspension” in connection with reverse takeovers is removed (except for reverse takeovers by shell companies).

For more information, please see our blog post here.
The Policy Statement is part of the FCA’s wider review of the structure of the UK’s primary markets. It was accompanied by a separate Feedback Statement (FS17/3) on the UK Primary Markets Landscape. This sets out three areas of possible reform of the UK primary markets that the FCA considers merit further exploration. These are: (i) listing categories; (ii) patient capital for companies that require long-term investment; and (iii) retail access to debt markets. The FCA may publish further proposals for consultation in these areas in due course.

The rule changes come into force on 1 January 2018.

For further information, please contact Carol Shutkever or Gareth Sykes.

3. DISPUTE RESOLUTION

3.1 Banking litigation

3.1.1 Court of Appeal confirms no tortious duty of care owed to customers in connection with the FCA past business review

Over the past two years, the courts have grappled with the novel claimant argument that financial institutions owe duties of care in tort directly to their customers in connection with their conduct of the past business review of interest rate hedging product sales announced by the FCA (then FSA) in 2012 (the Review). There have been a number of contradictory High Court decisions – see our previous e-bulletins here and here. However, in good news for financial institutions, the Court of Appeal has now clarified – in three conjoined appeals – that such claimants have little prospect of bringing such claims against the banks conducting that Review: CGL Group Limited & Ors v Royal Bank of Scotland plc & Ors [2017] EWHC 1871 (QB).

The Court of Appeal found it was not even arguable that the defendant banks in the three linked cases owed tortious duties to the claimants to conduct the Review with reasonable skill and care. This was primarily because such a duty would undermine the statutory and regulatory regime, which grants customers rights to bring claims against financial institutions only in certain defined circumstances. Such claims should now be amenable to summary judgment.

For further information, see our banking litigation e-bulletin or contact John Corrie, Ben Goodman, Dan Eziefula or Ceri Morgan.

3.1.2 High Court rejects application to include conspiracy allegations in IRHP misselling claim

In the context of interest rate hedging product (IRHP) misselling litigation, the claimants applied to introduce economic tort claims for wrongful interference, conspiracy to injure and/or conspiracy to use unlawful means: Elite Property Holdings Ltd & Anor v Barclays Bank plc [2017] EWHC 2030 (QB). The High Court comprehensively rejected the claimants’ application. It followed an earlier decision in the same proceedings, in which the Court struck out the majority of the claimants’ claims relating to the sale of their IRHPs and ordered the claimants to particularise properly their claims for conspiracy (see our e-bulletin on that decision here). The combined effect of these judgments is likely to bring an end to the proceedings in question, subject to the claimants’ pending applications for permission to appeal both decisions. In the instant case, the Court rejected the claimants’ application for permission to amend the particulars of claim on the basis that the claims sought to be introduced had no real prospect of success.

For further information, see our banking litigation e-bulletin or contact John Corrie, Hannah Bain or Ceri Morgan.

3.1.3 High Court applies public law standard to the exercise of discretion by a financial institution under a receivables finance agreement

BHL v Leumi ABL Ltd [2017] EWHC 1871 (QB) serves as an interesting illustration of how the court can import public law principles to the exercise of a commercial party’s contractual discretion, here in the context of a bank exercising its discretion under a receivables finance agreement. Applying the principles most recently set out by the Supreme Court in Braganza v BP Shipping [2015] UKSC 17, the Court conducted an analysis of whether the bank’s discretion was exercised in a way which was not arbitrary, capricious or irrational in the public law sense (the so-called Braganza duty). The instant case provides an unusual example where the Court found that the bank’s discretion was exercised in breach of the duty. The Court of Appeal has refused permission to appeal.

For further information, see our banking litigation e-bulletin or contact Harry Edwards, Amel Fenghour or Ceri Morgan.

3.2 Litigation

3.2.1 Choice of law, jurisdiction and enforcement of judgments post-Brexit

Papers published by the EU Commission and the UK Government in, respectively, June and August this year shed some light on what might happen post-Brexit when current reciprocal arrangements on choice of law, jurisdiction and enforcement of judgments no longer apply.

In relation to choice of law, there should be very little change. EU Member State courts will continue to apply to current rules (under the Rome I and Rome II Regulations) to determine the applicable law, whether or not that is the law of an EU Member State. The UK Government has stated its intention that Rome I and Rome II will be incorporated into UK domestic law at the point of exit, so UK courts will also continue to apply these rules.

The position is more complicated in relation to jurisdiction and enforcement of judgments, where reciprocity is a key element. There are, however, some indications that a deal may be negotiated to ensure the continuation of the current rules, or something similar. The UK Government is, it seems, hoping to reach an agreement with the EU that allows for close and comprehensive cross-border cooperation on a reciprocal basis “which reflects closely the substantive principles of cooperation under the current EU framework”, i.e. the recast Brussels Regulation. It has also indicated that it will seek to participate in the Lugano Convention, which applies to Norway, Switzerland and Iceland, and will participate in the Hague Convention on Choice of Court Agreements 2005, which sets out jurisdiction rules where there is an exclusive choice of court agreement.

All of this gives cause for quiet optimism, though there is much that remains uncertain.

For further information please contact Anna Pertoldi or Maura McIntosh.
3.2.2 Recent decisions show continuing trend for tough approach to rule breaches

A number of court decisions in recent months have re-emphasised the message that those who fail to comply with procedural rules should expect little sympathy, at least where they fail to take prompt steps to put matters right.

The implementation of the Jackson reforms in April 2013 introduced a new test for granting relief from sanctions for breaches of a court rule or order. Initially the test was applied very strictly, with the notorious Mitchell decision in November 2013 leading to a flood of satellite litigation and, in many cases, the imposition of harsh sanctions for relatively minor breaches. A more measured approach was prompted by the Court of Appeal’s decision in Denton in July 2014 which “clarified” the Mitchell guidelines.

However, since Denton we have continued to see cases which illustrate that the courts remain willing to take tough decisions against those who flout the rules, and those decisions appear to be coming out with greater frequency of late. The obvious overall messages for litigating parties are: ensure compliance with rules and orders so far as possible; make an early application for more time where it appears a deadline cannot be met; and apply promptly for relief from any applicable sanction where things have gone wrong.

For further information please see our blog post here or contact Anna Pertoldi or Maura McIntosh.

3.2.3 Working group proposes pilot of new rules for disclosure

A disclosure working group set up last year, chaired by Lady Justice Gloster, has published its proposals for reforms to the rules governing disclosure of documents in English litigation. The proposals are subject to consultation until 28 February 2018, following which they are to be considered by the Civil Procedure Rule Committee and are then likely to be piloted in the Business and Property Courts.

The working group’s report identifies a number of key defects in the current disclosure regime, including that the range of alternative disclosure orders in the “menu” introduced by the Jackson reforms are not being adequately utilised, and standard disclosure has remained the default for most cases. Under the new proposals, in broad summary, the current disclosure menu would be replaced by a new list of “models”. Although the list of models is not dramatically different from the current menu, the proposed rules contain clear signs steering the parties, and the court, toward a more restrained approach to disclosure - including that none of the models is referred to as “standard”. The court would only make an order that one of the disclosure models should apply where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the issues for Disclosure (which are to be agreed between the parties before the first case management conference).

The proposed rules contain an express duty to disclose documents a party is aware of which are adverse to its case (unless they are privileged), regardless of any order for disclosure. There is also an express duty to refrain from providing irrelevant documents.

The draft rules also provide that where a party wishes to claim a right or duty to withhold a document, or part of a document, or a class of documents (e.g. grounds of privilege), it must describe the document (or part or class) and explain “with reasonable precision” the grounds upon which the right or duty is being exercised. It is not clear whether this is intended to signal any change in the current practice of describing privileged documents in generic terms.

For further information, please contact Anna Pertoldi or Maura McIntosh.

4. EMPLOYMENT AND PENSIONS

4.1 Employment

4.1.1 Employers may face an increase in tribunal claims following Supreme Court ruling that fees are unlawful

Employers could face in an increase in tribunal claims (particularly low value and/or multiple claims) following the Supreme Court’s historic ruling in July 2017 that Employment Tribunal and Employment Appeal Tribunal (EAT) fees introduced in July 2013 were unlawful. The Court considered that the level of fees imposed had the effect of preventing access to justice, as they were unaffordable for low and middle income claimants and made it futile or irrational to bring claims for modest amounts or non-monetary remedies. (R (on the application of UNISON) v Lord Chancellor [2017] UKSC 51).

The fee requirement was removed immediately and a reimbursement scheme is expected to be in place by the end of November 2017. Although not yet confirmed, it is understood that the scheme will be open to respondents who paid a claimant costs order in respect of tribunal or EAT fees, but not where fees were paid as part of a settlement agreement. Individuals whose claim was rejected or dismissed for non-payment of a fee will be able to have their claim reinstated; individuals who were unable reasonably to afford the fee to bring a tribunal claim may now seek to argue that the tribunal should extend time to allow late claims.

The judgment and its implications are discussed in more detail in our blog here. It does leave open the possibility of the Government devising a different, lawful fees regime in the future.

For further information, please contact Peter Frost or Anna Henderson.

4.1.2 Employers should update manager training on whistleblowing, given recent rulings on “public interest” and potential liability of individual managers

Whistleblowing disclosures will only be protected if the whistleblower reasonably believes that the disclosures are “in the public interest”. However, employers should not assume that the disclosure of an alleged breach of employment contract will necessarily be outside the scope of protection. The Court of Appeal has confirmed in Chesterton Global Ltd v Nuramin [2017] EWCA Civ 979 that disclosure of private workplace disputes can be protected in certain circumstances, for example if the disclosure relates to serious, deliberate wrongdoing by a large employer and materially affects a significant number of workers. Further details are in our blog post here.

The EAT in International Petroleum Ltd v Osipov UKEAT/0229/16 and UKEAT/0058/17 has made clear that an employee can bring a whistleblowing detriment claim against a fellow worker in relation to their actions in dismissing him (for which the employer may be vicariously liable), in addition to an unfair dismissal claim against the
employer. The law only prohibits bringing a claim based on dismissal as a detriment claim against the employer, not against colleagues instrumental in the decision to dismiss. Given that detriment claims have a lower standard of causation and the possibility of injury to feelings awards (not available for unfair dismissal claims), it may well be advantageous for claimants to bring both types of claim. The decision has been appealed to the Court of Appeal.

Employers may wish to update their whistleblowing training for managers to reflect the possibility of personal liability for post-dismissal losses. It may also be appropriate to extend the training to both executive and non-executive directors where they may be instrumental in decisions to dismiss, eg board level dismissals (non-executive directors were held personally liable in the Osipov case).

For further information, please contact Andrew Taggart or Anna Henderson.

4.1.3 Pressure on employers to publish gender pay gap figures

Although larger private sector employers are only required to publish their gender pay gap data by 4 April 2018, the Government has recently been urging companies to publish early; only around 2% have done so as at early November. The Prime Minister has also called for smaller employers (with fewer than 250 employees) to publish voluntarily, and has encouraged employers to take steps to reduce the pay gap, by improving the pipeline to ensure progress on female representation at senior levels, including offering return to work schemes, and by advertising all jobs as open to flexible working arrangements from day one, unless there are “solid business reasons not to”. The promotion of flexible working was one of the recommendations made by the Equalities and Human Rights Commission’s recently published research and strategy for reducing gender, ethnicity and disability pay gaps, along with tackling unconscious bias and encouraging men and women to share childcare responsibilities.

Although there is no requirement to do so, some employers have chosen to supplement their gender pay gap data with a voluntary narrative explaining their pay gap and setting out an action plan to tackle it. Clients currently considering their own reports may be interested in our detailed review of the reports published to date, available from Anna Henderson.

The Parker Review Committee has also published its final report into the ethnic diversity of UK boards, its recommendations remaining unchanged from the consultation draft. The final report recommends that there should be at least one director of colour on each FTSE 100 board and each FTSE 250 board by 2024. There are also recommendations on ensuring the pipeline and disclosure of a company’s diversity policy in its annual report.

For further information, see our briefing here or contact Andrew Taggart, Christine Young or Anna Henderson.

4.2 Pensions

Three recent decisions of the Court of Appeal have offered employers who are struggling under the weight of their defined benefit (DB) pension liabilities some comfort as to how such liabilities might properly be managed in the future.

4.2.1 Pensionable pay cap did not breach employer’s “duty of trust and confidence”

In Bradbury v BBC [2017] EWCA Civ 1144 it was unanimously held that the introduction of a “pensionable pay cap” by the BBC (the effect of which was that only a proportion of future pay rises would be pensionable under its DB scheme) was lawful, and in particular that it:

- was permitted by the rules of the scheme;
- did not breach the “anti-alienation” provisions of section 91 of the Pensions Act 1995; and
- did not breach the employers’ “implied duty of mutual trust and confidence” either.

The facts are straightforward. The BBC decided in 2011, in an attempt to manage its burgeoning pension liabilities that going forwards only the first 1% of any pay rise given to members of its DB scheme would be pensionable. Members were given a choice of remaining in it (on that basis) or joining different arrangements providing either ‘career average’ or money purchase benefits.

The rules provided members with pensions based on their “Basic Salary”, defined as “the amount determined by the BBC as being an Employee’s basic salary or wages”. Section 91 of the 1995 Act then prevents members from giving up their accrued rights – “a right to a future pension” from a pension scheme cannot be surrendered, and any ostensible agreement to do so is unenforceable.

The Court of Appeal held that:

- as there was no entitlement to a pay rise at all, the definition of Basic Salary permitted the BBC to decide how much of any pay rise was then pensionable;
- as a consequence there was no breach of section 91 either, as this only protects rights that have actually already been earned (rather than those which might in future be earned as a result of later pay rises); and
- the manner in which the BBC had conducted itself (including its unilateral imposition of the cap on members of the DB scheme) did not offend its implied duties towards its staff, whether as employees or as members of the pension scheme.

For further information please contact Alison Brown or Samantha Brown.

4.2.2 The importance (or otherwise) of members’ “reasonable expectations”

“Non-pensionability agreements” or NPAs (being an extreme form of a pensionable pay cap, under which no element of a future pay rise is pensionable) also featured before the Court of Appeal in IBM v Dalgleish [2017] EWCA Civ 1212. The case concerned IBM’s closure of its DB scheme to future accrual in 2011 as part of a wider exercise to bring escalating pension liabilities back under control. The Court held that whilst failure to offer a pay rise to employees who are not contractually entitled to one could theoretically (in extreme circumstances) be a breach of duty, this was not the case here; and that, as a consequence, imposing NPAs as a condition of a pay rise did not constitute a breach of duty either. Nor, the Court continued, was the imposition of NPAs threatening or coercive behaviour by the employer.
The Court of Appeal also held, perhaps more tellingly, that “no special significance” should be given to members’ expectations in the context of the pension benefits to which they believed they would continue to be entitled. The High Court had, it found, elevated “reasonable expectations” to a status that they did not properly have. Instead, whilst members’ expectations clearly could not be ignored, they were just one of a number of relevant factors that an employer had to take into account when exercising a discretionary decision (such as whether to proceed with the closure of a pension scheme to benefit accrual) and when, on balance, deciding whether to or not.

The Court of Appeal did, however, lay down something of a warning about the consequences of breaching the Consultation Regulations by failing to consult properly with affected members when proposing changes to pension arrangements. No longer, it seems, is the maximum potential risk simply a £50,000 fine. Instead, a future breach of the Consultation Regulations now has the potential to result in a breach of the employer’s “implied duty of good faith” – and, in extreme circumstances, render the entire benefit change exercise void and unenforceable. Whilst the decision in IBM should therefore, in the main, be viewed by employers positively, any embarking upon such an exercise should also carefully heed the Court of Appeal’s words and ensure that in all respects consultation is carried out precisely as required.

For further information please contact Samantha Brown or Peter Frost.

4.2.3 Lightening the load? Equalisation and retrospective “levelling-down” of members’ benefits

Most recently the Court of Appeal has, in Safeway v Newton EWCA Civ 1482, referred to the Court of Justice of the European Communities (CJEU) various questions that call into doubt the long-established principle that – when equalising pension benefits as between males and females – it is not possible to retrospectively worsen benefits, or “level down”, by raising members’ retirement ages in order to align them with those of the opposite sex.

The matter is most likely to be relevant to pension schemes, such as that sponsored by Safeway, which have a power of amendment that expressly permits retrospective changes to members’ benefits, but which were advised – after the European Court decisions in cases such as Barber and Coloroll – that it could not be used in order to reduce, for the so-called Barber Window, the benefits of the “advantaged” class of members (which generally, insofar as equalisation is concerned, means females). It will not, by contrast, be relevant to the majority of occupational DB schemes.

If the CJEU rules that retrospective “levelling down” by schemes such as Safeway’s is in fact (and contrary to industry custom and practice) lawful, it might then be open to them to revisit the question of members’ benefits for the Barber Window period – albeit only to the extent, of course, that one can properly do so some 25 years on.

In summary there will be no “quick fix” as a result of Safeway. The precise questions are unlikely to be submitted to the CJEU until the New Year. It must then deliberate matters in open court. Once it has given its decision, the case will go back to the Court of Appeal for reconsideration on the basis of the answers provided by the CJEU.

And even then, given the amounts at stake (believed to be in the region of £100 million for the Safeway scheme alone), an appeal to the Supreme Court cannot be ruled out.

For further information, please contact Samantha Brown or James Rickards.
SECTOR SPECIFIC DEVELOPMENTS

5. BANKING, RESTRUCTURING AND INSOLVENCY

5.1 The potential discontinuation of LIBOR

The FCA has said that it will not encourage or compel banks to continue to provide quotes for LIBOR after the end of 2021. The view is that further reform of LIBOR cannot compensate for the lack of data from an underlying market, and that an alternative risk-free rate should be developed.

Currently, the preferred option is the Sterling Overnight Interbank Average Rate (SONIA), which is in the process of being reformed. The Loan Market Association has raised various concerns in relation to the adoption of SONIA as the replacement for LIBOR in the syndicated lending market, principally because, as a backward-looking, overnight rate rather than a forward-looking, term rate, it has the potential to cause the loan markets difficulty both operationally and commercially.

The Bank of England has recognised this, and the Working Group on Sterling Risk-Free Reference Rates is considering the development of a term SONIA. They have also noted that international co-ordination is crucial, given the different currencies for which LIBOR is currently produced, and risk mitigation strategies for legacy contracts will also be required.

It is difficult to draft meaningful, detailed provisions now which will cater for the replacement of LIBOR by a new reference rate since it is currently unclear what that reference rate will be, how that replacement rate will operate, and even when it will come into operation as the market standard. It is therefore important that documents which refer to LIBOR include robust fall-back provisions to allow the relevant interest rate to be determined even if LIBOR is not available. Parties may also wish to consider the consent threshold for replacement of the reference rate in the future.

See also the Debt Capital Markets section below.

For further information, please contact Simon Chadney, Will Nevin or Will Breeze.

5.2 Draft regulations banning provisions prohibiting assignment of receivables laid before Parliament

The Government has laid before Parliament final form Regulations to ban provisions which prohibit the assignment of receivables in certain business-to-business contracts.

The power to make the Regulations was included in The Small Business, Enterprise and Employment Act 2015. The Government consulted on the Regulations in December 2014 and issued a response to that consultation in August 2015. Since then there had been no update from the Government until September this year, when the final form Regulations were laid.

The Regulations provide that any term in a contract has no effect to the extent that it:
- prohibits the assignment of a receivable arising under a contract or any other contract;
- prevents the assignee of a receivable from determining its validity or value; or
- hinders the assignee’s ability to enforce the receivable.

A receivable is “a right (whether or not earned by performance) to be paid any amount under a contract (other than an excluded contract) for the supply of goods, services or intangible assets”.

Excluded contracts include contracts for prescribed financial services (eg banking and other financial services), contracts which concern any interest in land, petroleum licences and contracts where one or more parties is acting outside of a trade, business or profession.

The aim of the Regulations is to increase access to invoice financing for small and medium sized businesses but, as currently drafted, they could have a much wider effect and create legal uncertainty. For example, the Regulations:
- go against the long-standing English law tradition of freedom of contract in commercial transactions;
- apply to all companies wherever incorporated;
- apply retrospectively;
- do not clearly state their territorial scope;
- do not make clear whether they apply to security assignments and charges;
- do not make clear whether negative pledge clauses, which prohibit giving security over assets, are to be regarded as prohibitions on assignment;
- appear to nullify prohibitions on assignment of receivables in financing agreements that are structured around an income stream which is made up of receivables; and
- do not protect the payer of the receivable, who may not get a good discharge against payment and would lose rights of set-off against the original counterparty.

It is against this background that the Financial Law Committee of the City of London Law Society has written to the Government to raise serious concerns about the Regulations and try to bring about an urgent rethink.

No date has been scheduled for the Regulations to come into force but they are currently expected to be in force in late 2017.

The draft Business Contract Terms (Assignment of Receivables) Regulations 2017 are available on the legislation.gov.uk website.

For further information, please contact Dorothy Livingston or Simon Chadney.

6. COMPETITION, REGULATION AND TRADE

6.1 Intel: scope for dominant companies to justify rebate schemes under EU competition rules

The ruling by the Court of Justice of the EU (CJEU) in the Intel case in September 2017 confirmed the existing case law under which exclusivity rebate schemes will be presumed a restriction on competition under the Article 102 TFEU prohibition on abuse of dominance. Importantly, however, the ruling also makes it clear that it is possible for a dominant company to rebut that presumption. Where a dominant company submits supporting evidence that its conduct is not restricting competition, the European Commission is required to consider these arguments and should
take into account factors such as: the extent of the company’s dominant position on the relevant market and the portion of the market covered by the practices concerned, characteristics of the rebates such as their duration, the amounts and whether the company operated a strategy aimed at excluding “as efficient” competitors from the market.

This should give companies with strong market power more flexibility with their rebate schemes, although it will be important to consider the possible impact of those rebates on competitors and to establish the rationale for the rebate scheme upfront, in order to shore up a defence strategy if needed.

See our e-bulletin on the Intel case for more details.

For further information please contact Veronica Roberts or Kyriakos Fountoukakos.

6.2 Proposals for greater scrutiny of foreign direct investment (FDI) at EU and UK level

Against a backdrop of increased public interest intervention in the M&A process and protectionist rhetoric globally (in part in response to extensive Chinese outbound investment), including the recent expansion of the German FDI regime and the upswing in the Committee on Foreign Investment in the US intervention rate in the US, both the European Commission and the UK Government have put forward proposals for enhanced controls over FDI.

At EU level, in September 2017 the Commission unveiled a draft Regulation setting out a framework for FDI regimes with which Member States’ national screening mechanisms would need to comply (but which would not mandate Member States to introduce such mechanisms). The draft envisages an advisory role for the Commission, but would not give it any power to block deals. It remains to be seen whether, and if so in what form, the Regulation will make it through the EU legislative process, given the intense disagreement between different Member States on this issue.

In the UK, in October 2017 the Department for Business, Energy & Industrial Strategy (BEIS) published its long-awaited Green Paper on enhanced national security review for critical national infrastructure (as first foreshadowed when the Government approved the Hinkley Point C new nuclear project over a year ago). BEIS proposes to extend the UK Government’s powers to review transactions on national security grounds in two tranches, on which it is now consulting. Its longer term proposals for a significant overhaul of the current regime include the potential introduction of a mandatory notification regime for transactions involving specified “essential functions” in key sectors (including civil nuclear, telecommunications, defence, energy and transport).

Whilst the Green Paper stresses that the UK is open to trade, and the benefits of FDI (in common with the EU proposals), the potential new powers clearly have at least the potential to deter FDI. Much will depend on the design details of the new regime and how the test is applied in practice – in particular whether intervention is rigorously limited to genuine national security concerns, or whether this process allows other public interests to be introduced by the back door.

See our e-bulletins here and here on the EU and UK proposals for further details.

For further information please contact Veronica Roberts, Kyriakos Fountoukakos or Tim Briggs.

7. CONSTRUCTION

7.1 Parties to a building contract can validly allocate the risk of concurrent delay

In a forceful judgment delivered on 2 October 2017, Fraser J in the Technology and Construction Court held that parties to a building contract can validly allocate the risk of concurrent delay.

The parties had amended the JCT D&B standard form to provide that "any delay caused by a Relevant Event which is concurrent with another delay for which the Contractor is responsible shall not be taken into account" when assessing the Contractor’s entitlement to an extension of time.

The Contractor contended that the amendment was ineffective, and therefore where delay caused by a Relevant Event was concurrent with its own culpable delay, then time became "at large" and the contractual completion date no longer applied.

Fraser J rejected the Contractor’s arguments. He held that the meaning of the amendment was “crystal clear”, and therefore the mechanism agreed between the parties for dealing with concurrent delay should be applied.

Fraser J also held that “there is no rule of law” that prevents the parties from agreeing how concurrent delay should be addressed when assessing extension of time claims. This part of the judgment deals with the suggestion made by some commentators that the prevention principle is some form of overriding legal principle that overrides the clear wording of the contract. Fraser J appears to have confirmed that it is not. His judgment makes it clear that the court will always have primary regard in interpreting contracts to the parties’ intentions as expressed in their choice of language.

For further information, please contact Mark Lloyd-Williams or Ann Levin.

7.2 Contractors’ liability for design – interpreting potentially conflicting standards

In MT Højgaard A/S v E.ON [2017] UKSC 59 the Supreme Court decided that where there is a fitness for purpose obligation it should be given its natural meaning despite the fact that it is contained in a technical schedule and is potentially inconsistent with other provisions. The Court took this approach despite the fact that the contractor had complied with its obligations under the main conditions of contract, including its obligations to exercise reasonable skill and care and to comply with relevant international standards (one of which contained the error that led to the relevant defect).

For those responsible for contract drafting and negotiation, the key lesson is that it is important to review the entire contract, including all technical requirements and schedules as a whole, in order to eliminate inconsistencies and ambiguities. For practical reasons this may not always be possible in case of complex construction contracts involving multiple authors and, therefore, an appropriate priority of documents provision should be included.
This case may have the unintended consequence of contractors trying to price in their proposals the risk of international standards containing errors or to exclude liability for such errors. This would be unusual as the risk with respect to all aspects of the design would generally sit with the contractor where it has overall responsibility for design, which would include an obligation to verify designs rather than blindly following standards. In any event, the risk of such errors is likely to be minimal, and therefore, not something that may be appropriately priced.

For further information, please contact Mark Lloyd-Williams or Ann Levin.

8. DEBT CAPITAL MARKETS

8.1 Prospectus Regulation to replace current Prospectus Directive

The new Prospectus Regulation (the Regulation) came into force on 20 July 2017 and the majority of provisions will apply from 21 July 2019. The key changes for DCM include:

- new requirements on the form and content of risk factors and summaries in prospectuses. In particular, the Regulation requires risk factors to be presented in a limited number of categories depending on their nature, with the most material risk factors mentioned first. Further guidelines on risk factor disclosure are expected from the European Securities and Markets Authority in 2018;
- the expansion of the wholesale disclosure regime and exemption from the requirement to produce a summary (available under the Prospectus Directive to bonds with a minimum denomination of EUR100,000) to bonds traded on a regulated market to which only qualified investors can have access; and
- the introduction of the concept of a "universal registration document".

For further information, please contact Amy Geddes or Andrew Roberts.

8.2 The potential discontinuation of LIBOR

The FCA has said that it will not encourage or compel banks to continue to provide quotes for LIBOR after the end of 2021. The view is that further reform of LIBOR cannot compensate for the lack of data from an underlying market, and that an alternative risk-free rate should be developed. One option suggested is the Sterling Overnight Interbank Average Rate (SONIA), which is in the process of being reformed. However, there have been concerns raised about whether SONIA is an appropriate replacement as it is a backward-looking, overnight rate rather than a forward-looking, term rate.

There are two aspects to consider in relation to the bond markets: (i) ensuring contractual continuity for outstanding legacy bonds which currently reference LIBOR; and (ii) the adoption of an appropriate benchmark for future floating rate bonds. In relation to (i), it is uncommon for terms and conditions of bonds to provide for sterling LIBOR to be replaced by an alternative benchmark, therefore, in the absence of amendments to legacy contracts, the majority of these bonds would likely revert to a fixed rate (being the last available floating rate fixing) for their remaining term.

Market participants, together with the International Capital Markets Association, are considering the various options available for bond documentation, particularly given that there is no clear LIBOR alternative. These include making formal amendments to bond documentation via consent solicitation, and including a penultimate fallback mechanism in bond terms and conditions to allow the issuer or determination agent to appoint an independent financial adviser to determine the appropriate rate.

See also the Banking, Restructuring and Insolvency section above.

For further information, please contact Silke Goldberg.

9. ENERGY AND ENVIRONMENT

9.1 Energy

9.1.1 Nuclear Safeguards Bill

On 11 October 2017, the Government published the Nuclear Safeguards Bill (the Bill), which enables the UK to put in place a domestic nuclear safeguards regime to meet international standards. Nuclear safeguards are processes which allow countries to demonstrate to the international community that civil nuclear material is being used for peaceful purposes.

Currently, the European Atomic Energy Community (Euratom) of which the UK is a member, provides the framework for the UK nuclear safeguards regime (through the Treaty establishing Euratom). However, as a result of Brexit, the UK will withdraw from Euratom in 2019 and the Bill aims to deliver nuclear safeguards which are in line with existing Euratom standards.

Broadly, the Bill seeks to strengthen the roles and responsibilities of the UK nuclear regulator, Office for Nuclear Regulation, and provide relevant powers to the Secretary of State, in relation to nuclear safeguards issues.

For further information, please contact Silke Goldberg.

9.1.2 Update on second contract for difference allocation round outcome

The Department for Business, Energy & Industrial Strategy (BEIS) published the results of the second contract for difference (CfD) allocation round on 11 September 2017.
A total of 11 projects (with a total combined capacity of c. 3.3GW) were allocated CfDs in this round, with large offshore wind projects accounting for c. 3.2GW of the awarded capacity. This round saw a reduction in Strike Prices for offshore wind projects, with two projects (having a 2022/2023 delivery year) obtaining a strike price of £57.50/MWh (in contrast, the lowest strike price awarded to an offshore wind project in the first CfD allocation round (published on 26 February 2015) was £114.39/MWh). Additionally, six advanced conversion technologies and two dedicated biomass with combined heat and power projects were also awarded CfDs in this round.

The CfDs which the successful project developers in this round will enter into differ from the CfDs entered into by successful developers in the first allocation round - for instance, developers are now required to repay any State aid specifically attributable to the relevant project before the start date set out in the CfD and the risk of payments in the development and pre-development phase (for instance, grants) being held to be aid sits with the developers (and may impact lender behaviour).

For further information, please contact Silke Goldberg.

9.3 Clean Growth Strategy

On 12 October 2017, the Government published its Clean Growth Strategy (the “Strategy”) to deliver increased productivity whilst protecting the climate and environment (and meeting the Climate Change Act 2008 greenhouse gas emissions targets).

The Strategy sets out how over £2.5 billion will be invested by the Government to support low carbon innovation until 2021. Additionally, the National Productivity Investment Fund will provide an additional £4.7 billion (with an extra £2 billion a year by 2020 to 2021). Areas specifically identified by the Government as part of the Strategy include: (i) improving business and industry efficiency and energy efficiency of homes; (ii) accelerating the shift to low carbon transport; and (iii) delivering clean, smart, flexible power.

In order to track the UK’s progress in meeting its objectives, the Government has developed an Emissions Intensity Ratio (EIR) to measure clean growth performance that will be published each year (EIR measures the amount of greenhouses gases produced for each unit of Gross Domestic Product created). The current EIR is 270 tonnes/£ million and EIR is expected to be 100 tonnes/£ million by 2032 to meet current targets.

For further information, please contact Silke Goldberg.

9.2 Environment

9.2.1 DEFRA to create consultation group for Brexit

Twenty-seven environmental statutory instruments dealing with 850 pieces of environmental legislation are to be put before Parliament as part of the UK’s withdrawal process. A consultation group is to be created to enable business and organisations to engage with the necessary amendments. Environmental professionals are hoping the draft statutory instruments are released in sufficient time to allow meaningful comment and input. We understand that the Department for Environmental, Food and Rural Affairs (DEFRA) has so far hired around 400 new staff to deal with the increased workload.

For further information, please contact Julie Vaughan.

9.2.2 Plans for new UK “Environment Commission”

Statements made by the Secretary of State for DEFRA, Michael Gove, show that he has taken on board the need for a new body independent of Government to oversee compliance by the UK with its national level environmental commitments, eg on air quality limits, that will be retained as part of UK law after Brexit. The structure of the new body, its powers and functions, have yet to be announced. This follows earlier Government statements suggesting it was sufficient that private entities could challenge Government failures by bringing a judicial review action.

For further information, please contact Julie Vaughan.

9.2.3 Minamata Convention

In the last General Counsel Update, we reported on the Minamata Convention on Mercury (a global treaty to protect human health and the environment from the adverse effects of mercury) coming into force. The Government published a consultation in October 2017 on its proposed approach to enforcement and penalties in relation to the control of mercury. The proposed Control of Mercury (Enforcement) Regulations 2017 will create a new criminal offence for anyone who imports, exports or manufactures mercury-added products listed in Annex II of the EU Mercury Regulation 2017. The deadline for responding to the consultation is 21 November 2017.

For further information, please contact Julie Vaughan.

9.2.4 Consultation on the CRC Scheme post-2019

On 12 October 2017 BEIS issued a new consultation on what is to become of the CRC (formerly Carbon Reduction Commitment) Scheme post-2019. It is proposed that:

- the obligation to buy allowances to cover energy usage will cease from April 2019 and be replaced by an increase in the rate of the Climate Change Levy – a long-standing tax on high energy usage; and
- instead of reporting to the Environment Agency, disclosure of energy usage is proposed to form part of a company’s financial statements. The new proposals essentially extend the mandatory greenhouse gas reporting scheme to unquoted companies and to energy usage as well as greenhouse gas emissions.

BEIS’ aim is to reduce the administrative burden, simplify the tax system, make compliance easier and provide a clearer price signal to drive energy efficiency. Responses to the BEIS consultation need to be submitted to BEIS by 4 January 2018.

For further information, please contact Julie Vaughan.

9.2.5 Air quality – further judicial review

Public interest law firm ClientEarth has been granted permission to bring a further challenge to court regarding the adequacy of the Government’s National Air Quality Plan to bring the UK into compliance with limits on nitrogen dioxide in urban areas throughout the UK (mainly from traffic emissions). This follows successful challenges to earlier versions of the
plan. The Government is under pressure to implement solutions with a greater level of ambition and leaving less to local authorities.

For further information, please contact Julie Vaughan.

10. **FINANCIAL SERVICES REGULATION**

10.1 FCA consultations on extension of the SMCR

In July 2017, the FCA published proposals to replace the Approved Persons Regime with the Senior Managers and Certification Regime (SMCR) currently in force for banks. Almost all financial services firms will be required to comply with the SMCR, including insurance intermediaries; a separate consultation proposed introducing all elements of the SMCR to the current Senior Insurance Managers Regime applicable to insurers.

Key points in the proposals include:

- The SMCR will replace the Approved Persons Regime (APR).
- Most firms will need to meet certain core standards, although some will benefit from a lighter touch regime.
- For a few larger firms, the compliance burden will be significantly greater.

One or more further consultations are expected later in 2017. Outstanding issues include:

- the application of the SMCR to Appointed Representatives;
- operational aspects of the regime, including how firms will transition into it, changes needed to forms and processes for submitting information to the FCA; and
- applying existing guidance on enforcing the duty of responsibility in banks to other financial services firms.

The consultation periods ended on 3 November 2017. As with the banks’ implementation of the SMCR, implementation projects will rather than waiting for the Policy Statements. No precise date has been set for implementation, although the FCA and HM Treasury have previously stated 2018.

Our more detailed briefings can be found [here](#) and [here](#).

For further information, please contact Karen Anderson, Clive Cunningham or Alison Matthews.

10.2 **MiFID II – Legal Entity Identifier**

MiFID II, which consists of the recast Markets in Financial Instruments Directive (MiFID II Directive) and the Markets in Financial Instruments Regulation (MiFIR), will apply from 3 January 2018. Entities caught by the MiFID II regime must ensure they are able to meet the new requirements by this date. Clients of such firms may also be required to take action before 3 January 2018. As well as reviewing and, if necessary, responding to, materials sent by investment firms (eg terms of business or client agreements amended to meet the new MiFID requirements) over the next couple of months, certain clients must also take action to ensure they have a legal entity identifier (LEI).

MiFIR introduces a new requirement whereby firms subject to MiFID II transaction reporting obligations will not be able to execute a trade on behalf of a client who is eligible for a LEI but who does not have one. Therefore, any firm which is a legal entity or structure (including a charity or trust) and which is a client of a MiFID investment firm must make arrangements to obtain a LEI if it wishes the investment firm to continue to act on its instructions or make a decision to trade on its behalf from 3 January 2018 onwards. Many clients will already have a LEI as its use is required under a number of existing EU regulations eg European Markets Infrastructure Regulation (EMIR) and Market Abuse Regulation (MAR). Those who do not should contact its preferred LEI issuing organisation as soon as possible. A list of LEI issuers can be found on the Global LEI Foundation (GLEIF) website.

Where the following are legal entities, they will be required to be identified through the LEI:

- the clients (buyer, seller) on whose behalf the investment firm executes transactions;
- the client of the firm on whose behalf the trading venue is reporting under MiFIR; and
- the person who makes the decision to acquire the financial instrument.

They will need to be identified with a LEI even if they have no previous obligation to obtain one and regardless of where they are operating or legally based.

For further information on the LEI or on MiFID II generally, please contact Clive Cunningham or Karen Anderson.

11. **INSURANCE**

11.1 Implementation of the Insurance Distribution Directive

Distributors of insurance products in the EU will need to implement changes to their businesses to deal with revisions to the EU regulatory regime. The new regime is scheduled to take effect from 23 February 2018, although there have been calls for this to be deferred.

While the rules in the Insurance Distribution Directive (IDD), which replaces the Insurance Mediation Directive, are just the minimum level of regulation that each EU Member State must implement, the changes from the existing European regime are reasonably significant.

The FCA has published three consultation papers containing proposals for implementing the IDD in the UK:

- CP17/7 (and policy statement PS17/21) covers:
  - professional and organisational requirements;
  - complaints handling and out-of-court redress;
  - professional indemnity insurance (PII);
  - changes to conduct of business rules (for non-investment insurance contracts); and
  - the regulatory regime for ancillary insurance intermediaries.
- CP17/23 covers implementation of IDD requirements applying to:
life insurance business, including information provision requirements, and additional requirements related to the distribution of insurance-based investment products (IBIPs); and

- life and non-investment insurance business, including product oversight and governance, and professional and organisational requirements provisions.

- CP17/33 covers changes to the FCA’s rules to reflect the requirements of the IDD delegated acts.

Concerns that Level 2 and 3 measures have yet to be finalised have led to calls to extend the IDD application date to 1 October 2018, while leaving the transposition deadline of 23 February 2018.

For further information, please contact Alison Matthews or Geoffrey Maddock.

11.2 Solvency II reform

The European Insurance and Occupational Pensions Authority (EIOPA) has published its first set of advice to the European Commission on specific items in the Solvency II Delegated Regulation. The advice includes proposals for simplified calculation of capital requirements in the Solvency Capital Requirement (SCR) standard formula. EIOPA is expected to submit its second set of advice to the European Commission by the end of February 2018.

For further information, please contact Alison Matthews or Geoffrey Maddock.

12. INTELLECTUAL PROPERTY

12.1 New unjustified threats regime in force

Threatening proceedings for intellectual property right infringement can sometimes backfire. In relation to patents, trade marks and designs, there is a right for any person aggrieved by the threat to bring an action against the threatened. The “aggrieved” person may not necessarily be the person directly threatened with proceedings, it could be anyone whose commercial interests are damaged by the threat – such as a manufacturer whose suppliers or distributors are threatened. Not only does the threats action expose the intellectual property rights-holder to the risk of damages, it also turns the potential claimant into a defendant. This in turn creates a tension with the requirements of the Civil Procedure Rules to communicate a litigant’s case early before issuing proceedings, with rights holders more likely to sue first than to threaten first.

The new Intellectual Property (Unjustified Threats) Act 2017, which came into force on 1 October, attempts to encourage more pre-action communication by detailing what an actionable threat is, whilst providing for “permitted communications” or communications for “permitted purposes” which cannot amount to an actionable threat. It harmonises the position across patent, trade mark and design rights (including providing for unitary patents and European patents under the proposed Unified Patent Court jurisdiction) and allows pursuit of information on primary infringers from secondary parties where reasonable efforts have been made to find the primary infringer already.

For more information on the new Act and its impact on your communications, contact Joel Smith or Rachel Montagnon, read our blog post and view our short film for Practical Law on the new legislation.

13. PLANNING

13.1 Addressing the housing crisis: proposals on a national and London-wide scale

Following the Government’s Housing White Paper (February 2017), several recent publications by the Government and the Mayor of London set out proposed changes to planning legislation and policy, designed to address the housing crisis.

The Department for Communities and Local Government (DCLG) recently consulted on changes designed to increase the supply of new homes. The proposals include establishing standard methods for calculating local authorities’ housing need, streamlining viability assessments and making section 106 agreements more transparent and proposals to strengthen cross-boundary planning (DCLG’s “Planning for the right homes in the right places”, 14 September – 9 November 2017). Sajid Javid has also promised a Green Paper on social housing outlining reforms on a national level.

The Mayor of London adopted his Affordable Housing and Viability Supplementary Planning Guidance (SPG) in August 2017. This SPG aims to improve transparency and trust in the planning process and increase the amount of affordable housing to at least 35% (and 50% on public land) for each new development scheme which proposes 10 or more new homes, with an overall long-term strategic aim of at least half of all new homes in London being affordable.

The draft London Plan Review is expected to be published on 29 November 2017, setting out proposals to update the current policies in the London Plan.

For further information, please contact Matthew White or Catherine Howard.

13.2 Further planning changes expected: Community Infrastructure Levy and National Planning Policy Framework amendments

The Government’s response to the expert panel’s review of the Community Infrastructure Levy (CIL) regime is expected alongside the Autumn Budget on 22 November 2017. The panel considered the overarching question of whether CIL is meeting its objectives of providing a faster, fairer, more certain and transparent means of funding infrastructure through developer contributions, and their report recommended wide ranging reforms to the CIL system. Significant changes to the CIL regime are expected.
The National Planning Policy Framework (NPPF) was published in 2012 and has not been updated formally since, so the Government is due to publish draft revisions early in 2018. These are expected to take into account responses to the Government’s recent consultation (Planning for the right homes in the right places). The NPPF must be taken into account by local planning authorities when they make decisions on whether to grant planning permission.

For further information, please contact Matthew White or Catherine Howard.

13.3 Draft Airports NPS published for consultation

The Department for Transport has published its updated Airports National Policy Statement (NPS) for consultation (until 19 December 2017). This is in light of the publication of a series of reports including updated noise analysis and the Government’s national air quality plan. The consultation was delayed by June’s snap election but according to the Written Ministerial Statement, the timetable is unchanged for bringing forward a vote in the House of Commons on the final NPS (“in the first half of next year”).

For further information, please contact Matthew White or Catherine Howard.

14. TAX

14.1 New criminal offence of failure to prevent the criminal facilitation of tax evasion comes into force

Two new criminal offences for corporates and partnerships, one in relation to UK taxes and the other for foreign tax evasion offences, came into force on 30 September 2017. An entity will commit an offence where it fails to prevent an associated person (broadly, someone acting for or on its behalf) from criminally facilitating either a UK tax evasion offence or an equivalent offence under foreign law. Both new offences have extra-territorial effect, although the second offence (regarding foreign tax evasion) requires the entity or the facilitation to be linked to the UK. For each offence, it will be a defence for the entity to show that it had reasonable procedures in place to prevent such facilitation, or that it was not reasonable to expect it to have such procedures. Final HMRC guidance has been published, setting out principles which may be used to inform these prevention procedures.

For further information, please contact Isaac Zailer or Howard Murray.

14.2 Finance Bills

The second Finance Bill of 2017 (which will become Finance (No. 2) Act 2017) is progressing through Parliament and completed the House of Commons stages on 31 October. The Bill, which reintroduces clauses dropped from the Finance Act 2017 (due to the timing of the general election), incorporates draft legislation for various significant reforms, including changes to the tax deductibility of corporate interest expense, reform of the corporation tax loss regime, amendments to the Substantial Shareholding Exemption and changes to the taxation of non-UK domiciled individuals, all of which take effect from April 2017. Royal Assent to the Bill is expected to take place in the second half of November 2017.

Draft clauses for inclusion in the Finance Bill 2018 have also been published for consultation. These include provisions to clarify the tax treatment of partnerships, changes to the scope and administration of the bank levy (so that it will generally only be chargeable on UK activities) and removal of foreign service relief in relation to the taxation of employment termination payments. It is expected that the Bill will be published (taking into account any revisions from the consultation process) and introduced to Parliament following the Autumn Budget (taking place on 22 November 2017).

For further information, please contact Isaac Zailer or Howard Murray.

14.3 Post-Brexit customs, VAT and excise arrangements

The Government has published two papers in which it sets out its plans to legislate for standalone customs, VAT and excise regimes once the UK leaves the EU.

The Government’s stated aim is to facilitate the “most frictionless trade possible” between the UK and the EU post-Brexit. It sets out two alternative broad approaches to a customs relationship with the EU, both of which take the UK outside the EU customs union:

1. “a highly streamlined customs arrangement”: the UK and EU would trade with each other as third countries but with streamlined and simplified customs processes. This option aims to implement technology-based solutions (such as the new Customs Declaration Service scheduled for January 2019) to make it easier to comply with customs procedures. The Government acknowledges, however, that this approach would still increase the administrative burden compared with remaining in the customs union;

2. “a new customs partnership with the EU”: the UK’s approach to the customs border would be “aligned” with that of the EU, in a way that would “remove the need for a UK-EU customs border”. This could potentially involve the UK mirroring the EU’s requirements for imports from the rest of the world where their final destination is the EU.

The paper also suggests an interim period during which the UK will be in a new customs union with the EU, which will replicate the current one but will come to an end at a predetermined time and will allow the UK to negotiate, but not implement, trade agreements.

The VAT and excise regimes in the UK are based on an EU law framework, but are largely implemented in the UK by domestic legislation, which will therefore remain in place post-Brexit. The Government has confirmed that the administration of the VAT and excise regimes will remain largely the same as they currently are.

A Customs Bill, which will provide for a range of negotiated outcomes with regard to customs, VAT and excise, as well as a contingency scenario (applicable if the UK were to leave the EU without a negotiated settlement) is expected to be published in Autumn 2017.

For further information, please contact Isaac Zailer or Howard Murray.
14.4  Supreme Court denies compound interest in Littlewoods case

The Supreme Court delivered its judgment on 1 November in the long-running Littlewoods litigation (Littlewoods Limited v HMRC [2017] UKSC 70). The Court allowed HMRC’s appeal, which means that the taxpayer’s claim for compound interest of £1.2 billion in relation to overpaid VAT against HMRC fails.

The Supreme Court held that:

1. the taxpayer’s common law claim for restitution (which would have allowed for compound interest) is excluded by the statutory regime in the Value Added Tax Act 1994 (VATA 1994); and

2. that statutory regime, which provides for the payment of simple interest only, did give the taxpayer an “adequate indemnity” for the loss suffered by the taxpayer as required by EU law.

The decision has important consequences for the estimated 5,000 claims by companies against HMRC that are stayed pending the resolution of Littlewoods, in connection with VAT and other taxes. HMRC will likely now invite taxpayers with VAT related compound interest claims to withdraw them and, in relation to compound interest claims in connection with other taxes, it is likely that HMRC will argue that the decision has general application, in particular where similar provisions exist which restrict the remedy available to taxpayers to the statutory regime and the payment of simple interest only.

For further information, please contact Isaac Zailer or Howard Murray.

15. TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS, SOURCING AND DATA

15.1 GDPR compliance: Just over six months to go to get your houses in order

The EU General Data Protection Regulation (the GDPR) sets out a comprehensive reform of the current existing EU regime. The reform is designed to give citizens more control and protection over their personal data. The GDPR entered into force on 25 May 2016 with a two year implementation period before it comes into effect. This period gives organisations until 25 May 2018 to prepare for the new rules to apply.

With just over six months for organisations to get their houses in order, they should be carefully looking at their existing arrangements and the underlying systems and controls they have in place.

In the meantime, there has been a variety of guidance at the European level through the Article 29 Working Party (WP29) (which reflects the consolidated view of national supervisory data protection authorities in each Member State) and at the national level through the ICO. Most recently, in October 2017 the WP29 published guidelines on: (i) personal data breach notification requirements; (ii) automated individual decision-making and profiling; and (iii) the application and setting of administrative fines. The WP29 has also adopted guidelines on the right to data portability, data protection officers, lead supervisory authorities and on data protection impact assessment.

The ICO has issued a range of guidelines to assist organisations with compliance as well, including a constantly evolving “Overview of GDPR” which is intended to form the ICO’s guide to the GDPR. More recently, the ICO has also issued guidance on: (i) contracts and liabilities between controllers and data processors; and (ii) consent, plus a discussion document on profiling. Subsequent guidance is expected in the run-up to the application of the GDPR.

In parallel, the UK Government has confirmed its intention for GDPR standards to continue to apply to the UK after Brexit; these will be implemented through a combination of the EU Withdrawal Bill and the new Data Protection Bill (which was first introduced in Parliament in September 2017).

For further detail of the GDPR and steps to enable organisations to comply with it please refer to our related briefings here and here.

For further information, please contact Miriam Everett or Claire Wiseman.

15.2 Spotlight on international transfers of data

EU-UK transfers: Earlier this year the UK Government released its negotiating position paper on international transfers of personal data within the EEA in the context of Brexit, entitled “The Exchange and Protection of Personal Data”. In line with previous declarations, the paper outlines the Government’s intention to maintain the “frictionless” movement of data to and from other countries within the EEA.

If, as a result of Brexit, the UK were to secede from the EEA, the GDPR would fall away on exit and the UK would no longer form part of the EU “safe data” zone throughout which personal data may be freely transferred. The paper sets out the Government’s preference for an adequacy decision to allow the continued transfer of data; such a decision would need to be made by the European Commission confirming that the UK’s data protection regime offered a standard of protection equivalent to that in other EU Member States.

It is worth noting there are potential obstacles to an adequacy model that are not set out in the paper. In particular, there are ongoing concerns about the extent of the surveillance, interception and retention powers in the Investigatory Powers Act 2016, which run counter to the EU’s approach to data protection. Surveillance legislation in the US has to date precluded an adequacy decision, forcing it to rely instead on measures such as the EU – US Privacy Shield, Standard Contractual Clauses and Binding Corporate Rules. The paper also discusses interim adequacy arrangements, from the point of Brexit to the time when more permanent measures have been put in place, to maintain stability and consistency.

EU-US transfers: The Privacy Shield allows for the transatlantic transfer of personal data from the EU to the US in line with its framework and principles. The US Government, the European Commission and EU data protection authorities conducted the first annual review of the Privacy Shield in September 2017 and the European Commission published a related report in October 2017. On the whole the report suggests that the Privacy Shield continues to ensure an adequate level of data protection for personal data transfers for commercial purposes from the EU to the almost 2,500 participating US companies. However, the report also sets out a list of
recommendations for US authorities and the Privacy Shield still remains subject to challenge in the CJEU by two privacy advocacy groups. The Privacy Shield regime will no longer apply to the UK if it leaves the EEA and the UK will need to consider an appropriate data flow arrangement with the US as well.

For further information, please contact Miriam Everett or Claire Wiseman or refer to our blog post.

15.3 Automated and Electric Vehicles Bill

The Automated and Electric Vehicles Bill (the Bill) was announced in the Queen’s Speech earlier this year and was given its second reading in the House of Commons on 23 October 2017. The House of Commons Public Bill Committee has been considering the Bill since 31 October 2017 and is currently accepting written evidence; the Committee stage is scheduled to conclude by Thursday 16 November. In particular, the Bill aims to: (i) specify who is liable for damages following accidents caused by automated vehicles; and (ii) improve the network of charging points for electric vehicles.

The Bill meets these aims by extending the application of insurance law from a (human) driver-centric model to one that will cover automated vehicles where the car is essentially the driver. The proposed powers in the Bill would also allow the Government to regulate to improve the consumer experience of electric vehicle charging infrastructure, to ensure provision at key strategic locations like Motorway Service Areas (MSAs), and to require that charge points have “smart” capability.

The Bill forms a key part of the regulatory regime required for rapidly evolving automated and electric vehicle technology, a further critical element of which is ensuring the cyber security, data security and integrity of automated and electric vehicles. The Government provided some initial guidance regarding the cyber security of automated vehicles by publishing eight key principles in August 2017. The principles are designed to encourage the industry to work together to enhance cyber security in this sector and place responsibility for system security at board level.

The Government has previously stated its ambition to become a “leader” in autonomous technology and its commitment to creating an adequate regulatory and legislative framework is a clear indication of its support for the further development and mass production of automated vehicle technologies.

The Automated and Electric Vehicles Bill can be found here.

The key principles of vehicle cyber security for connected and automated vehicles can be found here.

For further information, please contact David Coulling or Nick Pantlin.
16. **AUSTRALIA**

16.1 **Changes to Australian intellectual property laws**

Australia’s intellectual property laws are likely to be amended, following the Government’s response to the Productivity Commission’s intellectual property report. The Government has indicated that it supports, or supports in principle, a number of important reforms proposed by the Productivity Commission, including the following:

- **Patents**
  - abolishing the innovation patent system, while maintaining existing rights;
  - requiring reporting of settlements between originator and generic pharmaceutical companies to detect any “pay for delay” arrangements;
  - changing the legislative test for inventive step to put beyond doubt that the assessment of inventive step is consistent with the European Patent Office;

- **Copyright**
  - allowing the parallel importation of books;
  - expanding the safe harbour scheme which currently applies to carriage service providers, to all providers of online services. This scheme limits liability for copyright infringement if certain conditions are met;
  - limiting liability for the use of orphan works, where a user has undertaken a diligent search to locate the rights holder;

- **Trade marks**
  - ensuring that parallel importation of trade marked goods will not infringe an Australian trade mark if the goods were brought to market elsewhere with the authority of the owner or licensee;
  - allowing trade marks to be challenged for non-use after three years, rather than the current five years.

Although the Government has indicated support for many of the proposed reforms, further industry consultation is currently taking place.

16.2 **Australia signs Mauritius Convention**

On 18 July 2017, Australia became the first country in the Asia-Pacific to sign the United Nations Convention on Transparency in Treaty-based Investor State Arbitration (Convention). The Convention will become binding on Australia once it has been ratified.

The Convention extends the UNCITRAL Rules on Transparency in Treaty-based investor-State arbitration (the Rules), which took effect on 1 April 2014, to investment treaties that were concluded before that date. The Rules introduce measures aimed at increasing transparency and the public’s accessibility to treaty-based investor-State arbitrations, by:

- requiring the publication of certain information and documents related to arbitration proceedings;
- enabling third parties to make submissions in arbitration proceedings; and
- requiring that hearings can be observed by the public.

The Rules contain some exceptions to the transparency measures in order to protect confidential and protected information.

The Convention entered into force on 18 October 2017 following its ratification by Canada, Mauritius and Switzerland. It has so far been signed by 22 states, hence like the Rules it is positioned to have a global reach. Parties with potential investment treaty based claims need to consider how and when the conduct of the proceedings might be impacted by the Convention and the Rules.

For further information, please contact Leon Chung.

16.3 **Federal Court of Australia enforces ICSID awards against Democratic Republic of Congo**

In *Lahoud v Democratic Republic of Congo* [2017] FCA 982 the Federal Court granted the applicants leave under the International Arbitration Act 1974 (Cth) (IAA Act) to enforce an award of a three-member tribunal and a subsequent decision of an ad hoc annulment committee to refuse to annul the original award (Annulment Decision). Both decisions were made in the context of International Centre for Settlement of Investment Disputes (ICSID) Case No. ARB/10/4.

In deciding whether to enforce the awards the Court was required to have regard to:

- the objects of the IAA Act; and
- the fact that “arbitration is an efficient, impartial, enforceable and timely method by which to resolve commercial disputes” and “awards are intended to provide certainty and finality.”

The Court found that the definition of “award” under the IAA Act was inclusive and should extend to a decision to refuse to annul an award, hence the Annulment Decision.

Lahoud reinforces Australia’s stance as a pro-arbitration jurisdiction. It confirms that parties can be confident that arbitral awards will be recognised and enforced by Australian courts – even if the particular award is against a foreign state.

For further information, please contact Leon Chung.
**16.4 Landmark sentencing decision in Australia’s second foreign bribery prosecution**

The New South Wales Supreme Court recently delivered a landmark sentencing decision against three offenders for conspiring to bribe an Iraqi official. Each of the offenders was sentenced to four years imprisonment with a non-parole period of two years and two of the offenders were also fined.

This is the first time individuals have been jailed under Australia’s foreign bribery offence and only the second prosecution.

The sentencing decision provides an insight into the approach the courts will take in addressing foreign bribery charges and in punishing the offence. Notably, the decision makes the following observations:

- Foreign bribery is difficult to detect giving it the appearance of being a “rare” crime;
- Deterrence of foreign bribery is especially important given the prevalence of Australian businesses working overseas on government contracts;
- It is irrelevant whether corruption is “more common” in the foreign country in which the offence took place; and
- Foreign bribery is not a victimless crime as it distorts markets by giving a competitive advantage to the person offering the bribe.

As the three offenders in this case pleaded guilty, the elements of the foreign bribery offence remain untested. Against this backdrop, the Government earlier this year proposed a number of amendments to the offence. We are still waiting to see if and when the Government intends to introduce these proposed amendments.

Click [here](#) to read the full legal briefing.

For further information, please contact Jacqueline Wootton or Tania Gray.

**16.5 Whistleblower protection laws – proposed amendments to the Corporations Act**

On 23 October 2017, the Government released draft legislation significantly amending whistleblower laws under the Corporations Act 2001 (the Act).

In addition to consolidating whistleblower protections in the corporate, financial and credit sectors into a single regime, the proposed amendments will:

- broaden the persons eligible for whistleblower protection under the Act – for example, they will now include former employees, contractors and spouses/children;
- expand the range of disclosures protected under the Act – for example, disclosure of conduct which constitutes misconduct or an improper state of affairs or circumstances will now be covered;
- require all public companies and large proprietary companies to have, and make available, an internal whistleblower policy which satisfies the requirements of the Act;
- impose stringent obligations to maintain the confidentiality of a whistleblower’s identity and introducing significant pecuniary penalties for breaching those obligations; and
- make it easier for whistleblowers to receive compensation by introducing a “reverse onus” of proof and significantly limiting the circumstances in which costs orders can be made against them in litigation.

See our article [here](#) for an overview of the proposed amendments and implications for corporates.

Submissions on the proposed amendments closed on 3 November 2017. The Government intends to introduce the proposed reforms to Parliament in December 2017.

For more information, please contact Paul Wenk, Andrew Eastwood, Carolyn Pugsley or Jacqueline Wootton.

**16.6 Regulatory engagement in Australia**

In recent years, the Australian regulatory landscape has expanded significantly, marked by rapid changes to the role of regulators and the scope of their powers. In this environment, it is understandable that important shifts have occurred in the way organisations and their lawyers engage with regulators. While the dynamics of such interactions no doubt vary between jurisdictions, the Australian experience reveals some discernible trends.

1. **The regulatory relationship**

   The regulatory relationship is becoming increasingly important, not only in respect of the process of engagement, but also potential regulatory outcomes. Such outcomes often differ, in some cases markedly, depending on the relationship between the regulator, the organisation and, to some extent, the law firm. In this context, the trust quotient enjoyed by the organisation with the regulator plays a major role.

2. **The avoidance of adversarial processes**

   Traditional adversarial processes are becoming less desirable and less relevant. Underpinning this trend is an increased awareness of the potentially damaging effect of the court of public opinion, and reflects a growing concern on the part of organisations as to the reputational damage often associated with lengthy and public court proceedings.

3. **The changing role of regulators**

   Regulators are increasingly acting as arbiters of the law. Early regulatory engagement has allowed organisations to adapt to this shift, including consulting with regulators prior to embarking on new ventures.

4. **The rise of “fuzzy law”**

   Recent reforms in the Australian financial sector suggest that the law is gravitating towards “fuzzy law”; that is, law which revolves around broad principles of equity and notions of fairness and unconscionability. Regulatory engagement will prove critical in navigating these obligations.

For further information, please contact Michael Vrisakis.
16.7 Shareholder approval for reverse takeovers under the ASX Listing Rules

The Australian Securities Exchange (ASX) Listing Rules currently allow the issue of shares under, or to fund, a takeover bid or merger by scheme of arrangement without shareholder approval.

ASX has recently announced amendments to the Listing Rules such that, from 1 December 2017, reverse takeovers – where the shares issued by a bidder under, or to fund the cash consideration for, a takeover bid or scheme of arrangement represent 100% or more of the pre-bid share capital of the bidder – will require bidder shareholder approval.

Therefore, while bidder shareholder approval will still not be required under most takeover bids and schemes of arrangement, reverse takeovers, including “mergers of equals” where the bidder starts as the smaller party, will need to be approved by a general resolution of the bidder’s shareholders.

ASX has said it will be alert to attempts to structure transactions to avoid the operation of these provisions and it will aggregate issues if, in ASX’s opinion, they form part of the same commercial transaction.

Other Listing Rule amendments relating to reverse takeovers include:

- requiring bidder shareholders to be provided similar disclosure to disclosure provided to target shareholders;
- disallowing:
  - the target;
  - any person who will obtain a material benefit (other than as an ordinary shareholder in the bidder or target); and
  - where the issue is to fund the cash consideration for a reverse takeover, any person who is expected to participate in the proposed issue, from voting in favour of the reverse takeover resolution.

For further information, please contact Rebecca Maslen-Stannage.

16.8 Labour hire licensing

Three Australian States have announced labour hire licensing (LHL) schemes. This has been largely driven by parliamentary inquiries and current affairs journalism revealing exploitation of labour hire workers in some sectors.

In Queensland, legislation has passed and providers will have 60 days, from 16 April 2018, to apply for a licence. South Australia is considering similar legislation, and Victoria is expected to follow soon.

The schemes in each State are similar. In Queensland, for example:

- It will be an offence to provide or be supplied “labour hire services” if the provider is unlicensed (penalty: AUD$378,450). The legislation has a broad scope and many labour supplies not typically considered “labour hire” may need licensing (eg labour supplies between related entities, professional secondments etc). Regulations, when released, may exclude certain arrangements.

- To be granted a licence, a business must be financially viable and a range of the applicant’s executives and managers must pass a “fit and proper” person test.

- Licensees must report to the regulator every six months and renew licences annually. The regulator has extensive powers to monitor compliance, investigate alleged contraventions, and suspend and cancel licences.

- Licensees’ details will be published on a public website including information about industries and locations where workers are supplied, and certain safety incidents and worker injuries (ie information which may be industrially and commercially sensitive).

See our other articles about the Queensland scheme and LHL in other Australian jurisdictions.

For further information, please contact Rohan Doyle or Adam Ray.

16.9 Big data in the Australian resources sector

“Big data” and the “internet of things” (IoT) are fundamentally transforming how Australian resources businesses conduct their operations, and helping them to improve productivity and safety. However, employers seeking to exploit these benefits need to understand the legal issues that can arise.

Big data enables operators to analyse large amounts of data by applying algorithms to find correlations, identify trends and make predictions. The IoT enables operators to obtain real-time data from devices connected to machinery, vehicles and employees.

Australian resources businesses are using this technology in plant and equipment automation, predictive maintenance, exploration, recruitment and promotion, and a range of other forms of monitoring and analysis. In doing so, operators are seeking to increase productivity, better manage their workforces, achieve safer operations, and improve compliance, cybersecurity and sustainability.

While big data and the IoT presents big opportunities in the Australian sector, employers must be aware of and manage the challenges that can arise. Taking into account relevant Australian industrial and employment laws, recent decisions, and the approach of regulators, the key challenges include:

- the risk of discrimination in recruitment;
- the increased exposure of companies and their workforce to general protections claims;
- the opportunities and challenges arising from using data in disciplinary decision-making (and in defending unfair dismissal claims);
- work health and safety implications;
- privacy implications of collecting and using workers’ personal information; and
- a changing industrial relations landscape.

For further information, please contact Kirsty Faichen or Adam Ray.
16.10 Sensible guidance from the Takeovers Panel on State owned enterprises and dilution

In Yancoal Australia Limited 02 & 03 and Yancoal Australia Limited 04R & 05R, the Takeovers Panel (the Panel) declined to conduct proceedings on two applications brought by shareholders of Yancoal Australia Limited (Yancoal) objecting to Yancoal’s recent US$2.5 billion capital raising.

Although the Panel did not fully adjudicate on the applicants’ submissions, since it declined to conduct proceedings, the Panel’s discussion indicates that State owned enterprises (SOEs) of the same country will not necessarily be treated as associates, unless there is evidence of actual or contemplated “substantive” association in relation to the relevant Australian entity.

The decisions also suggest that the mere fact that there is the potential for substantial dilution of non-participating shareholders in a rights issue will generally not give rise to unacceptable circumstances so long as shareholders have the opportunity to maintain their voting power.

The decisions raise important considerations for transactions involving SOEs, and for listed companies conducting rights issues with a substantially dilutive effect on non-participating shareholders. Sensible and pragmatic conclusions were reached on both points.

For further information, please contact Philippa Stone, Adam Strauss or William Chew or click here to read our full briefing on these decisions.

16.11 Distributed Ledger Technology: driving a new wave of innovation and productivity in the mining industry

Capital investment flows and the explosion of DLT projects across a multitude of industries internationally shows us that the technology which originated with the digital currency Bitcoin is exponentially shapeshifting in its use-cases and here to stay.

In early June 2017, the Commonwealth Scientific and Industrial Research Organisation (CSIRO)’s specialist Data61 unit released two reports examining the risks and opportunities of blockchain technology in Australia. One of the reports, “Risks and opportunities for systems using blockchain and smart contracts”, explores possibilities for blockchain systems using three case studies. Although the adoption of blockchain technology is still in its infancy, the report gives us practical insight into how DLT can be used in the agriculture, mining, manufacturing, and transport industries.

For further information, please contact Eliza Eaton or Natasha Blycha or click here to read our full briefing.

17. HONG KONG

17.1 Dawn raids – are you ready?

Surprise inspections by governmental authorities are on the rise. Any company in any sector may be on the receiving end and obstructing a lawful raid is a criminal offence. Therefore, it is essential to be prepared. Front line staff such as Reception and Security, through to the IT team, business units, legal counsel and management, need to know how to react and what information to provide.

Drawing on our experience, we have published a guide to help deal with a raid by any of the key authorities in Hong Kong. It provides step-by-step help with all aspects of a raid, as well as checklists of powers and duties, and a series of “golden rules” to follow. Since the guidance is practical, much of it can be deployed regardless of the jurisdiction and authority in question.

This publication should be a port of call as a dawn raid unfolds, along with our Dawn Raid Hotline. It accompanies our crisis prevention and management app (CrisisPM), which gives high level advice on what to do in a series of emergency situations, including a dawn raid. Details of the Hotline and app can be found in the guide.

We also provide dawn raid and broader crisis prevention and management training.

Please email asia.publications@hsf.com to request a copy of the guide and contact the authors with any questions or comments. For a preview please click here.

For further information, please contact Kyle Wombolt, Mark Jephcott or William Hallatt.

17.2 HKMA continues its focus on corporate governance in Hong Kong

On 16 October 2017, the Hong Kong Monetary Authority (HKMA) introduced by way of a circular new measures to heighten management accountability at Registered Institutions (RIs) for conducting or supervising the conduct of businesses that constitute regulated activities (RAs). These measures are detailed in a set of FAQs accompanying the circular.

This clarification is not unexpected given questions raised around how the Securities and Futures Commission’s (SFC) Manager in Charge (MIC) regime would be harmonised with the regime administered by the HKMA under section 72B of the Banking Ordinance (please see our briefing on the MIC regime here). However, the new guidance will require RIs to consider their existing governance frameworks and amend where appropriate to ensure full compliance with the HKMA’s expectations.

The implementation timetable is as follows:

- 16 March 2018 – RIs may commence submitting to the HKMA and the SFC relevant information on individuals who are principally responsible for businesses conducting RAs, together with an organisation chart depicting the RI’s management and governance structure (Required Information).
- 16 April 2018 – Existing RIs are expected to submit the Required Information to the HKMA and the SFC on or before this date. Authorised institutions applying for registration as an RI or for addition of RAs on or after this date should submit the Required Information to the HKMA in support of their applications.

Given the tight timeline, RIs should begin reviewing their organisational structure and identifying who is principally responsible for each business conducting RAs, and making any necessary changes to comply with this new guidance.
Our briefing highlights the key elements of this new guidance and their impact on RIs.

For further information, please contact William Hallatt, Gareth Thomas, Hannah Cassidy or Jeremy Birch.

17.3 New regulatory trial grounds for fintech firms in Hong Kong

On 29 September 2017, Hong Kong financial regulators announced new initiatives aimed at fintech firms, including several new regulatory sandboxes:

- The HKMA announced plans to launch Fintech Supervisory Sandbox 2.0, an enhanced sandbox that follows on the heels of its Fintech Supervisory Sandbox launched a year ago (further details of which are set out in our briefing here);
- The SFC announced the launch of a Fintech Regulatory Sandbox and issued further clarification on the meaning of “relevant experience” for responsible officers at fintech firms (see the SFC’s press release here); and
- The Insurance Authority announced two pilot initiatives – the Insurtech Sandbox and Fast Track.

The regulatory sandboxes will be linked up across the regulators via a common interface so as to provide a single point of entry for pilot trials of cross-sector fintech products and services. These developments follow the trend of regulators around the world looking to increase the competitiveness of their financial services market by encouraging innovation through financial technologies.

Our briefing sets out the above initiatives in more detail.

For further information, please contact William Hallatt, Hannah Cassidy or Michael Tan.

17.4 New Insurance Authority in Hong Kong commences regulation of insurers with enhanced powers

With effect from 26 June 2017, the independent Insurance Authority (IA) assumed its regulatory responsibilities and replaced the Office of the Commissioner of Insurance (OCI) in regulating insurers. The IA is a much more powerful regulator than its predecessor, with enhanced authorisation and supervisory powers, as well as inspection, investigation and disciplinary powers over insurers.

The IA was established on 7 December 2015 as part of the enhancement of Hong Kong’s insurance regulatory regime, by putting in place a regulator which is financially and operationally independent of the government and the industry in compliance with international standards. The regulation of insurers is the first phase in the IA’s assumption of regulatory responsibilities. It is anticipated that the second phase will occur in around two years’ time, when the IA takes over the regulation of insurance intermediaries (ie agents and brokers) from the three self-regulatory organisations. The IA’s new website has been launched and can be accessed at www.ia.org.hk.

Further details regarding the IA’s governance structure, enhanced powers over insurers, the transition of codes and guidelines and the issues on which the IA will focus in the near future can be found in our briefing. For further information, please contact William Hallatt, Gareth Thomas, Dominic Geiser or Hannah Cassidy.