C L I F F O R D

C H A N C E

DCM Round Up: June 2021

Welcome to our periodic round up of key developments for DCM. Further details on some of these topics can also be found on the Financial Markets Toolkit.

For a more detailed service please contact one of our experts, who can discuss in detail how these developments will affect your business and transactions.

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LIBOR

Contractual Continuity - UK

On 7 May 2021, the UK Government indicated that it will propose legislation to address the issues identified in HM Treasury's **Supporting the wind-down of critical benchmarks** consultation (that is, contractual uncertainties which might arise under "tough legacy" contracts following exercise of the UK FCA's powers relating to "synthetic LIBOR"). By way of reminder, Clifford Chance was one of the consultation respondees and our 15 March response is here. Confidential discussions with HM Treasury lawyers as to the scope of the proposed legislation are on-going, and the draft text is not yet publicly available. In the meantime, the UK Government, the FCA and the Bank of England continue to encourage market participants to transition away from LIBOR.

FCA's consultation on use of new powers to support orderly wind down of critical benchmarks

On 20 May 2021 the FCA published **Consultation Paper CP21/15** on its proposed policy framework regarding the use of critical benchmarks designated as Article 23A benchmarks (i.e. synthetic LIBOR) in legacy contracts. Although the scope of permitted "tough legacy" uses of synthetic LIBOR has been a keenly anticipated topic, the consultation adopts a principles-based approach rather than offering any granular detail as to the types of contracts, or circumstances, in which the use of synthetic LIBOR would be justified. It is noteworthy that the FCA has taken the opportunity to remind market participants that contracts falling within the scope of the Benchmarks Regulation must already have robust written plans addressing the designation of a critical benchmark as permanently unrepresentative, so it may be that use of synthetic LIBOR will not be permitted in contracts entered into subsequent to 1 January 2018. The FCA proposes primarily to consider the scale and nature of legacy contracts which do not have "adequate" provisions to cater for a prohibition on the use of a critical benchmark. Inadequate provisions in this respect are described by the FCA as those provisions which do not contain fallbacks or whose operation would lead to an unintended, unfair, or disruptive outcome. The consultation deadline is 17 June 2021. The FCA specifically requests that market participants provide examples of contractual provisions which would lead to unintended, unfair or disruptive outcomes, or prove to be inoperable in practice. The FCA will publish a Statement of Policy and feedback statement in Q3 2021.

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ESG/SUSTAINABILITY

EU April Package

In April 2021, the EU published a package of measures as part of its Sustainable Finance Action Plan (the **April Package**). The April Package covered the following:

- the final EU Taxonomy climate delegated act detailing the technical screening criteria applicable to the climate change mitigation and climate change adaptation objectives. The climate delegated act completes the legislative framework for these objectives by providing in 200 plus page annexes the specific criteria applicable to economic activities that significantly contribute to climate change mitigation and climate change adaptation. The climate delegated act will take effective from 1 January 2022. See our briefing ***ESG: European Commission finalises Taxonomy 'Technical Screening Criteria' for climate mitigation and adaptation***.

- a proposal for a corporate sustainability reporting directive (**CSRD**) which will amend the existing EU Non-Financial Reporting Directive (**NFRD**) requirements to significantly expand both the type of sustainability information required to be reported and the range of entities required to report, this will include third country issuers listed on EU regulated markets. The proposal still needs to go through the EU legislative process but the intention is for it to apply for financial years beginning on or after 1 January 2023. See our briefing ***ESG: EU Commission proposes corporate sustainability reporting directive***.

- adoption of six amending Delegated Acts ensuring that financial firms include sustainability in their procedures and investment advice to clients. This includes the requirement to consider sustainability factors as part of the product governance process. The implications for the standard ICMA 1 / 2 approach to product governance may need to be reviewed although initial thoughts are that no change will be required. See our briefing ***European Commission adopts long-awaited amendments for asset managers, insurers and insurance distributors on ESG integration***.

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PROSPECTUS REGULATION

ESMA updates its Q&A on the Prospectus Regulation

On 5 May 2021, the European Securities and Markets Authority (**ESMA**) published an **update** to its Questions and Answers on the Prospectus Regulation (the **Q&A**). The Q&A includes two new questions relevant to debt issuances.

The first question clarifies that, contrary to the situations specified in Article 18(1)(a) of Commission Delegated Regulation 2019/979, there is no automatic trigger to publish a supplement to a base prospectus or a non-equity prospectus following the publication of new audited annual financial statements. However, the Q&A also notes that the issuer should make its own materiality assessment.

The second question clarifies that Article 4(1) of the CRA Regulation (i.e. Regulation (EC) No 1060/2009, as amended) applies to any credit rating mentioned in a prospectus, regardless of whether such rating is included pursuant to Commission Delegated Regulation 2019/980. Article 4(1) requires the inclusion of prominent and clear information to state whether or not the credit rating is issued by a credit rating agency established in the European Union and registered as per the CRA Regulation.

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PROSPECTUS LIABILITY

On 3 June 2021, the CJEU gave a preliminary **ruling** on points of law referred by the Spanish courts on prospectus liability under the Prospectus Directive (2003/71). The relevant case was *Bankia SA v Unión Mutua Asistencial de Seguros* (Case C-910/19). It concerns a 2011 share offering to both retail and qualified investors and an issuer's liability for the prospectus under certain Prospectus Directive provisions.

The key question for the CJEU was whether qualified investors could claim damages for a mistake in the prospectus if the offer could have been made to them without any such prospectus. Briefly, the CJEU ruled that there is no distinction between investors: essentially, once a prospectus is produced, any investor may claim. Separately, the court also ruled (with certain caveats) that the Prospectus Directive provisions do not prevent member states from providing under national law that, in a claim for damages by a qualified investor, the fact that an investor was aware (or ought to have been aware) of the economic situation of the issuer otherwise than through the prospectus could or should be taken into account.

Whilst the CJEU conclusions are in line with expectations (and followed the recommendations of the Advocate General **opinion** from February 2021), principles expressed in the ruling will be of broad application. They will be useful for interpreting PD3 provisions and, also, in relation to wholesale debt "listing" prospectuses produced for exempt offers.

Direct link to the **English translation** of the judgment.

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BREXIT

European Commission's rejection of UK's application to join Lugano

On 4 May 2021, the European Commission recommended that the EU should reject the UK's application to accede to the Lugano Convention. The Lugano Convention, which is substantially the same as the Brussels I Regulation (although, without recourse to the EU's Court of Justice), sets out jurisdictional and enforceability rules and applies between the EU and the three EFTA members (i.e. Switzerland, Norway and Iceland).

As described in the **Clifford Chance briefing** on this topic, if the EU's Council and Parliament reach a similar view, the consequence would be that if parties to a contract would otherwise choose the jurisdiction of the English courts – whether through a non-exclusive jurisdiction clause, an asymmetric jurisdiction clause of the sort commonly found in financial agreements, or an exclusive clause – the disappearance of the Brussels I Regulation and the Lugano Convention systems (as a result of Brexit) will be a consideration if it is likely to be necessary to enforce an English judgment in an EU or EFTA member state.

If that is the case, the parties can consider whether the means of enforcing an English judgment outside the Brussels/Lugano regime are adequate for their purposes. In many cases, asymmetric clauses will continue to be the choice for financial contracts. In others, if there might be impediments to the enforcement of an English judgment, one option going forward would be to use exclusive jurisdiction clauses, which would bring the contract within the scope of the Hague Convention to which both the UK and the EU are parties (although the three EFTA participants have not acceded to it).

Article 71a BRRD: contractual stay

On 22 April 2021, **Delegated Regulation C(2021) 2656 final** was adopted by European Commission. It specifies content for contractual stay clauses and will be relevant for EEA entities to include in third country law contracts (including English law contracts). The text was substantially based on the EBA's **draft RTS** submitted to the European Commission on 16 December 2020, with minor changes. Although, technically, adoption of the Delegated Regulation by the Commission triggers the official start of a 3-month scrutiny period whereby co-legislators may object and the Delegated Regulation will only come into force 20 days after publication in the Official Journal, parties are typically already adhering to the proposed content requirements. Unlike the UK PRA contractual stay wording there is no intention for ICMA to develop market standard language but law firms have all developed very similar forms of acceptable wording reflecting the Delegated Regulation.

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OTHER

ISDA 2021 Definitions

ISDA intends to publish its updated interest rate derivatives definitional booklet (the **2021 Definitions**) on 11 June 2021 and these are scheduled to become effective in October 2021. The 2021 Definitions consolidate the ISDA 2006 Definitions and the various supplements to the 2006 Definitions. They will be published online with all future amendments consolidated directly into the online version but market participants will still be able to identify which version was in effect for their transactions. More information can be found **here.**

It is possible to include a reference to the 2021 Definitions in MTN programmes updated now which will allow for these definitions to used on drawdowns issued after the 2021 Definitions become effective. Frequent issuers who anticipate FRN funding needs drafted on an ISDA determination basis in the next 12 months may wish to refer to them in programmes currently being updated but we expect the majority of issuers will not need this optionality at this stage and can simply include reference to the 2021 Definitions during next year's update.

ICMSA's bulletin on the role of calculation agents and benchmark agents/independent advisers

The ICMSA bulletin (210510/56) ***The role of Calculation Agents and Benchmark Agents/Independent Advisors*** may be of interest in considering the role of the calculation agent on a typical MTN issuance and on a swap transaction and the role of a benchmark agent/independent advisor in relation to the benchmark replacement provisions in MTN issuances.

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