IN BRIEF

- The ACT has expressed its support for the Financial Reporting Council's proposals for revised guidance for the directors of UK companies on **going concern and liquidity risk**. The FRC proposes a new assessment running for 12 months from the half-year accounts. The ACT would go even further and remind company directors to do their going concern assessment "covering such period as the directors consider appropriate and at least 12 months".

- The cost of **fees for new equity issues** is likely to come down. A group of institutional investors, which usually act as subunderwriters, are understood to be planning to step into the primary role, with co-ordination provided by Lazard and Rothschild. Issuers and their institutional shareholders feel that the fees charged by the investment banks are too high and that alternative issuing structures could help bring them down to a fair level.

- Implementation of the **EU's Shareholder Rights Directive** is the subject of a guidance note issued by the Institute of Chartered Secretaries and Administrators (ICSA). The guidance covers the changes that have now implemented in such areas as shareholder meetings, proxies, notice periods, website information and the right of members to include matters at an AGM. It is available from: **http://tinyurl.com/q2zt8g**

- The International Accounting Standards Board (IASB) has proposed **changes to its employee benefits standard (IAS 19)** and the rate used to discount future pension liabilities to employees. Under the existing standard the discount rate employed is taken from the yields on high-quality corporate bonds. However, when there is no deep market in corporate bonds, market yields on government bonds must be used instead.

  But the global financial crisis has led to a widening of the spread between yields on corporate bonds and the yields on government bonds. As a result, entities with similar employee benefit obligations may report them at very different amounts.

  The IASB proposes to eliminate the requirement to use yields on government bonds. Instead, entities would estimate the yield on high-quality corporate bonds. The IASB intends to permit entities to adopt the amendments that arise from this in their December 2009 financial statements.

INTRODUCTION

By Martin O'Donovan
ACT assistant director, policy and technical

The battle for top place as the most tedious of legal agreements must surely be between the ISDA master agreement and banks' standard terms and conditions for current accounts and payments. But despite their apparently mundane content, both are important documents for treasurers and well worth devoting time and effort to when it comes to negotiating them. With the Payment Services Directive now almost on us, there is the opportunity, and indeed the need, to revisit banks' standard terms and conditions. It may even be that the content of current agreements is lost in the mists of time, so now is the chance to start afresh. Good luck with your negotiations.

S&P starts adding ERM into the ratings mix

Over the past year Standard & Poor's has begun to incorporate enterprise risk management (ERM) discussions into its regular meetings with rated companies, according to a progress report from the rating agency.

Consideration of ERM was a move announced last year and S&P is currently gathering information and developing a systematic approach to its evaluations.

S&P is deferring any conclusions about ERM's value but does not expect any ERM analysis to alter radically its existing credit rating opinions in most cases.

Its findings so far indicate that the level of adoption, formality, maturity and engagement of ERM varies widely, with few companies providing clear examples of definitions of risk tolerance or risk appetite.

Silo-based risk management focused at the operational manager level remains prevalent.

Companies with a true enterprise-wide approach to risk management appreciate the importance of going beyond quantifiable risks or even top 10 risks. They increasingly understand the importance of emerging risks.

Not many companies have got to grips with the upside aspects of ERM. The focus is instead on covering downside risks. There is a very strong compliance-driven push toward ERM, which S&P cited as a possible danger in the past. ■

Pre-contracts still worthless

The House of Lords has reaffirmed the UK legal principle that pre-contract negotiations are not worth the paper they are (or are not) written on. It is the formal contract that records the deal as opposed to what may have been said or written between the parties throughout negotiations that matters. The approach is reflected in the boilerplate "entire agreement" clause in most commercial contracts.

The ruling came in Chartbrook and Another v Persimmon Homes Ltd and Others [2009]. In brief, Persimmon, a developer, and Chartbrook, a landowner, signed a development agreement in October 2001. A dispute subsequently arose between them as to the calculation of an additional payment by Persimmon to Chartbrook. The formula contained a grammatical ambiguity, with each party putting forward a different interpretation of the calculation, with wildly different results.

Persimmon ultimately won the case. At the same time, the Lords expressly held that there were no reasons to depart from the long-standing rule in Prenn v Simmons: "The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent."

The Lords ruled that the agreement should have been interpreted in the manner of a reasonable observer, and not what either one or even both of the parties believed it to be.

Banking payments shake-up to go live

The Payments Services Directive – or the Payment Services Regulations 2009 in the case of the UK – will come into force on 1 November.

The directive was originally conceived to facilitate the development of the Single Euro Payments Area (SEPA) and provide additional consumer protection and transparency. In practice, though, it affects companies too, not least because, unlike SEPA, the directive covers all sterling electronic payments.

In the first instance companies will get a raft of new documentation from their payment banks. Rather than having to agree terms and conditions separately for every payment transaction, banks can agree framework contracts with their customers that specify the information obligations, service standards and liabilities covering all manner of payment channels – cards, bulk or one-off electronic payments, debits and credits.

Companies should not view the paperwork as mere boilerplate to be immediately filed away out of sight since the new terms and conditions will become binding even if not signed by the company. Simply continuing to do business with a bank may constitute implied acceptance.

The directive gives bank customers considerable protection against liability for unauthorised transactions, although banks can opt out, and will be keen to do so unless corporate customers negotiate a suitable compromise.

The extent to which your company takes responsibility for unauthorised payments or fraudulent use of passwords and security devices will depend on your negotiations, but one useful guide in this area can be found in the US Uniform Commercial Code (UCC 4A), which provides an expression of what might be regarded as a fair division of responsibility.

US banks are obliged to have reasonable security systems in place. If a loss results from an unauthorised payment order, then the customer suffers the loss if the bank accepted the order in good faith and complied with a commercially reasonable security procedure to verify the authenticity of the order.

But the loss can be shifted to the bank if the customer can show that its own organisation did not cause the loss. If the loss falls on the bank, it must refund any payment received from the customer and, if applicable, interest on the refundable amount. There is no liability for consequential loss. For more on this, visit: **http://tinyurl.com/nyygqc**

Many UK payments systems already come up to the directive's standards for mechanics and time cycles. But some of the directive's features may cause complications. For example, charges for transactions must not be deducted from a payment; instead, they must be charged separately by the paying bank on the payer and by the receiving bank on the recipient. Making one party bear all the transaction charges has been outlawed. Nor will the SWIFT charge codes BEN and OUR be allowed any longer.

The directive stops banks from charging by adjusting value dates. A recipient must be given good value on the day the receiving bank receives the credit, and debits should not be back-valued, although the directive wording here is ambiguous. Incoming payments must be at the disposal of the payee immediately after being credited, which means they must be visible and movable.

Time cycles for the receipt of payment orders are specified, and the time of receipt at your bank is simply when the bank receives the order, although a cut-off time "near the end of the day" can be established.

In theory the directive should harmonise payment practices across Europe, but differences will remain. Sweden, for example, has extended the scope of the directive to the limit, which is particularly relevant to "one leg out" transactions. Charges for cross-border payments must also be the same as for domestic transactions, so choosing the location to initiate cross-border credits or direct debits can produce savings. ■

http://www. WEBSITE WATCH

I sought the law…

Legal dictionaries and glossaries abound on the internet, but many are not comprehensive enough while others give only cursory explanations of terms. But law firm Gillhams' roundup of legal terms and phrases give enough detail to act as a mini-textbook on many legal concepts.
www.gillhams.com/dictionary

IN BRIEF

▸ The FSA has set out how its **market abuse rules on "acting in concert"** apply to activist shareholders. The City regulator has said that the market abuse rules do not prevent investors engaging collectively with the management of an investee company (although trading on the basis of another's intentions or similar activities could constitute market abuse). Nor would the FSA rules on the disclosure of major shareholdings affect shareholders having ad hoc discussions on a specific issue (although the rules would apply where investors have agreed on a united long-term strategy).

▸ The **limitation periods for bringing claims** in civil cases in tort or for breach of contract such as the non-payment of debts in the UK will be reduced if new Law Commission proposals are agreed. The basic feature of the core regime would be a three-year period running from when a claimant acquired the knowledge that they could bring a claim. This primary limitation period would be subject to a 10-year "long stop" limitation period, running from when the act or omission complained of occurred.

▸ The ACT has criticised EU proposals for reform of the **over-the-counter (OTC) derivatives market** in its response to the European Commission. The ACT believes that the proposed measures to reduce systemic risk in the financial system would have the unintended consequence of reducing the availability of OTC derivatives, increasing their cost, or requiring companies to put up cash collateral. The cashflow consequence for many companies would be to make hedging costly, difficult or even impossible. The ACT, the EACT and representatives of the French, Belgian and Luxembourg treasury associations have been putting the corporate viewpoint at a hearing in Brussels.

▸ The FSA is holding a **liquidity conference** on Friday 9 October to explain its reforms to the wholesale liquidity markets. Emphasis will be on the implications of the rule changes, planning for compliance with the new requirements, and how the FSA will assess financial firms from a liquidity risk perspective. All key aspects will be covered, including systems and controls, firms' own assessments (ILAA), waiver applications and regulatory reporting. Further details and registration are available at:
http://tinyurl.com/l3axhs