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International Financial Products and Services

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THE YEAR IN REVIEW
AN ANNUAL PUBLICATION OF THE ABA/SECTION OF INTERNATIONAL LAW

International Financial Products and Services

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This article highlights important developments in 2017 in the fields of international financial products and services in Brazil, Egypt, Romania, and the United States.

I. Development in Brazil²

On October 11, 2017, the Brazilian Securities and Exchange Commission (*Comissão de Valores Mobiliários – CVM*) issued a Note about the transactions known as Initial Coin Offerings (ICOs), which was published on CVM's webpage.³ Specifically, the Note addressed whether ICOs are regulated by CVM. CVM regulates certain securities under the provisions of Law No. 6,385, of December 15, 1976 (Law 6,385/76).⁴ According to article 2 of this law, these securities include:

(i) the shares, debentures and subscription bonuses; (ii) the coupons, rights, subscription receipts, and de-stocking certificates related to the securities referred to in item (ii); (iii) certificates of deposit of securities; (iv) the debentures notes; (v) quotas of investment funds in securities or investment clubs in any assets; (vi) the commercial notes; (vii) futures, options, and other derivatives contracts, the underlying assets of which are securities; (viii) other derivatives contracts, regardless of the underlying assets; and (ix) when publicly offered, any other securities or collective investment contracts that generate the right to participate, partnership or remuneration, including resulting from the provision of services, whose income comes from the efforts of third parties.⁵

CVM has identified several risks with respect to ICOs.⁶ First, investors may treat ICOs similarly to other “virtual assets, also known as tokens or coins.” Pursuant to article 2 of Law 6,385/76, virtual assets may represent

1. The committee Editors of this Year In Review is Mohamed Hashish, Soliman, Hashish & Partners, Egypt and the authors are Alan Rabkin, USA, Sabin Volciuc-Ionescu and Catalin-Sergiu Dinu, Romania, and Walter Stuber, Brazil.

2. Authored by Walter Stuber, Walter Stuber Consultoria Jurídica, São Paulo, Brazil.

3. See *Initial Coin Offering (ICO)*, SEC. & EXCH. COMM'N OF BRAZIL (Oct. 11, 2017), <http://www.cvm.gov.br/noticias/arquivos/2017/20171011-1.html>.

4. See Lei No. 6.385, de 7 Dezembro de 1976, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 09.12.1976 (Braz.), available at http://www.planalto.gov.br/ccivil_03/leis/L6385compilada.htm.

5. *Id.*

6. *Initial Coin Offerings (ICO)*, *supra* note 3.

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securities, “depending on the economic context of the issue of ICOs and the rights conferred to the investors.”⁷ In this regard, ICOs operations may be associated “with securities already subject to specific legislation and regulations”, and these operations must follow applicable rules. Any corporation, either publicly or closely held, “or other issuers that raise funds through . . . ICO[s],” may be regulated as an issuer or trader of securities. Virtual assets that are offered which fit the definition of securities “and are in violation of the regulations will be subject to the applicable sanctions and penalties.” But as of the date of this guidance from the CVM, no offer of “ICO[s] . . . has been registered or exempted from registration in Brazil.”⁸

ICO operations that are outside CVM’s jurisdiction will not be deemed public offerings of securities. “Securities offered through ICO operations can not be legally traded on specific virtual currency platforms ([called] *virtual currency exchanges*)” as CVM has not authorized virtual currency exchanges “to provide securities trading environments in Brazil[.]”⁹

In its guidance, CVM also warns potential investors in ICO operations regarding the “risks inherent in such investments,” particularly with respect to unregistered offers. These risks include:

- a) fraud and pyramid schemes (“Ponzi”);
- b) lack of formal processes of adaptation of the investor to the risk profile of the undertaking (suitability);
- c) risk of money laundering and tax evasion/foreign currency;
- d) service providers that act without observing applicable legislation;
- e) advertising material to the offer that does not conform with the CVM regulations.
- f) operational risks in trading environments that CVM does not monitor
- g) cyber risks, including attacks on infrastructure, systems, and credentials;
- h) operational risk associated with virtual assets and their systems;
- i) volatility associated with virtual assets;
- j) liquidity risk (i.e., risk of not finding buyers/sellers to certain amount of assets at the price quoted) associated with the virtual assets; and
- k) legal and operational challenges in cases of dispute with issuers, which may happen in cross-border transactions and the inherent virtual character related to those virtual assets.¹⁰

Potential investors should check the CVM’s webpage to determine whether the ICO offer advertisement is from an issuer registered with CVM or whether the operation was registered or exempted from registration, in order to avoid the risk of fraud.¹¹ Furthermore, CVM customer service

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

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accepts reports and “complaints about possible irregularities in . . . [ICO] operations.”¹² ICO operations should be carefully evaluated by potential investors in order to identify signs indicating irregularities such as, among others: “high guaranteed returns, pressure to participate in transactions immediately, unregistered offerors and/or offerings at CVM, and the absence of minimum requirements for participation in such operations.”¹³

CVM continues to monitor the evolution of ICOs and, whenever appropriate, will take adequate measures within the scope of “its legal competence to ensure the stability and continuous development of the Brazilian capital market.”¹⁴

II. Development in Egypt¹⁵

During 2017, “the Central Bank of Egypt (“CBE”) issued a number of decrees.”¹⁶ Specifically, “as of March 5, 2017, banks that are registered with CBE are required to notify CBE with any arrangement for making foreign currencies available to any governmental entity in Egypt including public economic entities, public business companies, and public companies as well as any their suppliers and contractors.”¹⁷ “As a part of CBE’s initiative encouraging banks in Egypt to provide finance to Small and Medium-sized Enterprises (“SMEs”), CBE decided to change the definition of SMEs to be as follows:”¹⁸

Size	Paid capital	Personnel
Micro	less than EGP 50,000	less than 10 employee
Small	From EGP 50,000 to EGP 5,000,000 for industrial companies and less than EGP 3,000,000 for non-industrial companies	less than 200 employee
Medium	From EGP 5,000,000 to EGP 15,000,000 for industrial companies and from EGP 3,000,000 to EGP 5,000,000 for non-industrial companies	

12. *Id.*

13. *Id.*

14. *Id.*

15. Authored by Mohamed Hashish, Soliman, Hashish & Partners, Brazil.

16. Mohamed Hashish, *Latest Amendments to the Financial Sector in Egypt*, ABA NEWSL. (ABA Sec. of Int’l L.), Mar. 2017, at 13.

17. Mohamed Hashish, CENTRAL BANK OF EGYPT, CIRCULAR REGARDING NOTIFYING CBE BEFORE ANY FOREIGN EXCHANGE TRANSACTION TO ANY GOVERNMENTAL BODY (Mar. 6, 2017).

18. Mohamed Hashish, CENTRAL BANK OF EGYPT, CIRCULAR REGARDING AMENDING SOME ITEMS OF THE SME INITIATIVES (Mar. 5, 2017).

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“CBE also relaxed the compliance requirements and conditions for providing finance to SMEs.”¹⁹

III. Development in Romania²⁰

A. POTENTIAL UNCERTAINTIES REGARDING THE WRIT OF EXECUTION CHARACTER OF LOAN AGREEMENTS

The Code of Civil Procedure was amended²¹ in March 2017 and specifically set out that a private deed may be considered a writ of execution (enforceable title) only if registered with public registers and subject to the conditions specifically provided by law; previously no registration requirement had existed.²²

This new requirement might be viewed in conflict with article 120 of the Government Emergency Ordinance 99/2006 on credit institutions and capital adequacy (“GEO 99/2006”), which provides that a loan agreement concluded by a credit institution represents enforceable title — without an obligation to register such agreement with any public register.²³

There are some limited views that any agreement should now be registered in a public register in order to constitute writ of execution following the recent amendments to the Code of Civil Procedure.²⁴ But several scholars argue that the new requirement is not of general application and should not apply to an agreement already deemed as writ of execution under the special laws regulating that type of agreement if there is no legal requirement to register that agreement in a public register under those special laws.²⁵ As such, a loan agreement subject to GEO 99/2006 should continue to be deemed as writ of execution.

19. Mohamed Hashish, *Latest Amendments to the Financial Sector in Egypt*, ABA NEWSL. (ABA Sec. of Int’l L.), Mar. 2017, at 13.

20. Authored by Sabin Volciuc-Ionescu and Catalin-Sergiu Dinu, Volciuc Ionescu SCA, Romania.

21. Government Emergency Ordinance No. 1/2016, Code of Civil Procedure, Gazz. Uff. No. 85 (Feb. 4, 2016) (Rom.).

22. Law No. 134/2010, Code of Civil Procedure art. 641, Gazz. Uff. No. 485 (July 15, 2010) (Rom.).

23. Government Emergency Ordinance No. 99/2006, Code of Civil Procedure, Gazz. Uff. No. 1027 (Dec. 27, 2006) (Rom.).

24. See Evelina Oprina & Vasile Bozecan, *The Analysis of the Last Modifications Made in the Civil Procedure and Forced Execution, in Particular, by Law No. 17/2017*, JURIDICE (Mar. 22, 2017), <https://www.juridice.ro/500604/analiza-ultimelor-modificari-aduse-materia-procedurii-civile-si-executarii-silite-special-prin-legea-nr-172017.html>; Petre Piperea & Adrian Manole, “*Just a Word*” Let Them “Say” About the Public Registers of Art. 641 CPC, JURIDICE (Mar. 31, 2017), <https://www.juridice.ro/502799/doar-o-vorba-sat-mai-spun-despre-registrele-publice-din-art-641-cpc.html>.

25. See Marieta Avram & Cristian Samoila, *Law No. 17/2017: A False Alarm in the Banking Environment*, JURIDICE ESSENTIALS (Mar. 27, 2017), <https://juridice.ro/essentials/1022/legea-nr-172017-o-falsa-alarma-in-mediul-bancar>; Roxana Stanciu, *Bank Credit Agreements and Legal Assistance Contracts are Enforceable Titles*, JURIDICE (Mar. 27, 2017), <https://www.juridice.ro/>

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**B. NEW RULES ON STRENGTHENING THE PRUDENTIAL REGIME OF
 NON-BANKING FINANCIAL INSTITUTIONS**

The Regulation no. 20/2009 on non-banking financial institutions (“NBFIs”)²⁶ was amended in October 2017 by the National Bank of Romania (“NBR”) through amending Regulation no. 1/2017.²⁷ The amendment was designed to limit the concerns of the NBR in relation to certain business models and practices of NBFIs that grant short term unsecured loans bearing high effective annual interests rates (“DAE”) to Romanian consumers.²⁸

Two additional criteria will exist that will trigger automatic registration of a NBFIs with the Special Register maintained by the NBR and entail increased prudential supervision by NBR.²⁹ The additional criteria refer to (i) the aggregate amount of consumers loans granted during the last three quarters exceeding approximately EUR 16.3 million, and (ii) the average monthly DAE for new consumers loans.³⁰

Moreover, the amending Regulation has introduced higher capital requirements for the high-risk consumer loans (such as term loan with DAE above 32.5% with a maturity of more than 90 days), applicable from 31 January 2018.³¹

**C. PROPOSED CHANGES POTENTIALLY RELAXING THE
 STRUCTURING OF GROUP FINANCINGS**

On June 27, 2017, the Senate approved a draft law amending the Company Law and Accounting Law (“Draft Amendment”)³² which repealed “two criminal offenses currently provided by the Companies Law.”³³ The prior law “had caused many concerns over the years [with regard to] structured lending transactions, which included certain forms of upstream,

501669/contractele-de-credit-bancar-si-contractele-de-asistenta-juridica-sunt-titluri-executorii.html.

26. Regulation No. 20/2009, Non-Banking Financial Institutions, Gazz. Uff. No. 707 (Oct. 21, 2009) (Rom.).

27. Regulation No. 1/2017, amending Regulation No. 20/2009, Non-Banking Financial Institutions, Gazz. Uff. No. 760 (Sept. 25, 2009) (Rom.).

28. *Id.*

29. EUROPEAN CENTRAL BANK, TEMPLATE FOR NOTIFYING NATIONAL MACROPRUDENTIAL MEASURES NOT COVERED BY CRR/CRD (2016).

30. *New Rules for Non-Banking Financial Institutions*, LEROY LAW, <https://www.leroylaw.ro/en/news/new-rules-for-non-banking-financial-institutions>.

31. *Id.*

32. Draft Senate Law No. 156/2017, (Mar. 28, 2017) (Rom.), available at https://www.senat.ro/legis/lista.aspx?nr_cls=L156&an_cls=2017#.

33. Law No. 31/1990, Companies Law, Gazz. Uff. No. 126 (Nov. 17, 1990) (Rom.); Volciuc Ionescu, *Proposed Changes Potentially Relaxing the Structuring of Group Financing in Romania*, LEXOLOGY (Sept. 13, 2017), <https://www.lexology.com/library/detail.aspx?g=844ef70f-6dc5-449b-a330-e554fddf78b9.1990>.

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downstream, and/or cross-stream guarantees and financings (such as cash pooling or secured lending transactions).” The repealed offenses relate to:

- bad-faith use of the credit of the company by company’s founder, director, general manager, manager, member of the directorate or of the supervisory board, or legal representative (art. 272(1)(b) of the Companies Law); and
- crediting of the director or above-mentioned persons by the company with an amount exceeding EUR 5,000 [. . .] (art. 272(1)(c) of the Companies Law).

The Draft Amendment is subject to further approval in the Chamber of Deputies.

IV. Development in the United States of America³⁴

A. CONSUMER FINANCIAL PROTECTION BUREAU (CFPB)

The CFPB, an agency of the U.S. Government, was created as part of the major Dodd-Frank financial reform legislation in 2010. The CFPB adopted significant rules and amendments in 2017 with regard to financial products and services, which are summarized below.

1. Preclusion of Arbitration Agreements In Consumer Financial Transactions³⁵

Pursuant to Section 1028(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act, and the authority to enact rules pursuant to 12 CFR Part 1040, CFPB issued a final rule (the Arbitration Agreements Rule) on July 19, 2017, regarding the inclusion of arbitration agreements in contracts for certain financial products and services.³⁶ The final CFPB rule has two important aspects. The first aspect prohibited providers covered by the rule from requiring the use of arbitration agreements by and between the covered provider and any consumer, and any related entities, to prevent the provider from contractually precluding the use of a significant litigation method known in the United States as a class action regarding any covered matter.³⁷ Second, the final rule stated that if a pre-dispute arbitration process is required contractually, certain records regarding the pre-dispute arbitration must be preserved and provided directly to CFPB.³⁸ It is noted that the Arbitration Agreements Rule would extend to providers who improperly released protected consumer financial information, such as discovered in the recent Equifax historic and massive security breach.³⁹ The

34. Authored by Alan B. Rabkin, Rabkin Consulting, LLC, USA.

35. Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017) (codified at 12 C.F.R. pt. 1040).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

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effective date for the Arbitration Agreements Rule was set by the Rule as September 18, 2017, with a compliance date set by the Rule for March 19, 2018.⁴⁰

In a rare reversal of an agency's rulemaking and decisional authority, on November 1, 2017, the President of the United States, Donald Trump, signed a joint resolution passed by the U.S. Congress disapproving of the above-referenced CFPB Arbitration Agreements Rule.⁴¹ This action has rendered the Arbitration Agreements Rule described in the prior paragraph (and enacted only a little more than three months earlier) of no further force or effect.

2. *Payday Debt Traps and the Ability to Repay High Interest Payday Debt.*⁴²

Payday Debt is a form of short-term specialty higher risk borrowing without, in most cases, the pledging of any collateral.⁴³ Payday loans, where allowed by state law, are often made at a substantially higher rate of interest and in certain states such lending is additionally regulated to a far greater extent because of the potential for lender abuse.⁴⁴ Payday loans, if allowed, are often regulated at the state level as to maximum size of loan, repayment terms, substantial recordkeeping, strict licensing, and auditing. This type of lending often has the feature of a large balloon payment that requires repayment of all the borrowed funds at one time upon conclusion of the loan; or, if the borrower is unable to do so, the lender forces the borrower to incur a new round of additional interest, new fees, and costs by rolling the prior unpaid payday loan into a new payday loan, at the same lender, and creating a difficult-to-break cycle of extended or even mounting debt (the so-called Payday Debt Trap).⁴⁵

On October 5, 2017, the "CFPB [. . .] finalized a rule [(the Payday Loan Rule)] aimed at stopping the [P]ayday [D]ebt [T]rap by requiring lenders to determine, upfront" whether the targeted borrowers can afford to repay payday type loans or not before the loan is actually made.⁴⁶ This is done by requiring a lender to positively demonstrate that reborrowing is not necessary to repay a payday loan (the so-called Full-Payment Test).⁴⁷ An

40. *Id.*

41. Lisa Lambert, *Trump Kills Class-Action Rule Against Banks, Lightning Wall Street Regulation*, CNBC (Nov. 1, 2017), <https://www.cnbc.com/2017/11/01/reuters-america-trump-kills-class-action-rule-against-banks-lightning-wall-street-regulation.html>.

42. Payday, Vehicle Title, and Certain High-Cost Installment Loans, 12 C.F.R.1041 (2017), *available at* https://files.consumerfinance.gov/f/documents/201710_cfpb_final-rule_payday-loans-rule.pdf.

43. *Id.* at 31.

44. *Id.* at 15, 17. .

45. *Id.* at 399.

46. CONSUMER FINANCIAL PROTECTION BUREAU, CFPB FINALIZES RULE TO STOP PAYDAY DEBT TRAPS (2017).

47. *Id.*

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alternative to demonstrating this requirement that the Full-Payment Test is met (which is outlined in detail in the Payday Loan Rule), is to allow the borrower the option to repay the original payday loan in installments without the need for reborrowing.⁴⁸ Other aspects of the Payday Loan Rule include waiver of some of the requirements for less risky community bank loans and a cut-off of certain automatic debit aspects (the so-called Debit Attempt Cut-Off) for loans that exceed 36 percent rate of annualized interest.⁴⁹

At the time of this Year in Review publication there was a continuing discussion as to whether the U.S. Congress and the President of the United States would nullify the CFPB's Payday Loan Rule in the same manner as was done for the CFPB's Arbitration Agreements Rule noted in the prior numbered section. As of December 1, 2017, the Payday Loan Rule has not been nullified but the future of the Payday Loan Rule has been made additionally uncertain by the announced departure of the current CFPB Director, Richard Cordray, at the end of 2017.

3. *The Federal Deposit Insurance Corporation (FDIC)*

The FDIC, an agency of the U.S. Government, adopted, among others, summarized the following significant procedures, rules and amendments in 2017 with respect to financial products and services.

a. *FDIC Procedural Guidance for Creating New (De Novo) Banks in the United States.*⁵⁰

In recent years, the FDIC has generally not been enthusiastic about the formation of new (de novo) banks in the United States of America. The concern arises from the financial crisis, which resulted in the failure of hundreds of previously chartered and deposit-insured U.S. banks during the period of 2007 through 2012, especially as many of the failed banks were unseasoned or recently de novo banks. This reluctance to insure new de novo banks is therefore understandable as the prior failure of so many banks of all types caused a massive depletion of deposit insurance trust funds held by the FDIC (a depletion that has since been substantially restored). But times change and slowly the FDIC, in its role under federal law as the national depository insurer of banks, along with the dozens of related federal and state chartering bank agencies, have begun collectively considering whether new applications for deposit insurance by de novo banks should finally be seriously considered and, possibly, approved.

Because banking has changed so much during this previous period in which de novo banks were not being chartered, at least in any significant numbers in the U.S., and because of emerging new and higher capital

48. *Id.*

49. *Id.*

50. FEDERAL DEPOSIT INSURANCE CORPORATION, *FIL-17-2017, FDIC RELEASES FINAL HANDBOOK FOR ORGANIZERS OF DE NOVO INSTITUTIONS* (2017).

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standards that bind existing banks, the FDIC has now produced a helpful and practical step-by-step thirty-seven page guide for de novo institutions seeking bank approval for a deposit insurance certificate (which certificate is a mandatory requirement for a banking institution to operate as a deposit gathering institution throughout virtually all of the United States of America, its possessions, and territories).

The guide is titled *Applying for Deposit Insurance, A Handbook for Organizers Of De Novo Institutions* and is produced by the FDIC's Division of Risk Management Supervision and was first produced in April 2017. The guide should be carefully considered before any new institution seeks de novo approval in the United States of America to offer financial products or services as a bank and where deposit-gathering activities will occur.

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