

Index

- administrative law
 - ISDA Master Agreement and, 244
 - relevance in financial markets, 241
- adviser, duties of. *See* duty of care
- agricultural goods, in over the counter derivatives markets, 14
- AIG Financial Products (AIG FP), 42–3
 - Troubled Asset Relief Program and, 42–3
- amenability, in judicial review, 269–73
- American Arbitration Association, 353
- anti-deprivation principle, 110–11
- appellate courts. *See also* English courts
 - basis clauses in, challenges to, 232
 - capacity claims in, 323
 - consistency and, 105
 - contractual discretion regulation in, 263
 - contractual estoppel and, 213, 214–15, 216–17
 - defensive drafting and, 213, 214–15, 216–17
 - fiduciary duties of banks in, decisions on, 194–5
 - jurisdiction of, for insolvency cases, 300
 - misrepresentation in, 174
 - in Singapore, 229–30
- arbitration
 - adjudicator expertise in, 350–2
 - alternative mechanisms, 337
 - American Arbitration Association, 353
 - confidentiality of, 352–3
 - in financial cases, 337
 - Hong Kong International Arbitration Centre, 353
 - International Chamber of Commerce, 353
 - ISDA Arbitration Guide, 354
 - ISDA Master Agreement, 282–3
 - London Court of International Arbitration, 283, 353
 - new initiatives, 353–7
 - New York Convention of 1958, 349–50
 - P.R.I.M.E. Finance, 353, 354–5
 - promotion of, 349
 - Singapore International Arbitration Centre, 353
 - Swiss Chambers' Arbitration Institute, 353
- Asian financial crisis of 1997–1998, 51
- asset-backing, ISDA Master Agreement and, 35, 38–41
 - collateralisation in, 38–9
 - contractual architecture and, 40–1
 - credit risks, 39–40
 - Credit Support Annexes, 39
- Automatic Early Termination, in ISDA Master Agreement, 52, 80
- Bank for International Settlements (BIS)
 - deglobalisation and, 346
 - futures and, 15
 - over the counter derivatives and, 17–18
 - data collection by, 18–19
- Bank of England, Financial Law Panel, 6–7
- bank recovery and resolution, 345
- banks. *See specific banks*
 - duty of care. *See* duty of care
 - fiduciary duties. *See* fiduciary duties
- Basel Committee on Banking Supervision (BCBS), 48
- basis clauses
 - defensive drafting and, 200–1, 203–5, 215–16, 222–3
 - in Singapore cases, 226–7
- BBC. *See* Business Banking Code
- BCBS. *See* Basel Committee on Banking Supervision
- 'best interests' rule, in Conduct of Business Sourcebook, 125–6
- Big Bang Protocol, 93
- bilateral derivatives, 22. *See also* 'non-cleared' derivatives
- BIS. *See* Bank for International Settlements

- breach, in duty of care, 187–8
- Brexit, 4
- financial courts and, 339–46
- Bank Recovery and Resolution Directive, 345
 - Brussels Convention and, 342–3
 - contract continuity risks as result of, 340
 - dispute resolution provisions with, 341
 - enforcement of judgments by, 343–4
 - under English law, 342
 - EU equivalence policy and, 340
 - financial market uncertainty from, 340
 - Financial Markets Law Committee, 341–2
 - Hague Convention and, 343
 - jurisdiction for, allocation of, 342–3
 - Law Society of England and Wales, 341–2, 345
 - legal risks in, 345–6
 - Lugano Convention and, 342–3
 - Markets in Financial Instruments Regulation and, 345
 - Recast Brussels Regulation, 342–3
 - reciprocity in, EU regimes, 342
 - recognition of, 343–4
 - service of documents and, 344
 - transition period for, 339–40
- financial risks from, 346
- ISDA Master Agreement and
- under French law, 60–1
 - under Irish law, 60–1
- Brussels Convention
- Brexit and, 342–3
 - ISDA Master Agreement and, 61–2, 365–6
- Brussels Regulation
- insolvency cases and, 298–9
 - in international court decisions, 294–5
 - ISDA Master Agreement and, 365–6
- Brussels Regulation, Recast, 286, 298
- Brexit and, 342–3
 - ISDA Master Agreement and, 365–6
- Business and Property Courts, 357–8. *See also*
- English courts; *specific courts*
- Business Banking Code (BBC), 180–1
- capacity
- definition of, 325
 - determination of, 328–34
 - mis-selling claims and, 334
 - theory of, 333–4
- capacity claims, choice of law and, 323–36
- applicable law, 324–8
 - in common law traditions, 325
 - definition of capacity, 325
 - determination of capacity, 328–34
 - end-users and, legal nature of, 330, 334
 - in English courts, 324, 329–30, 331–2, 335–6
 - foreign public bodies, 324
 - function of derivatives under, 331
 - under German law, 325
 - impact of Localism Act 2011, 323–4
 - internationalist determination of, 327–8
 - ISDA Master Agreement and, 334
 - in Italian courts, 322–3
 - mis-selling claims and, 334
 - under Norwegian law, 325–7, 328
 - under Portuguese law, 328–9
 - under Recast Brussels Regulation, 335
 - redress for, 334–6
 - under Rome Convention of 1980, 324–5
- caps, in interest rate swaps, 17
- caveat emptor rule, 179–80
- CCPs. *See* central counterparties
- CDOs. *See* collateralised debt obligations
- CDS. *See* credit default swaps
- central counterparties (CCPs)
- definition of, 45
 - function and purpose of, 46–7
 - judicial review and, 272–3
 - over-the-counter derivatives and, 2, 46–7
 - in regulatory mechanisms, 45
- Charter of Fundamental Rights of the European Union, 274
- Chicago Mercantile Exchange, 14
- choice of law
- capacity claims. *See* capacity claims
 - default position on, 313–15
 - in English courts, 313–14
 - capacity claims, 324, 329–30, 331–2, 335–6
 - English Commercial Court, 315
 - interest rate swaps and, 315, 316
 - ISDA Master Agreement and, 315
 - under laws of restitution, 335–6 - foreign law and, application of, 321–3
 - appellate court decisions, 322
 - contractual interpretation principles, 322–3
 - in English courts, 321, 322
 - expert witnesses, 351
 - in first instance decisions, 323
 - jurisdiction clauses, 321–2
 - in multi-contract settings, 321–2
- interest rate swaps and
- in English courts, 315, 316
 - mandatory rules for, 315–17
- ISDA Master Agreement and
- capacity claims and, 319–20
 - in English courts, 315
 - multicurrency cross-border version, 319–20
 - 1992 version, 282, 316, 319–20
 - 2002 version, 282
- local laws and, 315

- mandatory rules in, 315–21
 - interest rate swaps and, 315–17
 - ISDA Master Agreement and, multicurrency cross-border version, 319–20
 - under Italian law, 318–19
 - under Portuguese law, 315–17
- Rome Convention of 1980 and, 314–15
 - capacity claims under, 324–5
 - under Rome I Regulation, 314–15
 - for strategic industries, 63
 - theoretical approach to, 312–13
- City of London
 - emergence as ‘global city,’ 21–2
 - New York and, 27
 - reaction to swaps litigation, 6
- clearing, for over-the-counter derivatives, 46
- clearing, over-the-counter derivatives and, 22. *See also* central counterparties
 - dispute resolution and, 338–9
- close-out netting, 26
 - in ISDA Master Agreement, 36, 37
- close-out scheme, in ISDA Master Agreement, 79
- club markets, 15
- COBS. *See* Conduct of Business Sourcebook
- collars, in interest rate swaps, 17
- collateralised debt obligations (CDOs), 30
- commercial reasonableness, 241
- common law, development of
 - capacity claims under, 325
 - contractual discretion under, 255
 - judicial review under, 275–6
 - mis-selling claims under, defensive drafting in, 225
- complaints procedures, in mis-selling claims, 128–9
- concurrent duties of care, 189
- Conduct of Business Sourcebook (COBS)
 - mis-selling claims and, 123–4, 125–6
 - ‘best interests’ rule, 125–6
 - execution factors, 126
 - information access and presentation, 126
 - ‘personal recommendation’ rule, 126
- confidentiality, in dispute resolution mechanisms, 352–3
- construction industry, as strategic industry, 62–3
- consumer protection
 - under Consumer Rights Act 2015, 236–7
 - mis-selling claims and, defensive drafting in, 236–9
- consumer rights, legislative protections, 205, 236–7
- consumers, definition of, 237–8
- contract law, consumers under, 237–8
- contracts
 - continuity risks, after Brexit, 340
 - defensive drafting of, 220–3
 - exchange-traded, 15
 - financial positions, 76
 - forward, 14
 - ISDA Master Agreement as, 33, 34
 - asset-backing and, 40–1
 - mis-selling claims and, 220–3
 - multi-contract settings, under foreign laws, 321–2
 - multiple, in English courts, 284–91
 - standard form, 2, 30–5
- contractual discretion, regulation of, 254–69
 - under common law, 255
 - general default rule in, 256
 - good faith doctrine and, 262–3
 - implied terms of, 254–8
 - Lehman Brothers (International) Europe Ltd. and, 261
 - reviewability of, 258–62
 - scope of, 254
 - significance of, 267–9
 - standards for, 262–6
 - rationality controls, 264–5, 267–8
 - Unfair Contract Terms Act 1977 and, 255
 - unilateral, 259–60
 - valuation and, 244
- contractual estoppel
 - contractual interpretation, general principles of, 103–5
 - Investors Compensation Scheme and. *See* Investors Compensation Scheme
 - defensive drafting and, 211–17
 - in appellate courts, 213, 214–15, 216–17
 - development of, 212
 - mis-selling claims and, 224, 226
 - objective and purpose of, 212–13
 - ultra vires* and, 213
 - in Hong Kong law, 225–31
 - modern approach to, 97–107
 - in New York law, 213–14
 - non-reliance clauses and, 236
 - in Singapore law, 226–7
 - standard form contracts, 105–7
 - textualist approach to, 95–7
- contractual interpretation, of ISDA Master Agreement
 - choice of law and, 322–3
 - by Determination Committees, 95–7
 - under foreign law, 322–3
 - Greek sovereign debt crisis and, 96
 - modern approach to, 97–107
 - in New York courts, 111–12
 - non-reliance clauses, 234

- credit default swaps (CDS), 18–20, 23
 Credit Events, 19–20, 93–7
 Determination Committees and, 93–7
 ISDA and, 32–3, 93–7
 Credit Derivatives, ISDA, 93–7
 credit risks, asset-backing and, 39–40
 Credit Support Annexes (CSAs), 32–3
 ISDA Master Agreement and, 39, 115
 criminal law, fraud and, 161
 CSAs. *See* Credit Support Annexes
- 'dark markets,' 15
 DCs. *See* Determination Committees
 decision-making
 contractual discretion, regulation of. *See* contractual discretion
 express standards of, 242–53
 in ISDA Master Agreement, 241, 242–53
 administrative law and, 244
 after Global Financial Crisis, 248–9
 Lehman Brothers (International) Europe, 250–1
 Market Quotation as payment measure, 244–6
 in 1992 version, 244–9
 in 2002 version, 250–2
 judicial review and. *See* judicial review
 in Lehman Brothers (International) Europe cases, 250–1, 261
 overview of, 277–8
 theoretical approach to, 241–2
 defensive drafting
 basis clauses, 200–1, 203–5, 215–16, 222–3
 categorisation of, 201–5
 by financial contract, 202–3
 contractual estoppel and, 211–17
 in appellate courts, 213, 214–15, 216–17
 definition of, 211–12, 219
 development of, 212
 objective and purpose of, 212–13
ultra vires and, 213
 of documents, 186
 exclusion clauses, 203–11
 Unfair Contract Terms Act 1977 and, 205–11
 ISDA Master Agreement and, 201, 202–3, 219–20, 221–2
 Misrepresentation Act 1967 and, 205–6
 in mis-selling claims. *See* mis-selling claims
 multiple claims, 200
 no representation clause and, 216
 non-reliance clause and, 220, 229
 in private law, 223
 typical, 202–3
 ambition of, 203
 detail of, 203
 range of, 203
 Unfair Contract Terms Act 1977, 204–11
 controls in, 205–7
 exclusion clauses and, 205–11
 non-financial parties in, 209–10
 non-reliance clauses and, 208
 reasonableness requirements in, 206, 207–11, 233
 deglobalisation, financial courts and, 346–7
 economic effects from, 346–7
 political effects from, 346–7
Derivatives Law and Practice (Firth), 83, 87–8
 derivatives litigation. *See also* *Hazell v Hammersmith and Fulham London Borough Council*; private law. *See also specific topics*
 Brexit and, 4
 drivers of, 50–60
 Global Financial Crisis, 50–2
 in English courts. *See* English courts
 history of, 4–7
 landmark cases, 55–9
Lomas litigation, 52–4
 sources of, 54
 derivatives markets. *See also* over the counter derivatives
 bilateral, 22
 Credit Derivatives, 93–7
 exchange-traded, 15–16
 growth of, 18
 interest rate, 16
 as modular financial product, 2
 for risk management, 25
 Determination Committees (DCs), 93–7
 Big Bang Protocol, ISDA and, 93
 composition of, 94
 contractual interpretation by, 95–7
 credit default swaps and, 93–7
 structural mechanisms of, 94–5
 discretion. *See* contractual discretion
 dispute resolution, non-court forms of. *See also* arbitration; mediation
 Brexit and, 344
 Financial Ombudsman Service, 129
 Dodd-Frank Act (2010), U.S., 68
 drafting. *See* defensive drafting
 drafting of choice law and choice of forum clauses, 53–4, 280, 287
 duty of care, banks and, 175–91
 advice for, 182
 breach of, 187–8
 concurrent, 189
 defensive drafting of documents, 186

- in equity markets, 196–7
 - establishment of, 175–87
 - advisory duty, 182–7
 - in Business Banking Code, 180–1
 - caveat emptor rule and, 179–80
 - Hedley Byrne*, 178–82, 187
 - information duty in, 180–1
 - non-advisory capacity and, 356
 - novel duties of care, 176–8
 - pragmatic approach in, 177–8
 - salesmen and, 183
 - interest rate hedging products compensation
 - scheme and, 150–2, 190–1
 - interest rate swaps and, 185–7
 - ‘mezzanine’ duty, 181–2
 - negligence and, 190
 - quantum in, 188–91
 - reform of, 196–9
 - Financial Conduct Authority and, 196–9
 - scope of, 189
 - theoretical approach to, 175
- Early Termination, in ISDA Master Agreement, 85–7
- EBF. *See* European Banking Federation
- ECtHR. *See* European Court of Human Rights
- EMIR. *See* European Market Infrastructure Regulation
- enforcement of judgments, impact of Brexit, 343–4
- English Commercial Court, 315
- English courts. *See also specific topics*
- Brexit and, financial courts and, 342
 - Business and Property courts, 357–8
 - choice of law in, 313–14
 - for capacity claims, 324, 329–30, 331–2, 335–6
 - English Commercial Court, inconsistent decisions in, 315
 - interest rate swaps and, 315, 316
 - ISDA Master Agreement and, 315
 - under laws of restitution, 335–6
 - Financial List, 358–62
 - foreign laws in, application of, 321, 322
 - globalisation and, 72
 - ISDA Master Agreement in, 51–2, 60–2, 112–13.
 - See also specific cases*
 - contractual interpretation of, 111–12
 - jurisdiction of. *See* jurisdiction
 - legal policy approach to, 62–75. *See also specific policies*
 - Lehman Brothers in, collapse of, 51–2
 - London Court of International Arbitration
 - and, 283
 - strategic industries in, litigation involving, 62–7
 - choice of law in, 63
 - construction industry, 62–3
 - definitions of, 63
 - insurance industry, 62–3
 - Scaptrade* decision, 64–6
 - shipping industry, 62–3
 - Test Case scheme and, 362
- equitable remedies, limits in financial markets
 - context, 193–6
 - equity limits, 196
 - rescission and, 195
- estoppel. *See* contractual estoppel
- EU. *See* European Union
- European Banking Federation, 34
- European Convention on Human Rights, 274–5
- European Court of Human Rights (ECtHR), 275
- European Market Infrastructure Regulation (EMIR), 43–4
 - non-financial counterparties and, 273
- European Union (EU). *See also* Brexit
- Brexit and, reciprocity regimes, 342
 - Charter of Fundamental Rights of the European Union, 274
 - equivalence policy, Brexit and, 340
 - over-the-counter derivatives markets in, 3
- Events of Default, in ISDA Master Agreement, 36, 39, 76
- exchange-traded contracts, 15
- exchange-traded derivatives, 15–16
- exclusion clauses, in defensive drafting, 203–11
 - genuine, 207
 - Unfair Contract Terms Act 1977 and, 205–11
- exclusionary rule, in contractual interpretation, 102
- experts
 - in dispute resolution mechanisms, 350–2
 - Panel of Recognised International Market Experts in Finance and, 308
 - witnesses, 113, 247, 288, 321, 351
- express representation, 166–71
- fairness. *See* good faith; procedural fairness
- FCA. *See* Financial Conduct Authority
- FFAs. *See* Forward Freight Agreements
- fiduciary duties, of banks
 - in appellate court decisions, 194–5
 - equitable remedies and, 193–6
 - equity limits, 196
 - rescission and, 195
 - establishment of, 191–3
 - in financial markets, 192
 - proprietary relief, 191
 - relationships as factor for, 192–3
- financial collateral arrangements, 38–9
- Financial Collateral Directive, 38–9

- Financial Conduct Authority (FCA), 138–41. *See also* Conduct of Business Sourcebook
 duty of care reform and, 196–9
 Financial Ombudsman Service and, 129–30
 over-the-counter derivatives, 2
- financial courts, 7–13. *See also specific courts*
 Brexit and. *See* Brexit
 capacity of, 11–13
 deglobalisation and, 346–7
 Bank for International Settlement and, 346
 economic effects from, 346–7
 political effects from, 346–7
 diversification of, 362–4
 English court system as, 357–62
 Business and Property courts, 357–8
 Financial List, 358–62
 Test Case scheme and, 362
- fragmentation of, since Global Financial Crisis, 338–47
 under French law, 348
 International Islamic Financial Market, 347
 internationalisation of, 362–4
 market-minded perspective, 337
 mediation in, 337
 over-the-counter derivatives market reform
 impact upon, 338–9
 clearing, 338–9
- Financial Crisis Inquiry Report, U.S., 93
- Financial Crisis of 2008
 contractual discretion cases arising from, 246
 over-the-counter derivatives during, 2
 Turner Review into, 19, 41
 U.S. Financial Crisis Inquiry Report on, 93
- Financial Dispute Resolution Scheme (FDRS), 129, 356–7
- Financial Law Panel (FLP), Bank of England, 6–7
- Financial List, 12–13, 358–62
- Financial Markets Law Committee (FMLC), 6
 Brexit and, 341–2
- Financial Ombudsman Service (FOS), 129–31
 Financial Conduct Authority and, 129–30
 Financial Services and Markets Act 2000
 and, 130
 function and purpose of, 130
 limitations of, 131
 scope of, 130–1
- Financial Services and Markets Act (FSMA) 2000, U.K., 29–30, 122–5, 127
 claim for breach of statutory rule, 131–41, 152
 Conduct of Business Sourcebook and, 133
 legal value of, 133
 ‘private person’ definitions in, 133–6, 138–41
- Financial Services Authority (FSA), 141–2. *See also* Financial Conduct Authority
- Financial Stability Board (FSB), 23, 68, 338
 Financial Stability Oversight Council, 68
 systemically important financial institutions
 and, definition of, 69–71
- floors, in interest rate swaps, 17
- FLP. *See* Financial Law Panel
- FMLC. *See* Financial Markets Law Committee
- foreign law. *See also specific countries; specific laws*
 choice of law and, application of, 321–3
 appellate court decisions, 322
 contractual interpretation principles,
 322–3
 in English courts, 321, 322
 in first instance decisions, 323
 jurisdiction clauses, 321–2
 in multi-contract context, 321–2
- forward contracts, 14
- Forward Freight Agreements (FFAs), 80
- FOS. *See* Financial Ombudsman Service
- France
 financial courts in, 348
 insolvency cases in, jurisdiction over, 298
 ISDA Master Agreement in, Brexit as influence
 on, 60–1
- fraud, mis-selling litigation and, 161–4
 in civil law, 161
 in criminal law, 161
 damage assessment, 163–4
 under Fraud Act 2006, 161
 negligence and, 162
 pleading requirements, 162
- French law governed Master Agreement, 348
- FSB. *See* Financial Stability Board
- futures
 Bank for International Settlements and, 15
 exchange traded derivatives, as
 on Chicago Mercantile Exchange, 14
 on London Metal Exchange, 14
- gambling, 29–30
 general default rule, in contractual discretion, 256
- Germany, public bodies’ capacity claims in, 325
- GFC. *See* Global Financial Crisis
- GKOs. *See* Russian government debt
- Global Financial Crisis (GFC). *See also* Financial Crisis of 2008
 financial courts after, fragmentation of, 338–47
 ISDA Master Agreement after, decision-making
 in, 248–9
 Lehman Brothers, 41
 macroprudential regulation after, as part of
 reform agenda, 67–9
 mis-selling claims regulation influence by,
 120–2

- over-the-counter derivatives and, 41–9
 - causes of crisis, 41–3
- Global Master Repurchase Agreement (GMRA), 78, 261, 284–6
- globalisation. *See also* deglobalisation
 - English court decisions influenced by, 72
- GMRA. *See* Global Master Repurchase Agreement
- good faith
 - consumer protection and, 237
 - express standards, 243
 - fiduciaries, 191–2
 - implied duty of, 241, 254
- good faith doctrine, 262–3
- Greece, sovereign debt crisis in (2010–2012), contractual interpretation and, 96
- Hague Convention, 298
 - Brexit and, 343
- Hazell v Hammersmith and Fulham London Borough Council*, 1, 4–7
 - Court of Appeal, 5
 - derivatives markets and, portrayal of, 5–6
 - Financial Law Panel and, 6–7
 - House of Lords, 5
 - City of London response to, 6–7
 - interest rate swaps, 5–6
 - legacy of, 6–7
 - legal foundations of, 4–5
- Hedley Byrne duty of care, 178–82, 187
- HKIAC. *See* Hong Kong International Arbitration Centre
- Hong Kong
 - Control of Exemption Clauses Ordinance, 230
 - Financial Dispute Resolution Scheme, 129, 356–7
 - mis-selling claims in, defensive drafting of, 225–31
- Hong Kong International Arbitration Centre (HKIAC), 353
- human rights. *See* European Convention on Human Rights
- ICC. *See* International Chamber of Commerce
- IHRP compensation scheme. *See* interest rate hedging products compensation scheme
- IIFM. *See* International Islamic Financial Market Master Agreement
- implied representations, 166–71
 - scope of, 170–1
- inducement, 171–4
 - financial contracts and, 172, 173–4
- information duty of care, 180–1
- insolvency cases, jurisdiction in, 297–311
 - in appellate courts, 300
 - Brussels Regulation and, 298–9
 - commercial approach to, 302
 - conflicting judgments over, 302–7
 - in English courts, as contractual court of record, 299–302, 303–6
 - in France, 298
 - under Hague Convention, 298
 - for ISDA Master Agreement, 301–2, 303
 - under Lugano Convention, 298–9
 - in New York litigation, 306–7
 - Panel of Recognised International Market Experts in Finance (P.R.I.M.E.) and, 308
 - Perpetual Trustee litigation in London and New York, 298, 302–3, 304, 305, 307, 310–11
 - pragmatic approach to, 302
 - private dispute resolution and, 308–9
 - Recast Brussels Regulation and, 298
- insurance industry, as strategic industry, 62–3
- interest rate derivatives, 16–17
 - as new market, 17
 - over-the-counter derivatives, market size and, 16
 - range of, 16–17
 - swaps, 16–17
 - caps, 17
 - collars, 17
 - floors, 17
 - variability of, 17
- interest rate hedging products (IHRP) compensation scheme, 141–52
 - basic redress for, 146
 - consequential loss for, 146
 - Financial Conduct Authority and, 141–2, 145–6
 - FSA and, 142–4
 - legal challenges to, 147–52
 - duty of care in, 150–2, 190–1
 - judicial review of, 147–8, 149–50
 - tests in, 151
 - review features of, 144–6
 - types of customers for, 142–4
- interest rate swaps, 16–17
 - caps, 17
 - choice of law and
 - in English courts, 315, 316
 - mandatory rules for, 315–17
 - collars, 17
 - duty of care and, 185–7
 - floors, 17
 - mis-selling claims for, 142, 143
 - Total Return Swap, 292
 - variability of, 17

- interest rates
 hedging products. *See* interest rate hedging products compensation scheme
 swaps. *See also* interest rate swaps
 in *Hazell v Hammersmith and Fulham London Borough Council*, 5–6
- interest rates derivatives, 16
- International Chamber of Commerce (ICC), 353
- International Islamic Financial Market Master Agreement (IIFM), 347
- International Swaps and Derivatives Association (ISDA)
 activities of, 31, 32–3
 Big Bang Protocol, 32–3
 credit default swaps and, 32–3
 Credit Derivatives, 93–7
 Credit Support Annexes and, 32–3, 39
 history of, 31
 Model Netting Act and, 28
- Investors Compensation Scheme (ICS), 98–105
 committed contextualism in, 100–1
 contextual approach, 98–9
 contractual words in, meaning of, 103–5
 exclusionary rule in, 102
 literal approach, 98–9
 ‘reasonable person’ perspective, 101–3
 Re-statement in, 99–105
- Ireland
 financial courts in, 348
 ISDA Master Agreement in, Brexit as influence on, 60–1
- Irish law governed ISDA Master Agreement, 60–1, 348
- ISDA. *See* International Swaps and Derivatives Association
- ISDA Arbitration Guide, 354
- ISDA Master Agreement (ISDA MA)
 asset-backing in, 35, 38–41
 collateralisation in, 38–9
 contractual architecture and, 40–1
 credit risks, 39–40
 Credit Support Annexes, 39
 Automatic Early Termination, 52
 Big Bang Protocol, 93
 Brussels Convention and, 61–2
 choice of forum. *See* jurisdiction
 choice of law and
 capacity claims and, 319–20
 in English courts, 315
 multicurrency cross-border version, 319–20
 1992 version, 60, 282, 316, 319–20
 2002 version, 60, 282–3
 Close-out Amount, 243
 challenges to, 250, 264–5
 close-out scheme, 79, 243
 challenges to, 246
 contractual structures in, 33, 34
 asset-backing and, 40–1
 creation of, 31–2
 Credit Derivatives, 93–7
 Credit Events and, 93–7
 Credit Support Annexes and, 39, 115
 decision-making in, 241, 242–53
 administrative law and, 244
 after Global Financial Crisis, 248–9
 Lehman Brothers (International) Europe, 250–1
 Market Quotation as payment measure, 244–6
 in 1992 version, 244–9
 in 2002 version, 250–2
 ‘defensive’ drafting in, 219–20
 Determination Committees in, 93–7
 Big Bang Protocol and, 93
 composition of, 94
 contractual interpretation by, 95–7
 credit default swaps and, 93–7
 structural mechanisms of, 94–5
 in English courts, 51–2, 60–2, 112–13. *See also specific cases*
 contractual interpretation of, 111–12
 jurisdiction of, 282–3, 293–4
- Event of Default, 36, 39, 76
- Financial Collateral Arrangements, 38–9
- Financial Collateral Directive and, 38–9
 in France, Brexit as influence on, 60–1
 history of, 31–2
 inducement and, 173–4
 interpretation of, 33, 64–5. *See also* contractual interpretation
 case studies for, 79–97. *See also specific case studies*
 certainty objectives in, 108–12
 clarity objectives in, 108–12
 contextual information in, sources of, 112–16
 ‘correct approach’ to, 107–19
 predictability objectives in, 108–12
 theoretical approach to, 76–9
 in Ireland, Brexit as influence on, 60–1
 jurisdiction clause in, 61, 62, 365–6
 jurisdiction for
 choice of law and, 282–3
 in English Courts, 282–3, 284–91
 for insolvency, 301–2, 303
 legislative framework for, 365–8
 in New York, 282
 in 1992 version, 282, 365–6
 in 2002 version, 294, 365–6

- Loss in, 85–92
 - definition of, 88–91, 243, 247
 - value clean principle and, 88–91
- Lugano Convention and, 61–2
- Market Quotation, 85–92
 - definition of, 87–8
 - as payment measure, 244–6
 - netting in, 35–8
 - close-out, 36, 37
 - legislative support for, 37–8
 - in New York, 60
 - contractual interpretation of, 111–12
 - 1992 version, 60, 61–2, 116–19
 - Early Termination in, 85–7
 - jurisdiction for, 282
 - Loss in, 85–92, 243
 - Market Quotation in, 85–92
 - Section 2(a)(iii), 79–85
 - Section 2(a)(iii)
 - anti-deprivation principle and, 110–11
 - Forward Freight Agreements, 80
 - Lehman Brothers litigation involving, 52–3, 79–80
 - in New York, 83–4
 - in 1992 Master Agreement, 79–85
 - revised version, 85
 - Termination Events and, 36
 - 2002 version, 60, 61–2, 116–19
 - amendments in, 91–2, 117
 - Close-out Amount, 91–2, 250–2
 - commercially reasonable result in, 243, 246, 252
 - jurisdiction under, 294
 - Section 2(a)(iii), 85
- Italy
 - capacity claims in, 322–3
 - choice of law in, mandatory rules under, 318–19
 - local authority swaps litigation in, 17, 285, 291
- Japan, netting laws in, 28
- judicial review, 242, 269–77
 - amenability to, 269–73
 - central counterparties and, 272–3
 - Charter of Fundamental Rights of the European Union, 274
 - under common law tradition, 275–6
 - European Convention on Human Rights and, 274–5
 - European Court of Human Rights and, 275
 - on grounds of procedural fairness, 275–6
 - Human Rights Act 1998 and, 274
 - interest rate hedging products and, 271–2
 - of interest rate hedging products compensation scheme and, 149–50
- limits of, in commercial context, 274–6
 - of London Metal Exchange, 275–6
 - of private entities, 271
 - of public sector entities, 270–1
 - remedies as result of, 276–7
- jurisdiction
 - Brexit, implications of, 342–3
 - Brussels Convention, 61–2
 - Brussels Regulation
 - insolvency cases and, 298–9
 - in international court decisions, 294–5
 - of English courts, 280, 290
 - appellate court decisions on competing clauses, 284, 295–7
 - challenges to, 283–97
 - commercial approach to, 287–8
 - contractual interpretation of, 285–6
 - exclusive jurisdiction provision, 52, 61–2, 365–6
 - for insolvency cases, as contractual court of record, 299–302, 303–6
 - ISDA Master Agreement and, 282–3, 293–4, 365–6. *See also separate entries*
 - legal capacity and, 294–7
 - Lehman Brothers (International) Europe, 293–4
 - London Court of International Arbitration and, 283
 - multiple contracts and, 284–91
 - non-exclusive jurisdiction provision, 61–2, 282, 291–2, 365–6
 - parallel proceedings, by jurisdiction, 291–4
 - under Recast Brussels Regulation, 286, 365–6
 - Total Return Swap and, 292
- for insolvency cases. *See* insolvency cases
- in ISDA Master Agreement
 - choice of law and, 282–3
 - in English Courts, 282–3, 284–91
 - for insolvency, 301–2, 303
 - legislative framework for, 365–8
 - in New York, 282
 - in 1992 version, 282
 - in 2002 version, 294
- Lehman Brothers (International) Europe and, 293–4
 - under Lugano Convention, 293–4
 - insolvency cases, 298–9
- in New York
 - for insolvency cases, 306–7
 - ISDA Master Agreement, 282
 - for parallel proceedings, by jurisdiction, 292–3
 - party autonomy, 281

- jurisdiction (cont.)
 Recast Brussels Regulation
 in English courts, 286
 insolvency cases and, 298
- jurisdiction clauses
 choice of law and, 321–2
 exclusive jurisdiction provision, 61–2, 282,
 365–6
 under foreign laws, 321–2
 in ISDA Master Agreement, 61, 62
 non-exclusive jurisdiction provision, 61–2, 282,
 291–2, 365–6
- law. *See* choice of law; common law
- law reform, regulation through, of over-the-counter
 derivatives, 26–7
- Law Society of England and Wales, 341–2, 345
- LBIE. *See* Lehman Brothers (International)
 Europe Ltd.
- LCIA. *See* London Court of International
 Arbitration
- legal advice
 consumers and, 130
 equality of bargaining power and, 208
- Lehman Brothers, 16
 collapse of, in English courts, 51–2
 during Global Financial Crisis, 41
 law as engineering and, 19
 New York litigation and, 306
 structured finance litigation and, 306
- Lehman Brothers (International) Europe Ltd.,
 52–3, 76–7, 111
 contractual discretion and, 250–1, 261
 jurisdiction provisions of, in English courts,
 293–4
- LME. *See* London Metal Exchange
- Loan Market Association, 31, 78
- local authority swaps litigation
 Italian, 17, 285, 291
 in U.K. *See* *Hazell v Hammersmith and Fulham
 London Borough Council*
- London Court of International Arbitration
 (LCIA), 353
- London Metal Exchange (LME)
 futures and, 14
 judicial review of decision-making, 275–6
- Loss, in ISDA Master Agreement, 85–92
 definition of, 88–91, 243, 247
 value clean principle and, 88–91
- Lugano Convention, 293–4
 Brexit and, 342–3
 insolvency cases and, 298–9
- Lugano Convention, ISDA Master Agreement
 and, 61–2
- macroprudential regulation, 67–75
 Dodd-Frank Act and, 68
 function and purpose of, 69–71
 market connectedness and, 71
 as post-Global Financial Crisis reform
 agenda, 67–9
- mandatory rules, in choice of law, 315–21
 interest rate swaps and, 315–17
 ISDA Master Agreement and, 319–20
 under Italian law, 318–19
 under Portuguese law, 315–17
- Market Quotation, 85–92
 definition of, 87–8
 as payment measure, 244–6
 valuation of, 245
- Markets in Financial Instruments Directive
 (MiFID) regime, 121–2
 classification regime, 124
 as statutory route to redress, 127
- McCreevy, EU Commissioner C., 42
- mediation, 337
- 'mezzanine' duty of care, 181–2
- microprudential regulation, 70
- MiFID. *See* Markets in Financial Instruments
 Directive regime
- misrepresentation, in private mis-selling litigation,
 160–74
 in appellate courts, 174
 fraud, 161–4
 in civil law, 161
 in criminal law, 161
 damage assessment, 163–4
 under Fraud Act, 2006, 161
 negligence and, 162
 pleading requirements, 162
- inducement, 171–4
 financial contracts and, 173–4
- inducement and, 173–4
- negligence, 165–6
 fraud and, 162
- representations and
 definition of, 166–7
 express, 166–71
 implied, 166–71
 scope of, 170–1
- scope of, 160–1
- statutory, 205–6, 210
- mis-selling claims
 basis of, 120
 capacity and, 334
 Conduct of Business Sourcebook and, 123–4,
 125–6
 'best interests' rule, 125–6
 execution factors, 126

- information access and presentation, 126
- ‘personal recommendation’ rule, 126
- defensive drafting and, 202–3, 217–39
 - under common law, 225
 - consumer protection in, 236–9
 - Consumer Rights Act 2015 and, 236–7
 - contractual estoppel doctrine and, 224, 226
 - contractual interpretation and, 218
 - disclaimer effects of, 218–20
 - in everyday settings, 224–5
 - in Hong Kong, 225–31
 - non-reliance clauses, 231–6
 - overview of, 239–40
 - in Singapore, 225–31
 - standardised, 218–20
 - swaps contracts, 220–3
 - Unfair Contract Terms Act 1977 and, 231–6
 - unsuccessful outcomes from, 200
- financial instruments and, definition of, 121
- in Hong Kong, defensive drafting and, 225–31
- interest rate hedging products compensation scheme and. *See* interest rate hedging products compensation scheme
- for interest rate swaps, 142, 143
- Markets in Financial Instruments Directive and, 121–2
- PPI mis-selling and, 130
- in private law. *See* private law
- regulatory context for, 120–6. *See also* Conduct of Business Sourcebook; Financial Services and Markets Act
 - Global Financial Crisis as influence on, 120–2
- in Singapore, defensive drafting effectiveness in, 225–31
- statutory routes to redress, 127–41
 - broadening of protections for, 138–41
 - Financial Ombudsman Service, 129–31
 - internal complaints procedures, 128–9
 - Markets in Financial Instruments Directive and, 127
 - ‘New Duty’ consultation, 196
- Model Netting Act, ISDA, 28
- multiple contracts, approach to jurisdiction in English courts, 284–91
- negligence, 165–6
 - duty of care and, 190
 - fraud and, 162
- netting
 - close-out, 26
 - in ISDA Master Agreement, 36, 37
 - in ISDA Master Agreement, 35–8
 - close-out, 36, 37
 - legislative support for, 37–8
 - netting laws, 28
 - New York (state)
 - contractual estoppel in, 213–14
 - ISDA Master Agreement in, 60
 - contractual interpretation of, 111–12
 - jurisdiction for insolvency cases, 306–7
 - ISDA Master Agreement and, 282
 - regulation of over the counter derivatives in, 27
 - Southern District of New York, US Bankruptcy Court parallel proceedings in, with London, 292–3
 - New York Convention of 1958, 349–50
 - non-centrally cleared over the counter derivatives, 48–9. *See also* bilateral derivatives
 - non-court dispute resolution mechanisms, 352. *See also* arbitration; mediation
 - non-dealers, for over-the-counter derivatives, 24–5
 - non-financial customers, 24–5
 - other financial institutions, 24
 - non-financial counterparties, 16–17, 45–6
 - European Market Infrastructure Regulation and, 273
 - in swaps litigation, 220–1
 - non-reliance clauses
 - contractual estoppel and, 236
 - contractual interpretation of, 234
 - mis-selling claims and, defensive drafting of, 231–6
 - statutory regulation of, 233, 235–6
 - Northern Rock, shareholder dispute, 242
 - Norway, capacity claims in, 325–7, 328
 - novel duties of care, 176–8
- over-the-counter (OTC) derivatives. *See also specific topics*
 - for agricultural goods, 14
 - AIG Financial Products and, 42–3
 - Bank for International Settlements and, 17–18
 - futures data collected by, 15
 - OTC data collected by, 18–19
 - bilateral derivatives and, 22
 - central counterparties and, 2, 46–7
 - clearing business, 22
 - in club markets, 15
 - collateralised debt obligations and, 30
 - concentration of markets for, 21–5
 - credit default swaps, 18–20, 23
 - Credit Events, 19–20
 - in ‘dark markets,’ 15
 - data collection for, 17–18
 - by Bank for International Settlements, 18–19
 - dealers in, 23–4
 - definitions of, 14–17
 - diversification of markets for, 1–2, 21–5

- over-the-counter (OTC) derivatives (cont.)
 under English law, 3
 in Europe, 3
 exchange-traded contracts and, 15
 exchange-traded derivatives compared to, 15–16
 during Financial Crisis of 2008, 2
 Financial Stability Board and, 23
 forward contracts, 14
 futures and
 Bank for International Settlements and, 15
 on Chicago Mercantile Exchange, 14
 on London Metal Exchange, 14
 G20 reform of, 43
 gambling and, 5, 29
 Global Financial Crisis and, 41–9
 causes of crisis, 41–3
 gross notional outstanding value, 1
 interest rate derivatives and, 16
 ISDA Master Agreement and, 2
 market size, 18–21
 gross credit exposure data, 20
 gross value, 20
 interest rates derivatives and, 16
 notational amount, 18, 20
 maturity of, 15
 mis-selling claims and. *See* mis-selling claims
 non-centrally cleared, 48–9
 non-dealers, 24–5
 non-financial customers, 24–5
 other financial institutions, 24
 pension funds and, 15
 pension scheme arrangements (PSAs), 25
 public enforcement mechanisms for, 15
 regulation of. *See* regulation
 self-regulatory qualities of, 3
 standard form contracts and, 2, 30–5
 transparency and, 15
 uses of, 14–17
 end-users, 15
 for risk management, 25
- Panel of Recognised International Market Experts
 in Finance (P.R.I.M.E.), 308
- party autonomy, in context of choice of forum, 281
- Payment protection insurance (PPI). *See* PPI mis-selling
- pension funds, over the counter derivatives and, 15
- pension scheme arrangements (PSAs), 25
- Perpetual Trustee litigation, 298, 302–3, 304, 305, 307, 310–11
- ‘personal recommendation’ rule, in Conduct of Business Sourcebook, 126
- Portugal, public body capacity claims involving, 328–9
- Portuguese transport companies, choice of law and, 315–17
- PPI mis-selling, 130
- P.R.I.M.E. *See* Panel of Recognised International Market Experts in Finance
- P.R.I.M.E. Finance, 353, 354–5
- private dispute resolution mechanisms
 financial courts and, 337
 for insolvency cases, 308–9
- private law, mis-selling claims in
 concurrent claims, 156–8
 case management with, 156
 duty of care and, breach of, 156–7
 lack of authority with, 156
- contracts, 158–60
 duty of care in, breach of, 159–60
 ISDA Master Agreement and, 159, 160
 limitation of claims with, 157
 privity of, 160
- definition of, 155–6
- duty of care
 concurrent claims and, breach of, 156–7
 contracts and, breach of, 159–60
 misrepresentation. *See* misrepresentation
 theoretical approach to, 154–5
- ‘private person,’ statutory definitions of, 133–6, 138–41
- procedural fairness, 275–6
- property rights, 35. *See also* asset-backing; financial collateral
- proprietary relief, fiduciary duties and, 191
- protections. *See* consumer protection
- PSAs. *See* pension scheme arrangements
- quantum, in duty of care, 188–91
- rationality controls, contractual discretion and, 264–5, 267–8
- ‘reasonable person’ perspective, in ICS Restatement, 101–3
- reasonableness in context of contractual discretion, 248
- reasonableness test, in Unfair Contract Terms Act 1977, 233
 defensive drafting, 206, 207–11
- Recast Brussels Regulation
 Brexit and, 342–3
 capacity claims under, 335
 in English courts, 286
 insolvency cases and, 298
- recoverability of losses in negligence, 189
- regulation, regulatory mechanisms and
 of non-reliance clauses, 233
 of over-the-counter derivatives, 25–41, 43–9

- Basel Committee on Banking Supervision, 48
 central counterparties and, 45
 clearing and, 46
 close-out netting, 26
 under Commodity Futures Modernization Act, 29–30
 financial market infrastructure and, 45
 G20 strategy for, 43–6
 under Gramm-Leach-Bliley Act, 26–7
 by International Swaps and Derivatives Association, 28–9. *See also* ISDA Master Agreement
 through law reform, 26–7
 under Model Netting Act, 28
 through netting laws, 28
 in New York, 27
 in post-2008 crisis legislation, 43–4
 in public sector, 25–30
 Regulatory Technical Standards, role of, 48–9
 risk mitigation and, 48–9
 through self-regulation, by contract, 30–3
 by soft law organisations, 26
 trade reporting on, 44–5
 of use of financial collateral, 29
- Regulatory Technical Standards (RTS), for over-the-counter derivatives, 48–9
- remedies, from judicial review, 276–7
- representations, in private mis-selling litigation
 definition of, 166–7
 express, 166–71
 implied, 166–71
 scope of, 170–1
- rescission, 195
- restitution, law of, 335–6
- Rome Convention of 1980
 capacity claims under, 324–5
 choice of law and, 314–15
- Rome I Regulation, 314–15
- RTS. *See* Regulatory Technical Standards (RTS), for over the counter derivatives
- Russian financial crisis of 1998, 51
- Russian government debt (GKOs), in mis-selling litigation, 172
- Section 2(a)(iii), of ISDA Master Agreement. *See* ISDA Master Agreement
- service of documents abroad, impact of Brexit, 344
- shipping industry, as strategic industry, 62–3
- shipping law, importance of, 64–6, 281
- SIAC. *See* Singapore International Arbitration Centre
- SIFIs. *See* systemically important financial institutions
- Singapore
 appellate courts in, 229–30
 basis clauses in, 226–7
 contractual estoppel in, 226–7
 mis-selling claims in, defensive drafting of, 225–31
- Singapore International Arbitration Centre (SIAC), 353
- soft law organisations, 26
- standard form contracts
 contractual interpretation of, 105–7
 Master Agreement and, 16
 over the counter derivatives and, 2
 use in syndicated loan market, 31
- standardised defensive drafting, 218–20
- standards, for contractual discretion, 262–6
 rationality controls, 264–5, 267–8
- statutory cause of action, 122, 134, 135, 221
 exclusion from, 136
- strategic industries, in English courts, 62–7
 choice of law in, 63
 construction industry, 62–3
 definitions of, 63
 insurance industry, 62–3
Scaptrade decision, 64–6
 shipping industry, 62–3
- swaps contracts. *See also* over the counter derivatives
 defensive drafting in, 220–3
 mis-selling claims and, 220–3
- swaps litigation. *See also* *Hazell v Hammersmith and Fulham London Borough Council*
 non-financial counterparties in, 220–1
- Swiss Chambers' Arbitration Institute, 353
- syndicated loan markets, standardisation of documentation in, 31
- systemic risk, 69
- systemically important financial institutions (SIFIs), 69–71
- TARP. *See* Troubled Asset Relief Program
- Termination Events, ISDA Master Agreement and, 36
- Test Case scheme, Financial List, 362
- Total Return Swap, 292
- trade reporting, as over the counter derivatives regulation, 44–5
- Troubled Asset Relief Program (TARP), 42–3
- ultra vires*
 current relevant English law, 323–4
 defensive drafting in context of, 213

- ultra vires* (cont.)
 - foreign capacity claims and, 324
 - UK local authorities and. *See Hazell v Hammersmith and Fulham London Borough Council*
- Unfair Contract Terms Act 1977 (UCTA), 135
 - contractual discretion regulation and, 255
 - defensive drafting and, 204–11
 - controls in, 205–7
 - exclusion clauses and, 205–11
 - mis-selling claims and, 231–6
 - non-financial parties in, 209–10
 - non-reliance clauses and, 208
 - reasonableness requirement in, 206, 207–11
 - exclusion clauses and, 205–11
 - Misrepresentation Act 1967 and, 205–6, 210
 - non-reliance clauses, 231–6
 - reasonableness test in, 233
 - defensive drafting and, 206, 207–11
 - unilateral contractual discretion, 259–60
- valuation
 - of collateral, 9, 268
 - implied terms as a limitation upon, 254
 - under Market Quotation definition, 245
 - ‘rationality’ assessment of, 266
 - Termination Events and, 90–1
 - value clean principle and, 90, 118
- value
 - gross notional outstanding value, of over-the-counter derivatives markets, 1
 - value clean principle, 88–91
 - valuation and, 90, 118
- Wednesbury standard, 244