

SYNTHETIC LIBOR AND UK CONTRACTUAL CONTINUITY: CRITICAL BENCHMARKS (REFERENCES AND ADMINISTRATORS' LIABILITY) BILL

Most non-USD LIBOR tenors and currencies will cease altogether on 31 December 2021. A few Sterling and Yen tenors are likely to continue in a modified form ("synthetic LIBOR") for a limited period, pursuant to powers given to the UK FCA. Such synthetic LIBOR would replace LIBOR, with the intention that it would be available for use in a limited range of "tough legacy" contracts. Those eligible contracts are yet to be specified by the UK FCA.

Legislation giving the UK FCA powers to declare a critical benchmark as unrepresentative and to demand modification of methodologies - as well as to determine which contracts or arrangements might use the modified rate - are already in place. This was done via amendments to the UK Benchmarks Regulation made by the UK Financial Services Act 2021. A missing element was UK legislation to address contract continuity, where parties to an eligible contract use synthetic LIBOR, rather than the LIBOR rate specified in the contract. This is being addressed in a new Bill introduced into the House of Lords on 8 September 2021: the Critical Benchmarks (References and Administrators' Liability) Bill.

In essence, the Bill provides that references to LIBOR in relevant English law contracts or "arrangements" will be interpreted as references to synthetic LIBOR. This will be the case even where the contract pre-dates this continuity legislation as well as the FCA's designation of the benchmark and subsequent modification to create synthetic LIBOR. Whilst the Bill will have broader application and will not be limited to LIBOR benchmarks, LIBOR is receiving most focus at the moment, given the 31 December deadline.

Time is short and the legislation is likely to be expedited, but a second reading debate in the House of Lords has yet to be scheduled. We will be monitoring the evolution of the legislation closely and are happy to answer your queries on the legislation. In the meantime, here are a few areas for you to consider:

- As with the UK FCA's additional powers, the new contract continuity provisions are due to be implemented by amending the UK Benchmarks Regulation. The Bill's provisions are, however, intended to apply to any contract or arrangement made under the laws of England and Wales, Scotland or Northern Ireland (albeit subject to the UK FCA's determination on permitted use) and will not be limited to the narrower "use" of a benchmark in the UK Benchmarks Regulation. That means that the

contract continuity provisions may apply to non-supervised entities and products outside the scope of the UK Benchmarks Regulation, as well as to supervised entities.

- The Bill attempts to catch all types of references in contracts or arrangements to FCA designated benchmarks in sweeping terms, but contracts will, nonetheless, need to be reviewed to assess whether or not they are impacted.
- The Bill makes clear that designation and modification will not constitute "cessation" of a benchmark and will therefore not activate "cessation" fallback triggers in contracts. It is worth noting, however, that the Bill carves out contracts or arrangements which have specifically contemplated FCA designation. Accordingly, the fallbacks within products with, for example, a "no longer representative" trigger should operate as intended by the parties. This will, though, entail careful consideration of contracts and fallbacks – and any mismatch between products.
- A key discussion area earlier this year, in the context of HMT's February 2021 consultation on "Supporting the wind-down of critical benchmarks", was whether a specific "safe harbour" was needed to protect parties who switch to synthetic LIBOR. There is no general safe harbour in this Bill. It does, however, provide protections for the administrator of the relevant benchmark (only), granting immunity from claims for damages when acting pursuant to the UK FCA's direction to calculate LIBOR using a revised methodology by inserting a new Article 23FC into the UK Benchmarks Regulation. Further, the Bill provides that designation and modification of a benchmark will not, themselves, give cause to argue either breach of contract or a material change, or frustration. It also provides that Article 23FA neither extinguishes causes of action pre-existing before the FCA designation nor creates a new cause of action which did not previously exist.

CONTACTS

Andrew Bryan
Knowledge Director
T +44 207006 2829
E andrew.bryan@cliffordchance.com

Mark Campbell
Consultant
T +44 207006 2015
E mark.campbell@cliffordchance.com

Marisa Chan
Knowledge Director
T +44 207006 4135
E marisa.chan@cliffordchance.com

Charles Cochrane
Partner
T +44 207006 2196
E charles.cochrane@cliffordchance.com

Caroline Dawson
Partner
T +44 207006 4355
E caroline.dawson@cliffordchance.com

Paul Deakins
Partner
T +44 207006 2099
E paul.deakins@cliffordchance.com

Anne Drakeford
Partner
T +44 207006 8568
E anne.drakeford@cliffordchance.com

Jeremy Elliott
Knowledge Director
T +44 207006 3442
E jeremy.elliott@cliffordchance.com

Kate Gibbons
Partner
T +44 207006 2544
E kate.gibbons@cliffordchance.com

Simon Gleeson
Partner
T +44 207006 4979
E simon.gleeson@cliffordchance.com

Katie Hoyle
Knowledge Director
T +44 207006 4258
E katie.hoyle@cliffordchance.com

Bruce Kahl
Partner
T +44 207006 2419
E bruce.kahl@cliffordchance.com

Louise Keary
Partner
T +44 207006 1249
E louise.keary@cliffordchance.com

Paul Landless
Partner
T +65 6410 2235
E paul.landless@cliffordchance.com

Joanna Lilley
Knowledge Director
T +44 207006 4488
E joanna.lilley@cliffordchance.com

Julia Machin
Knowledge Director
T +44 207006 2370
E julia.machin@cliffordchance.com

Stuart Mason
Senior Associate
T +44 207006 4291
E stuart.mason@cliffordchance.com

Kate Scott
Partner
T +44 207006 4442
E kate.scott@cliffordchance.com

Jeremy Walter
Partner
T +44 207006 8892
E jeremy.walter@cliffordchance.com

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www.cliffordchance.com

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London, E14 5JJ

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