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# LIBOR TRANSITION: LITIGATION RISKS FOR BANKS



A practice note considering the risks for banks inherent in transitioning contracts from the London Interbank Offered Rate (LIBOR) to risk-free reference rates (RFRs) such as the Sterling Overnight Index Average (SONIA) and the Secured Overnight Financing Rate (SOFR), the extent to which those risks may result in litigation and the steps banks can take to mitigate that litigation risk.

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## SCOPE OF THIS NOTE

On 5 March 2021, the ICE Benchmark Administration Limited (IBA) and the UK Financial Conduct Authority (FCA) confirmed that the publication of EUR, CHF, JPY and GBP London Interbank Offered Rate (LIBOR) for all tenors, and USD LIBOR for one-week and two-month tenors, will cease on 31 December 2021. For other USD LIBOR settings, the relevant date of cessation is 30 June 2023. For more information, see *Practice notes, Interest rate benchmark reform: working groups* and *Interest rate benchmark reform: key dates*.

As LIBOR remains the reference interest rate for millions of contracts ranging from complex derivatives to bilateral and syndicated business loans, many of which will mature after 2021, market participants must ensure that all legacy contracts include provision for transitioning to risk-free rates (RFRs). This note considers the risks for banks inherent in the process of remediating legacy contracts, the particular litigation risks which may arise and the steps which banks can take to mitigate that litigation risk. For more information on proposed solutions to tough legacy issues in the UK, the EU and the US, see *Practice note, Interest rate benchmark reform: tough legacy issues.*

## WHY LITIGATION RISK IS INHERENT IN TRANSITION TO RISK-FREE RATES (RFRS)

Litigation risk is inherent in the process of transitioning from LIBOR to RFRs as:

- There remains uncertainty as to which RFR should be adopted.
- The proposed RFRs are different to LIBOR in critical respects.
- It is presently unclear whether transition LIBORs will apply and, if so, for what period and in respect of which legacy contracts.
- Reliance on existing fallback clauses may be misplaced.
- Parties may not agree on new or replacement fallback wording.
- There may be a mismatch between loan facilities and related hedging contracts.
- Borrowers may be disinclined to agree amended terms, leaving unworkable fallback wording in place.
- Tough legacy contracts may not be able to convert to RFRs without legislative intervention (which the UK has not yet enacted).

The choice of replacement rate may involve a negotiation. Borrowers will be trying to cope with the challenge of an interest rate that does not provide them with certainty about the likely cost of a loan over a fixed period. They may also be concerned that, because they have more than one type of finance instrument, they may end up with multiple replacement rates which may complicate their hedging arrangements. For more information, see *Borrower perspective*.

Lenders will try to replicate the commercial position that they were in when entering into the financing arrangement (the replacement rates may well lead to different outcomes, see *Distinction between RFRs and LIBOR*). They may also be concerned about the practicalities (and burden) of incorporating the new processes needed to calculate the replacement interest rates when administering the loan or other financial product Most banks have a very large number of loans and other financial products to transition to a replacement rate. They will therefore be involved in a large repapering exercise in which they must assess the loans, decide on a replacement rate and decide if borrower consent is needed. If it is, they need to seek consent. and if not, they must notify borrowers that they have chosen a particular replacement rate. For more information, see by way of example *Sector note, LIBOR reform: project managing a repapering exercise*.

## ALTERNATIVE RFRS

A number of jurisdictions including the UK, the US, Canada, the EU, Japan and Switzerland have offered proposed alternative RFRs to replace the relevant IBORs. For more information on those proposals and the characteristics of the alternative rates, see *Practice note, Interest rate benchmark reform: working groups: Overview of working groups and selected RFRs*.

While parties may therefore agree in principle that a RFR should replace LIBOR, they may not be able to agree on the appropriate rate, particularly in multi-currency agreements, or where the conversion of currencies is possible.

## DISTINCTION BETWEEN RFRS AND LIBOR

LIBOR is produced for five currencies with seven maturities each London business day, based on an average of rates provided by a panel of participating banks (for further information on this process, see *Practice note, Interest rate benchmark reform: reform of existing rates: What is LIBOR?*).

SONIA (the proposed alternative to sterling LIBOR) and SOFR (the proposed alternative for US Dollar LIBOR) are very different to LIBOR in these respects:

- Whereas LIBOR is quoted in multiple currencies, SONIA and SOFR are only available in sterling and USD respectively.
- Whereas LIBOR is available in multiple maturities, SONIA and SOFR are overnight rates.

- Whereas LIBOR is forward-looking (agreed at the start of an interest period), SONIA and SOFR are backward-looking (cannot be determined until the end of an agreed interest period).

This means the RFR will not match the LIBOR rate that it replaces and will be calculated based on different data and different methodologies. This may result in changes to the mark-to-market value of each affected transaction and could potentially impact related collateral requirements. A borrower who consents to a replacement RFR, but does not appreciate this at the outset, may well feel aggrieved down the line.

Critically, as the RFRs are backward-looking, borrowers will no longer have upfront certainty about the amount of their interest payments. The solution that market participants have developed to mitigate the effect of this is to:

- Aggregate SONIA rates on a compounded basis over an interest period to produce a term interest rate. This means that the interest rate on a SONIA loan will essentially reset on a daily basis, for example, a three-month interest period would comprise three months' worth of daily rates.
- Use a "lag period" and "observation shift" to reference the SONIA rate because the actual interest rate using compounded SONIA and the related interest payment amount would only be known at the end of the interest period.

This means that:

- The period over which the daily SONIA rate is compounded lags the interest period.
- The observation shift results in interest being calculated from the start of the lag period to the end of the lag period.

However, this solution still does not enable rates to be fixed at the start of an interest period. That will only be possible when a forward-looking SONIA term rate is widely adopted as the replacement rate.

## POSSIBILITY OF TRANSITION LIBOR RATE

While some market participants are hopeful that LIBOR will continue to be published for certain sterling tenors for a period after 31 December 2021 using a synthetic method of determining those rates, the scope and application of any transition LIBOR rate is currently uncertain. For more information, see *Practice note, Interest rate benchmark reform: tough legacy issues*.

If LIBOR transition rates are used, that use is likely to be strictly confined. Counterparties may well find that a contract one (or both) believed would be governed by a transition LIBOR rate cannot be characterised as a genuine tough legacy contract. This means that there could be a dispute between the parties about whether a contract should be characterised as a tough legacy contract. Alternately any contract that the parties think might be a tough legacy contract, but which is not governed by a transition LIBOR rate, must by definition be a contract they think has no realistic ability to be renegotiated or amended to transition to an alternative benchmark and they may turn to the courts to decide an alternative RFR for them.

## EXISTING FALLBACK CLAUSES

Fallback language refers to the contractual provisions that set out the process through which a replacement rate can be identified if LIBOR is not available. Although many LIBOR-referenced contracts contain fallback provisions, these provisions were intended to operate where LIBOR is not available for a short period; they are not designed to deal with the permanent cessation of LIBOR.

Fallback language also often lacks clarity in selecting replacement rates and can result in economically undesirable outcomes. The fallback language varies between derivatives and loan facilities and, even further, between different facilities. For example:

- The vast majority of the world's derivatives transactions are documented under standardised International Swaps and Derivatives Association (ISDA) Master Agreements and definitions published by ISDA, including the 2006 Definitions. The 2006 Definitions include certain fallback provisions which call for the calculation agent (usually one of the parties to the transaction) to determine the fallback rate by polling banks in the London market and then, failing that, polling banks in the New York market, for interbank lending rates.

Banks may now refuse to provide requested rates. Further, the volume of USD LIBOR derivatives would make this approach impractical to carry out. This will leave no methodology to calculate the floating rate or to determine the market value of the derivatives concerned.

- LIBOR loans under English law typically have fallback language referring to "cost of funds". Lending documents typically do not provide guidance on how the cost of funds should be calculated. Historically, lenders funded their LIBOR lending activity through the London interbank loan market. However, the volumes of loans funded through the London interbank market has decreased and the cost of funds fallback could be interpreted more broadly as either:
  - the average cost to the lender in question of funding all its assets;
  - the cost to the lender of carrying an asset on its balance sheet; or
  - the hypothetical cost to the lender of borrowing the loan.
- Fallback provisions in legacy bonds typically rely on the application of the last available LIBOR fix for the remaining life of the bond. This, in effect, turns floating rate instruments into fixed-rate instruments. Some other legacy bonds involve the exercise of discretion which may not be straightforward.

Relying on legacy provisions, which were drafted on the basis that LIBOR would only ever be unavailable for a short period, is therefore very risky. These fallback clauses are not drafted to provide the lender with the right to permanently alter the commercial terms of the agreement.

Lenders risk being in breach of contract if they rely on these clauses to transfer an agreement over to a different interest rate benchmark for the remaining term of the agreement, on the basis that, on its proper construction the fallback provision; does not enable the lender to do take this action for more than a short period; or does not apply in circumstances where LIBOR has permanently ceased.

## REPLACEMENT FALLBACK WORDING

Replacement fallback wording has been published for the specific purpose of LIBOR transition, but the replacement provisions are not consistent across all contracts:

- The ISDA 2020 IBOR Fallback Protocol published by the International Swaps and Derivatives Association Inc incorporates fallbacks into legacy derivative trades, but only if the counterparties choose to adhere to the Protocol. The fallback rates that will apply are the relevant RFRs compounded over the relevant period, plus a spread (determined by reference to the historical difference between the RFR and the IBOR) as calculated and published by Bloomberg. For instance, in the case of LIBOR, the relevant successor rate is compounded SONIA. For more information, see *Practice note, Understanding the ISDA® IBOR Fallbacks Supplement to the 2006 ISDA Definitions and IBOR Fallbacks Protocol (UK).*
- In relation to syndicated loans, the LMA's "replacement of screen rate clause" provides a mechanism for the parties to the facility agreement to agree a replacement benchmark rate using a lower consent threshold than would otherwise have been the case (a majority of, rather than all, lenders). In simple terms, it provides for the parties to set a date sufficiently ahead of the end of 2021 to agree, in good faith, the use of a replacement benchmark (with these negotiations to be concluded by a specified date ahead of the end of 2021).

The LMA "Replacement Benchmark" means (in broad terms):

- A benchmark rate which is formally designated as the replacement for a given IBOR by that IBOR's administrator or the applicable supervisory authority or other competent body.
- A benchmark rate which, in the opinion of the Majority Lenders (or other agreed consent level) and the parent or borrower, is:
  - the generally accepted appropriate successor to the Screen Rate being replaced; or
  - which, in the opinion of the Majority Lenders (or other agreed consent level) and the parent/borrower, is simply an appropriate successor.

The replacement of screen rate clause therefore assumes that there will be a subsequent negotiation between the parties in relation to the replacement benchmark rate. Consequently, the parties must hold further negotiations over LIBOR transition at a later date and formally document whatever they agree via an amendment to the facility agreement. There is no new fallback mechanism if the parties cannot reach agreement on the replacement benchmark rate and the way it will work. The clause does therefore not compel consent.

Issues may also arise if market participants have different fallback rate calculation mechanisms across different documents on a related transaction.

For example, many term loans are hedged by interest rate swaps and legacy loan documents are likely to have very different fallback provisions from those contained in the ISDA Protocol and Amendments. The loan documents may allow the lender to determine a fallback rate at its discretion or may automatically fall back to an unfavourable rate. Changing the benchmark rate within the main facility agreement is likely to cause a mismatch in payments as compared with under the related hedging documents.

Disputes may arise if the parties fail to reach agreement, for example, where the borrower wants a loan replacement rate which matches the rate in a hedging agreement, but the bank's lending team considers that this is inappropriate in light of its own rate replacement policies.

## BORROWER PERSPECTIVE

Generally, borrowers in the bilateral loan market will be less sophisticated and less attuned to LIBOR transition. The diverse nature of the borrowers concerned and the volume of loans is bound to make individual renegotiations of their loans contracts challenging in practice.

It is also a big change for borrowers to move from a forward-looking rate to a backward-looking one, even with a lag period and observation shift. Borrowers may need to manage their cash more actively towards the end of the lag period to ensure they have sufficient funds to meet their interest payments. Borrowers may therefore be reluctant to move to a backward-looking RFR.

SONIA has also historically been below LIBOR rates. Borrowers who have obligations to pay an agreed fixed rate under derivative contracts in exchange for LIBOR payments may be reluctant to have that replaced with a lower SONIA rate, which would affect the market value of their trades.

Where borrowers refuse to agree a replacement rate (or replacement fallback wording), contracts may become unworkable when LIBOR is no longer available. Borrowers who wish to exit those contracts may claim the contracts have been frustrated or that performance is impossible so that they should be released from their obligations, or that there has been a breach of contract. For more information on the borrower's perspective, see *Article, LIBOR transition: the final countdown*.

## TOUGH LEGACY CONTRACTS

Tough legacy contracts are contracts which cannot be converted to an alternative reference rate or amended to add fallbacks. The reasons why tough legacy contracts will exist differs depending on the types of contract concerned.

### Derivatives

Derivatives are generally easier to transition than bonds and loans. This is primarily because of the ISDA Protocol (see *Replacement fallback wording*). However, there are still a number of derivatives that are part of the tough legacy. For example:

- Situations where a derivative is used to hedge a tough legacy loan or where it forms part of a more complex structure.
- Non-linear derivatives where the effect of adopting the ISDA fallbacks may change the economic substance of the transaction.
- Instances where one or more parties to an uncleared derivative chooses not to adhere to the ISDA Protocol.

### Bonds

In relation to bonds, problems arise where:

- It is not possible to obtain the necessary consent from a large number of bondholders.
- There is insufficient time available to transition the number of outstanding LIBOR bonds.
- There are complex arrangements (such as securitisations) and there is no longer a party able to make the decision or to assume the costs of amendment, including where the originator no longer exists or is insolvent, or where the economic interest in the transaction has been sold to a third party.

### Loans

Particular issues also arise in relation to legacy loans:

- Despite replacement of screen rate wording, which reduces the required lender consent thresholds for amendments, many legacy loans require the consent of all lenders.
- Syndicated and bilateral loans may include a fallback to individual lender cost of funds, which is problematic due to the difficulty of calculating the relevant cost.

For more information, see *Practice note, Interest rate benchmark reform: tough legacy issues*. These issues may lead to *Disputes arising out of existing contractual documentation* or wider *Disputes or litigation risk arising out of the repapering exercise*.

## LEGISLATIVE FIX

### UK

In the UK, the Working Group on Sterling Risk-Free Reference Rates established a Tough Legacy Taskforce (Taskforce) to identify issues around tough legacy contracts. The Taskforce has proposed that the UK government considers legislation to address tough legacy exposures in English law-governed contracts.

The proposed legislation would:

- Prohibit a party from refusing to perform its contractual obligations or declaring a breach of contract as a result of LIBOR discontinuance or the use of the endorsed benchmark replacement.
- Establish that the endorsed benchmark replacement is a commercially reasonable substitute for LIBOR.
- Mitigate litigation risks when the endorsed benchmark replacement is used.

There is, however, no guarantee that a legislative solution in the UK will materialise or that it would cater to all contracts. Parties will also need to wait for the FCA to provide clarity as to which contracts fall within the definition of tough legacy contracts. Further, a one-size-fits-all solution is unlikely where tough legacy contracts may be simply bilateral loans or complex securitisation structures.

### US

In the US, the New York State legislature passed its statutory solution to tough legacy contracts on 6 April 2021 (by amending the New York General Obligations Law). Similarly, the EU enacted a legislative fix in the form of the *Benchmarks Regulation*, which was incorporated into UK law on 31 December 2020.

The New York legislation addresses contracts that:

- Are governed by New York law.
- Have interest rates or dividend rates determined by reference to USD LIBOR.
- Have no fallback rate provisions or have fallback rate provisions that will not work once USD LIBOR is discontinued.

In terms of type of contract, the New York legislation applies broadly to "contracts, securities and instruments", a wide definition extending beyond financial products to general corporate contracts. It is the nature of the fallback which then matters:

- There are mandatory provisions which apply where there is no fallback or where the fallback is itself based on LIBOR. In those cases, the recommended benchmark replacement rate will automatically replace LIBOR, being the appropriate adjusted SOFR plus a spread adjustment that the US regulators will select.
- In cases where the parties have a contractual discretion regarding the fallback, the party who has the option under the contract to select a replacement rate now has the option to select the recommended benchmark replacement rate.

Parties have the right to agree to opt out of the statute and to switch to a reference rate of their own choice at any time.

Importantly, the New York legalisation includes a form of safe harbour from claims, see *Interest rate benchmark reform: tough legacy issues; US: ARRC proposal for New York state legislation.*

## WHAT ARE THE LIKELY DISPUTES?

The likely disputes can be divided into two broad categories, namely:

- Disputes arising out of the existing contractual documentation.
- Disputes arising out of the repapering exercise.

### Disputes arising out of existing contractual documentation

As set out in *Existing fallback clauses*, many of the contracts which provide for payments linked to LIBOR contain a fallback clause setting out how the rate is to be calculated in the event that LIBOR becomes unavailable. However, there are issues with relying on this:

- Those clauses (assuming there is no replacement fallback provision) have most likely been drafted with temporary unavailability of LIBOR in mind. As such, it may be unclear whether, and if so how, those clauses apply in circumstances where LIBOR has ceased to exist permanently.
- Even if the clauses operate successfully in the event of a permanent cessation of LIBOR, they may be cumbersome to apply.
- The fallback arrangement will inevitably benefit one party financially and cause loss to the other.

Therefore, there is likely to be both scope and appetite for arguing about the true interpretation of the fallback provisions.

#### Force majeure clauses

In addition to containing fallback provisions, many of the contracts under discussion are likely to contain *force majeure* clauses.

These clauses set out the consequences of a force majeure event. While practice is not uniform, they frequently provide for the contract to simply terminate from the date of the force majeure event (with losses falling where they lie at that time).

As with fallback provisions:

- These clauses are unlikely to have been drafted with the possibility of the permanent cessation of LIBOR in mind. In fact, these clauses tend to be drafted in intentionally general terms precisely because they are meant to allow for unexpected circumstances that the parties did not contemplate when the contract was entered into.
- The economic impact of these clauses will likely benefit one party more than or instead of the other.

As such, there will likely be both scope and appetite for arguing about the true meaning and effect of the force majeure clause and whether it is the fallback provision or the force majeure clause that applies.

#### Frustration

Even if the contract does not contain a force majeure clause, there may be argument about whether the relevant fallback provision applies or whether the contract in question is frustrated.

Frustration is a common law principle which applies when the subject matter of a contract is destroyed, or has otherwise become unavailable, such that the performance of the contract by one or both of the parties is rendered impossible.

The withdrawal of LIBOR clearly creates a risk of contract frustration. Even if there is a legislative solution pursuant to which the benchmark can be said to have simply evolved or transitioned to something new, the risk of contract frustration would still exist because the evolved benchmark may no longer share the identity of the old benchmark.

However, a contract is not frustrated if the contract in question has expressly or impliedly allocated the risk of something happening as between the parties to the contract.

As such, the meaning and scope of the relevant fallback provision is relevant to a dispute about whether the contract is frustrated. This is because, prima facie, fallback provisions are drafted specifically for situations where LIBOR becomes unavailable. However, as set out above, they are unlikely to have been drafted with the permanent cessation of LIBOR in mind.

Even where there is a legislative fix for certain tough legacy contracts, the parties' economic interests will necessarily diverge. One party will benefit from the legislative fix more than (or instead of) the other(s). Therefore (assuming the language of the relevant legislation allows for disputes, which seems likely), there will be argument about the scope and application of the legislative fix.

**How to mitigate the risk of disputes arising out of existing contractual documentation: repapering**

The potential disputes outlined above arise out of the existing agreed contractual or statutory language or general principles of common law (in the case of frustration). Without express provisions allowing the bank to simply notify its contractual counterparty of a change in the applicable rates (and such a clause is unusual), the parties must seek to agree a replacement rate, an entirely new contract or (if a replacement rate cannot yet be identified or agreed) a replacement fallback provision. This exercise is commonly called "repapering".

Given the extensive use of LIBOR in existing agreements, repapering exercises are complex, time consuming and costly. Market participants need to review their portfolios to identify the affected transactions and then undertake a process of agreeing amendments or fresh contracts with the relevant contractual counterparties.

Some negotiations will need to involve multiple parties (for example, syndicated loans). Other negotiations may involve parties such as trustees who may be reluctant to agree anything, or at least to agree anything quickly, for fear of being sued themselves if they are later found to have agreed the "wrong" replacement rate or the "wrong" revised fallback provision.

Additionally, given the likely scale of the exercise, the reality is that transactions may be missed and it may not be possible to reach agreement with all counterparties.

However, without a repapering exercise, the risk of litigation is extensive. As such, the repapering exercise is a worthwhile one as it provides market participants with contractual certainty. Even if the litigation risk in relation to a particular contract or pool of contracts is not considered particularly great because a fallback provision applies, the mechanism set out in that fallback provision may be cumbersome to apply in practice over long periods of time. Therefore, a repapering exercise may be considered prudent.

However, there is also litigation risk associated with the repapering exercise itself.

## Disputes or litigation risk arising out of the repapering exercise

The repapering exercise requires a renegotiation. Therefore, the usual risks arising out of contractual negotiations or renegotiations arise including a risk that one of the parties will later argue that there was a misrepresentation which induced it to enter into the contract allowing it to claim damages or avoid the contract.

That risk is heightened in this context given that the parties' economic interests will necessarily diverge and the chosen new solution will benefit one of the parties more than (or instead of) the other. The lender may, for example, suggest a replacement rate and represent:

- That it is cost neutral when it is not.
- That agreeing a replacement rate is necessary when it is arguable that an existing fallback provision would have applied or a legislative fix would have been available and it later transpires that would have been more beneficial to the borrower than the replacement rate agreed.

In addition to claims for misrepresentation there may also be claims for mis-selling arising out of the renegotiation.

Though there is a significant overlap between this risk and the risk of misrepresentation claims, it is relevant to bear the mis-selling risk in mind because mis-selling claims are not limited to misrepresentations. A party may advance the argument that, rather than misrepresenting something, the bank failed to adequately explain the proposed replacement rate and matters relevant to it, such as other options available (for example, a legislative fix).

The risk of mis-selling claims is particularly important for banks to bear in mind because LIBOR is used in a wide range of contracts with relatively unsophisticated, small borrowers' consumers and not just those contracts involving financially sophisticated counterparties.

**How to mitigate the risk of disputes arising out of the repapering exercise**

The steps which the parties (particularly banks, which are likely to be in the stronger negotiating position) can take to minimise risk include the following:

- When considering what replacement rate to suggest, consider what is market practice in the relevant market or for the relevant type of product. For example, the ISDA protocols have arguably created a standard market practice replacement for LIBOR in relation to at least certain types of derivative. If a party is able to show that their chosen replacement rate is the market standard for the product in question, then that is likely to go a long way to showing that the choice of that rate is reasonable. This will make a mis-selling argument harder for the borrower to run.
- Choosing the market practice replacement rate may also make any misrepresentation argument more difficult. The strength of a misrepresentation argument depends on what has in fact been said in the circumstances of a particular case. However, the choice of a market practice replacement rate may, for example, make it harder for a representee to argue that it relied on anything said about the rate as opposed to the fact that the rate was identified as the market standard replacement rate for the financial product in question.
- Treat similar customers and products consistently. This will likely assist in defending a claim that a particular customer has been treated unfairly (for example, for the purposes of a mis-selling claim).
- Insofar as representations are made and information is provided as part of the renegotiation, ensure that the information provided is balanced and that disclosure is made of:
  - the fact that there may be other possible options (such as a legislative fix); and
  - the risk(s) associated with the various options, including the uncertainties inherent in any fallback provision.
- Include appropriate disclaimers in pre-contractual documentation. This should include disclaimers to the effect that:
  - the lender is not advising the borrower about whether to agree the proposed replacement rate;
  - the information provided does not provide a complete or exhaustive list of the various available options; and
  - there is uncertainty and risk associated with the various options including the uncertainties inherent in any fallback.

  These kinds of disclaimers will likely assist in arguing that no advisory duty exists (if one is alleged) and in defending an argument that a misrepresentation has been made or relied on.

- When a new contract is agreed, include appropriate "contractual estoppel" or exclusion clauses (as well as appropriate, and carefully drafted, contractual representations and warranties). Again, the aim is to ensure that no misrepresentations can be said to have arisen or been relied on. In this context, following the Court of Appeal's decision in *First Tower Trustees Ltd v CDS (Superstores International) Ltd [2018] EWCA Civ 1396*, relying on contractual estoppel clauses to avoid the effects of the *Unfair Contract Terms Act 1977* is no longer feasible. Therefore, these clauses are no longer the "complete answer" to a misrepresentation claim.
- Draft the contract as clearly as possible. It may be tempting to agree something vague or even an alternative fallback provision rather than a new rate because:
  - that may be easier to agree; and
  - the parties may not yet know what they wish to agree. New legislative options may be in the pipeline or it is not yet clear what alternative rate the market will choose as the preferred rate for a particular product.

  However, doing so may just replace one problem with another, similar one. Instead of arguing about the meaning and effect of the fallback provision and force majeure clauses in the initial contract, the parties may end up arguing about the meaning and effect of the replacement arrangement agreed. The easiest way to minimise that risk is to simply agree and clearly identify a replacement rate. However, as always, this may not be possible (or sensible) in every case and a balancing act is required.