

ALLEN & OVERY

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Issues of Frustration and Continuity under English Law

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A wide range of financial contracts use EURIBOR

How will the evolution of EURIBOR affect those contracts?

Low risk of frustration and most contracts should continue to reference the evolved rate.

High impact if a contract is successfully challenged.



What is frustration?

When?

Applies when an event that takes place after formation of the contract, that is not the fault of either party, renders the contract "physically or commercially impossible to fulfil" or transforms the obligation to perform in to a "radically different obligation"

Effect

Automatically discharges a contract and excuses the parties from their future obligations under the contract



Not frustrated by mere inconvenience, hardship or material loss

National Carriers Ltd v Panalpina (Northern) Ltd [1981]

Contract is frustrated when an event "so significantly changes the nature (**not merely the expense or onerousness**) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution"

Remote risk of frustration under English law

EURIBOR+ should not be seen as a radically different obligation

- Change in determination methodology, not the underlying economic variable being measured
- EURIBOR+ remains a measure of banks' wholesale funding rate



English courts do not like applying this doctrine:

- Imply terms to prevent frustration
- Alternative method of performance: Fall back mechanisms?



Continuity of contracts

Question on intention: Did parties to a contract intend not to use EURIBOR+?

–Arnold v Britton [2015]

Intention to be objectively evaluated in light of “***what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean***”... And it does so by ***focusing on the meaning of the relevant words, ... in their documentary, factual and commercial context.***

–Court should hold that a reference to EURIBOR is a reference to a readily available benchmark for banks’ cost of funding



Question on contractual interpretation: Does EURIBOR+ fit into current standard form documentation?

Two examples



LMA EURIBOR definition as of November 2015

- **"EURIBOR"** means, in relation to any Loan in euro:
the applicable Screen Rate as of the Specified Time for euro and for a period equal in length to the Interest Period of that Loan;
- **"Screen Rate"** means:
in relation to EURIBOR, the euro interbank offered rate administered by the European Money Markets Institute (or any other person which takes over the administration of that rate) for the relevant period displayed [(before any correction, recalculation or republication by the administrator)] on page EURIBOR01 of the Thomson Reuters screen (or any replacement Thomson Reuters page which displays that rate),
- **"Specified Time"** read with Schedule 12 is 11:00 a.m. (Brussels time)
- **"Market disruption"**
- If Screen Rate is not available, and not possible to calculate Interpolated Screen Rate, then apply Reference Bank Rate.
- Courts may imply a term (Leonard Hoffmann QC, in relation to MLR)

2006 ISDA Definitions

“EUR-EURIBOR-Reuters” means that the rate for a Reset Date will be the rate for deposits in euros for a period of the Designated Maturity which appears on the Reuters Screen EURIBOR01 Page as of 11.00 a.m., Brussels time, on the day that is two TARGET Settlement Days preceding that Reset Date. If such rate does not appear on the Reuters Screen EURIBOR01 Page, the rate for that Reset Date will be determined as if the parties had specified “EUR-EURIBOR-Reference Banks” as the applicable Floating Rate Option.

Questions?



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