

Using the ISDA IBOR Fallbacks Supplement in Finance-Linked Hedging Transactions

While a welcome development for parties to derivatives transactions generally, the launch of ISDA's robust benchmark fallbacks may not be the most appropriate solution for IBOR cessation in finance-linked hedging transactions until the loan market reaches consensus on its approach.

Key Points:

- The IBOR Supplement came into effect on 25 January 2021 and provides robust fallbacks that will apply upon the permanent cessation of a relevant IBOR or a pre-cessation announcement made with respect to LIBOR.
- The IBOR Supplement brings much-needed certainty to the derivatives market during the IBOR cessation and transition process and provides an effective mechanism for ensuring that derivatives transactions can continue without amendment following discontinuation of an IBOR.
- The first IBOR to be discontinued will be GBP LIBOR, which is expected to cease by the end of 2021 and will be replaced with a risk-free rate in the form of SONIA. At present, there is no agreed loan market consensus on SONIA loan market conventions.
- In light of this loan market uncertainty, parties should consider whether applying the IBOR Supplement to finance-linked hedging transactions provides the most appropriate solution.
- ISDA's 2018 Benchmarks Supplement may, therefore, continue to prove useful during the IBOR transition process with respect to finance-linked hedging transactions.

LIBOR discontinuation and implications for finance-linked hedging transactions

Interbank offered rates (IBORs) represent the reference rate at which banks borrow money in the interbank market. In recent years, IBORs have been subject to enhanced scrutiny, and working groups have been established to define and implement alternatives in the form of risk-free rates (RFRs). The transition away from IBORs to RFRs is expected to continue over the next few years. The first IBOR to be permanently discontinued will be the London Interbank Offered Rate (LIBOR). Current proposals have GBP LIBOR ceasing by the end of 2021 (notably, USD LIBOR is not expected to be discontinued until June 2023).

Each of the discontinued LIBORs is likely to be replaced with an RFR, and the expectation is that GBP LIBOR will be replaced with the Sterling Overnight Index Average (SONIA). As such, loan

agreements that currently apply floating rates of interest that are calculated by reference to GBP LIBOR are expected to transition to a SONIA-based alternative benchmark. Any associated interest rate hedging arrangements will need to do the same. Key to this transition, therefore, will be to ensure that any mismatch between the replacement benchmarks used under loans and the related hedging transaction — as well as spreads over those benchmarks (which reflect a move away from IBOR rates with implicit credit risk to overnight RFRs) and any differences in lookback periods and lag/shift methodologies — are kept to a minimum.

Historically, neither the International Swaps and Derivatives Association, Inc. (ISDA) nor the Loan Market Association (LMA) frameworks provided for interest rate fallbacks to be used in the event of a permanent LIBOR cessation. Indeed both ISDA and LMA, together with market participants, only envisaged, and provided for fallbacks to be used during, a short and temporary period of non-publication of LIBOR.

ISDA has taken a proactive approach to tackling the discontinuation of LIBOR and other IBORs in future. On 23 October 2020, ISDA published its IBOR Fallbacks Protocol (IBOR Protocol) and Supplement No. 70 to the 2006 ISDA Definitions (IBOR Supplement), which set out benchmark fallbacks to be applied in the event of the permanent cessation of certain IBORs. Publication of the IBOR Protocol and IBOR Supplement has brought much-needed certainty to the interest rate derivatives market for both existing transactions (where parties have adhered to the IBOR Protocol) and new transactions (given that the IBOR Supplement automatically amends the 2006 ISDA Definitions (2006 Definitions)) entered into on and from 25 January 2021 (IBOR Fallback Effective Date).

The LMA has also taken a proactive approach in facilitating the transition from LIBOR to replacement RFRs, producing a suite of exposure drafts of loan agreements that reference RFRs. This is in addition to the replacement of screen rate provisions produced by the LMA, which give parties the flexibility to amend a loan agreement to include agreed RFR provisions at a later agreed date or upon the occurrence of a later event with requisite lender consent. Whilst the LMA's exposure drafts reflect the SONIA loan market conventions recommended by the Working Group on Sterling Risk-Free Rates (Sterling Working Group), they do not constitute recommended forms, in part due to the absence of established market and operational practice in relation to the recommended SONIA loan market conventions. Currently, there is no agreed loan market consensus on SONIA loan market conventions, and most loan agreements continue to include the LMA's replacement of screen rate provisions in order to tackle LIBOR transition. As a consequence, the potential for a mismatch to arise between the loans (as and when they move to RFRs) and any underlying hedges remains a significant risk for parties to a finance-linked hedging transaction. This risk is driving the current approach to benchmark replacement in such transactions.

Background

ISDA Benchmarks Protocol and Supplement

Prior to publication of the IBOR Protocol and the IBOR Supplement, parties to derivatives transactions regularly relied on the ISDA 2018 Benchmarks Supplement Protocol (Benchmarks Protocol) and/or the ISDA 2018 Benchmarks Supplement (Benchmarks Supplement), which were published by ISDA on 19 September 2018. Adherence to the Benchmarks Protocol by two parties to a transaction allowed them to amend interest rate transactions entered into between them prior to 19 September 2018 to incorporate the Benchmarks Supplement. For transactions entered into after that date, parties have been incorporating the Benchmarks Supplement directly into their ISDA Schedules or trade confirmations. For ease, this *Client Alert* shall refer to the "Benchmarks Supplement" only, although many of the issues covered herein will also apply if parties have adhered to the Benchmarks Protocol.

The Benchmarks Supplement was published in light of the requirement of Article 28(2) of the EU Benchmark Regulation for “supervised entities” (being EU banks, investment firms, insurers, mutual funds and alternative investment funds and their management companies, and consumer credit providers) that use a benchmark to produce and maintain robust written plans setting out actions to be taken in the event that a benchmark materially changes or ceases to be provided. The Benchmarks Supplement applies with respect to trades that incorporate certain ISDA definitional booklets, including the 2006 Definitions, and must be expressly incorporated into an ISDA Schedule entered into between two counterparties if they wish to rely on its terms. The Benchmarks Supplement remains available for use between parties to derivatives transactions.

The Benchmarks Supplement provides parties with a means to amend their derivatives transactions upon the occurrence of certain events with respect to IBORs, but does not provide set fallbacks to operate in place of discontinued IBORs. Instead, it introduces a series of fallbacks (each an Alternative Continuation Fallback) that are intended to ensure that any transactions between parties can continue to be effective upon the occurrence of either (i) the permanent discontinuation of an IBOR (a Cessation Event) referenced in any such transaction, or (ii) the benchmark, or the administrator of a benchmark, ceasing to be approved (an Administrator/Benchmark Event), such that the benchmark referenced in any such transaction cannot be used by the parties or by the calculation agent.

Upon the occurrence of a Cessation Event or an Administrator/Benchmark Event with respect to an IBOR referenced in a transaction that incorporates the Benchmarks Supplement, the parties are required to act in good faith and use commercially reasonable efforts to try and apply the Alternative Continuation Fallbacks during a specified period of time and in any event prior to the cut-off date (Cut-off Date) set out in the Benchmarks Supplement. If more than one of the Alternative Continuation Fallbacks can be used to allow the relevant transaction to continue within that period, then the parties must apply the Alternative Continuation Fallbacks in accordance with the hierarchy set out in the Benchmarks Supplement. If none of the Alternative Continuation Fallbacks can be used prior to the Cut-off Date or the parties do not otherwise agree that application of a particular Alternative Continuation Fallback leads to a workable solution (after having applied them in accordance with the hierarchy), a termination right arises (No-Fault Termination Right).

IBOR Protocol and Supplement

Both the IBOR Protocol and the IBOR Supplement took effect on the IBOR Fallback Effective Date, and the IBOR Supplement now automatically forms part of the 2006 Definitions. Adherence to the IBOR Protocol by two parties to a “Protocol Covered Document” (including trade confirmations, credit support documents, and master agreements, including each of the ISDA Master Agreements) allowed them to amend interest rate trades entered into between them prior to the IBOR Fallback Effective Date by deeming the IBOR Supplement to form part of the 2006 Definitions if the 2006 Definitions had been incorporated into those transactions. For trades entered into on or after the IBOR Fallback Effective Date, which incorporate the 2006 Definitions, the IBOR Supplement will automatically apply unless expressly disappplied. For ease, this *Client Alert* shall refer to the “IBOR Supplement” only, although many of the issues covered herein will also apply if parties have adhered to the IBOR Protocol.

The purpose of the IBOR Supplement is to amend the 2006 Definitions so that they continue to operate for interest rate transactions, both during and following the various IBOR transition periods, by applying set replacement RFRs into IBOR-referencing trades.

The fallbacks contained in the IBOR Supplement apply if an IBOR referenced in the IBOR Supplement is subject to a Cessation Event (defined in the same way as under the Benchmarks Supplement) or, with

respect to LIBOR only, it is determined in a pre-cessation announcement by the UK Financial Conduct Authority that a relevant LIBOR has become non-representative of its underlying market (a Pre-Cessation Event). The new fallbacks contained in the IBOR Protocol and the IBOR Supplement include fallbacks to term- and spread-adjusted versions of RFRs identified as alternatives to the relevant IBORs.

Upon the occurrence of a Cessation Event or a Pre-Cessation Event with respect to a derivatives transaction that (a) references an IBOR and (b) either (i) incorporates the 2006 Definitions or (ii) is a legacy trade and both parties have adhered to the IBOR Protocol, the RFR specified in the IBOR Supplement will automatically apply, and the transaction will continue to exist in accordance with the rest of its terms.

Interaction between the Benchmarks Supplement and the IBOR Supplement

The 2006 Definitions Benchmarks Annex to the Benchmarks Supplement provides that, if the definition of a “Relevant Benchmark” referenced in a derivatives transaction between two parties (including the definition of a benchmark contained in the 2006 Definitions where incorporated) includes a reference to an “index cessation event” (or refers to a similar concept as defined or described therein), then any fallback specified to apply in that definition or description will be a “Priority Fallback” for the purposes of the Benchmarks Supplement. Following the occurrence of a Cessation Event, such Priority Fallbacks will apply first, and the Alternative Continuation Fallbacks will only be applicable if the relevant Priority Fallback fails to “provide a means of determining the index level”.

If the IBOR Supplement applies to a derivatives transaction that also incorporates the Benchmarks Supplement, and a Cessation Event or Pre-Cessation Event occurs under the IBOR Supplement with respect to the relevant IBOR, the hardwired fallback for that IBOR, as set out in the IBOR Supplement, will be treated as a Priority Fallback and will apply in place of the Alternative Continuation Fallbacks under the Benchmarks Supplement. For many derivatives transactions, both the Benchmarks Supplement and the IBOR Supplement are likely to apply, as many market participants have adhered to both the Benchmarks Protocol and the IBOR Protocol.

The use of one or both of the IBOR Supplement and the Benchmarks Supplement (including, if both apply, the interaction between the two) provides much-needed certainty for the derivatives market generally, but the application of the IBOR Supplement to finance-linked hedging transactions raises additional questions in the context of such transactions. If derivatives transactions are being used to hedge underlying floating rate exposures in a loan or other financing agreement, parties must consider whether the hardwired fallbacks contained therein provide the best solution in light of the desire of those parties to hedge interest rate exposure (which, by its nature, will generally aim to minimize any mismatch between the benchmark used in the financing and in its associated hedging transaction). However, to the extent that the IBOR Supplement is not applied, parties must continue to ensure that they have robust fallbacks in place in anticipation of LIBOR cessation.

LIBOR discontinuation and approaches taken in financing documentation

In April 2020, the Sterling Working Group published revised recommendations for LIBOR transition as follows:

- By the end of Q3 2020, lenders should be in a position to offer non-LIBOR linked products to their customers.
- After the end of Q3 2020, lenders, working with their borrowers, should include clear contractual arrangements in all new and refinanced LIBOR referenced loan products to facilitate conversion

ahead of the end of 2021, through pre-agreed conversion terms or an agreed process for renegotiation to SONIA or other alternatives.

- All new issuance of GBP LIBOR referencing loan products that expire after the end of 2021 should cease by the end of Q1 2021.

The LMA's "replacement of screen rate" provisions, most recently updated on 21 October 2020, include an optional non-representativeness pre-cessation trigger is the most common approach taken in the loan market (Mutual Benchmark Replacement). This approach gives loan parties flexibility to amend the terms of the loan agreement from LIBOR to an agreed replacement RFR, with the consent of the requisite majority of lenders. Following on from the Sterling Working Group's April 2020 statement that loan documents should include clear contractual arrangements "*through pre-agreed conversion terms or an agreed process for renegotiation*", the LMA updated this provision on 24 August 2020 to include hardwired dates to trigger renegotiation of the loan agreement by a specified date so that the amendment is effective before 31 December 2021 (i.e., providing an "*agreed process for renegotiation*").

The LMA's exposure drafts from 23 November 2020, which include a "switch mechanism" for loan agreements to automatically switch from LIBOR to agreed RFRs in accordance with the terms of the RFR as set out in the loan agreement as well as their most recent (28 January 2021) exposure draft for day one RFR linked loans — both of which reflect the Sterling Working Group recommendations for SONIA loan market conventions, and apply this across multi-currencies for efficiency and ease of drafting (together, Hardwired Benchmark Replacement) — aim to assist market participants to adhere to the Sterling Working Group's April 2020 recommendation to (1) provide clear contractual provisions in loan agreements through "*pre-agreed conversion terms*", and (2) cease new issuance of GBP LIBOR referencing loan products that expire after the end of 2021 by the end of Q1 2021.

Taking into account these two alternative approaches in light of the application of one or both of the IBOR Supplement and Benchmarks Supplement, the question remains how parties can align the replacement benchmark that should apply under both the financing and any associated hedging transactions, as well as the timing for agreeing and implementing such replacement benchmark, in connection with lending documents that incorporate either of the above approaches.

Use of the Benchmarks Supplement in finance-linked hedging transactions

Since publication of the Benchmarks Supplement, it has become market standard for parties to incorporate the Benchmarks Supplement into interest rate transactions that are entered into for the purpose of hedging underlying floating rate exposures with respect to lending transactions. It has even become standard for lending transaction documents that govern creditor rights (such as LMA-style intercreditor agreements) to expressly permit hedge counterparty creditors the independent right to terminate hedging transactions in reliance on the No-Fault Termination Right contained in the Benchmarks Supplement.

Whilst many market participants had assumed that, following the IBOR Fallback Effective Date, the IBOR Supplement would be relied upon in most types of derivatives transactions, in practice, and until the LMA advocates a conclusive position with respect to LIBOR replacements, the actual approach to be taken in finance-linked hedging transactions will largely be driven by the applicable benchmark replacement process under the relevant financing (i.e., Mutual Benchmark Replacement or Hardwired Benchmark Replacement).

Mutual Benchmark Replacement

If a loan agreement incorporates Mutual Benchmark Replacement provisions, then incorporating the Benchmarks Supplement in the associated hedging agreement can provide a neat solution to aligning the approach to, and timing of, agreeing a replacement benchmark in the related hedging derivatives transaction, whilst also giving both parties comfort that the No-Fault Termination Right will apply in the event that a replacement benchmark cannot be agreed between the parties to the derivatives transaction.

The parties may, however, wish to make amendments to the Benchmarks Supplement when incorporating it into the relevant derivatives transaction (at either the master agreement or confirmation level) in order to ensure that it operates mechanically in the same way as the Mutual Benchmark Replacement provisions of the corresponding loan agreement, thus allowing the borrower to enter into replacement benchmark discussions with all creditors at the same time. If that is the case, then the parties should consider making the following modifications to the terms of the Benchmarks Supplement:

- Aligning the Cut-off Date with the date by which the parties to the loan agreement must agree and implement the replacement loan benchmark or, if earlier, the date on which the parties to the loan reach agreement in respect of such replacement benchmark. This ensures that the Benchmarks Supplement Cut-off Date will not automatically apply and that discussions and negotiations under both documents will continue until the same date.
- Expanding the definition of “Index Cessation Event” to include the commencement of negotiations with respect to the replacement benchmark under the loan agreement. This ensures that discussions and negotiations in respect of benchmark replacement under both documents will also begin at the same time.
- Applying only the Alternative Continuation Fallback set out Section 1.3(a) (*Agreement between the Parties*) of the Benchmarks Supplement, being the requirement for the parties to the relevant derivatives transaction to agree on the actions (if any) to be taken as a result of a Cessation Event or an Administrator/Benchmark Event. This serves to align procedures under both documents and acknowledges that other Alternative Continuation Fallbacks (e.g., use of a benchmark nominated by the calculation agent) are less likely to avoid a mismatch between the loan and the derivatives transaction. If the parties to the derivatives transaction are not able to reach agreement pursuant to Section 1.3(a) by the amended Cut-off Date, then the No-Fault Termination Right will apply.

Hardwired Benchmark Replacement

In respect of loan agreements that incorporate Hardwired Benchmark Replacement provisions, it remains an open question as to whether the Benchmarks Supplement offer the same neat solution.

Similar amendments to those listed above can be made to the Benchmarks Supplement, but with the significant difference that the Cut-off Date will be aligned to the date on which the pre-agreed replacement benchmark becomes effective under the loan agreement. In this scenario, it may not be appropriate for the Benchmarks Supplement and the No-Fault Termination Right contained therein to apply, since the replacement loan benchmark is known on the date the hedging transaction was entered into.

Benchmarks Supplement: Other Considerations

In addition to ensuring that the Benchmarks Supplement, when used in finance-linked hedging transactions, aligns to the timing for agreeing replacement benchmarks under the associated loan, the parties may want to consider the following:

- IBOR Supplement carve-out → if the Benchmarks Supplement is incorporated and amended in the relevant finance-linked hedging master agreement, the parties may want to ensure that the IBOR Supplement is expressly *disapplied* to avoid the hardwired fallbacks contained therein from being treated as Priority Fallbacks under the Benchmarks Supplement. This is of particular concern if, following the IBOR Fallback Effective Date, the 2006 Definitions are incorporated into the terms of a hedging transaction at the level of the confirmation (as is standard) (see below). One way to achieve this would be to amend the finance-linked hedging master agreement (noting that, where such master agreement is an ISDA Master Agreement, this will be notwithstanding the application of Section 1(b) (*Inconsistency*)) or alternatively in the terms of the relevant intercreditor agreement (the terms of which will generally prevail over the terms of the hedging transaction). Disapplying the IBOR Supplement in this way ensures that, if an automatically generated trade confirmation incorporates the 2006 Definitions but does not itself disapply the IBOR Supplement, the Benchmarks Supplement will continue to prevail.
- Temporary reprieve for mandatory hedging requirements → incorporation of the Benchmarks Supplement and a failure by the parties to agree a replacement benchmark by the relevant Cut-off Date leads to application of the No-Fault Termination Right. Prior to terminating, parties should be mindful of any mandatory hedging requirements that may apply and whether termination of any relevant hedging transactions would lead to a breach of those requirements. Given that this is a non-fault-based termination, it may be sensible to grant a temporary reprieve to the borrower for a breach of mandatory hedging requirements as a consequence of the exercise of a No-Fault Termination Right in order to allow the borrower sufficient time to put additional or replacement hedging in place.

Application of the IBOR Supplement to finance-linked hedging transactions

Following the occurrence of the IBOR Fallback Effective Date, discussion has turned to whether the IBOR Supplement provides a more appropriate solution than the Benchmarks Supplement in finance-linked hedging transactions and whether it should supersede the incorporation of the Benchmarks Supplement.

Mutual Benchmark Replacement

In respect of loan agreements that incorporate Mutual Benchmark Replacement provisions, application of the IBOR Supplement to finance-linked hedging transactions could result in a potential mismatch between differing replacement benchmarks ultimately incorporated in the loan and those in the finance-linked hedging transactions. Whilst the relevant hedging fallback will be hardwired and known at the date of entry into the derivatives transactions, the loan benchmark fallback is unknown at the date of entry and will be subject to mutual agreement between the relevant creditors and the borrower.

Unlike the terms of the Benchmarks Supplement, there is no in-built termination right that would allow the parties to the finance-linked hedging transactions to terminate in the event that the fallback RFR set out in the IBOR Supplement results in a mismatch between the loan and the derivatives transactions. In addition, whilst in practice the parties to the loan agreement may take into consideration the replacement RFR contained in the IBOR Supplement, there is often no express requirement for them to reflect such RFR, meaning that a borrower may, through application of the IBOR Supplement and due to no fault of its own, be party to finance-linked hedging transactions that ultimately fail to adequately hedge its exposure under the loan.

One approach being seen in practice is to incorporate a bespoke termination right into the finance-linked hedging transactions (which would also need to be permitted pursuant to the underlying finance documents and which would also be subject to the same mandatory hedging considerations set out in

“*Benchmarks Supplement: Other Considerations*”) allowing a party to a finance-linked hedging transaction to terminate if there is a mismatch between the RFR contained in the IBOR Supplement and the replacement benchmark agreed in the loan. Alternatively, some parties are using a combined approach relying on both the Benchmarks Supplement and the IBOR Supplement. In particular, parties may wish to first use the Alternative Continuation Fallbacks set out in the Benchmarks Supplement (including some form of a termination right), with an ultimate fallback to the relevant RFR set out in the IBOR Supplement.

Hardwired Benchmark Replacement

While the fallbacks set out in the IBOR Supplement create certainty for parties to finance-linked hedging transactions referencing LIBOR and other IBORs with respect to relevant fallbacks, parties will need to consider carefully whether this certainty outweighs the risk of mismatch if the relevant RFR set out in the IBOR Supplement differs from the RFR set out in the Hardwired Benchmark Replacement provisions of a corresponding loan agreement. In particular, parties should consider whether they are able to manage this mismatch using alternative risk management methods or additional hedging.

If the LMA ultimately follows the same or a similar approach to ISDA with respect to its proposed LIBOR replacement RFRs, and the associated lookback periods and lag/shift methodologies that are applied to those RFRs, then undoubtedly the IBOR Supplement will offer a practical solution for parties, allowing trades to be automatically amended and avoiding mismatches between loans corresponding finance-linked hedging transactions. At this time, as the loan market continues to evolve, the proposed SONIA based loan rates recommended by the Sterling Working Group do not match the IBOR Supplement RFRs in such a precise manner. If that continues to be the case and relevant Hardwired Benchmark Replacement provisions do not align to the IBOR Supplement, then the practical implications of a mismatch between a loan and its corresponding finance-linked hedging transactions will need to be considered carefully by parties to finance-linked hedging transactions.

IBOR Supplement: Other Considerations

Whilst the IBOR Supplement will play a vital role in ensuring continuity of interest rate transactions in the derivatives market during the transition period for each IBOR, the following considerations may be of relevance in determining the role the IBOR Supplement is able to play in finance-linked hedging transactions:

- Calculation of early termination amounts following termination due to benchmark mismatch → as mentioned above, with respect to loan agreements that use Mutual Benchmark Replacement provisions, it may be helpful to incorporate a bespoke hedging termination right that is triggered upon a mismatch between the relevant replacement RFR agreed between parties to a loan and the applicable RFR contained in the IBOR Supplement. The method of calculating the early termination amount payable upon the occurrence of such event should, in particular, be carefully considered.
- Implications on cleared back-to-back transactions → parties should consider the approach taken by clearing houses if they have entered into cleared back-to-back transactions as part of their hedging strategy. In particular, consideration should be given as to whether those transactions will be deemed to incorporate the IBOR Supplement, or otherwise have their terms amended in accordance with the IBOR Supplement from the IBOR Fallback Effective Date. Those parties that have hedged their finance-linked interest rate transactions with cleared trades could benefit from ensuring that the relevant provisions of the IBOR Supplement apply to their finance-linked transactions in order to avoid a mismatch.

Conclusion

ISDA is currently working on a new set of “rate options” to facilitate the use of RFRs in finance-linked hedging transactions based on conventions being seen in the loan market, and the LMA has shared its current rate switch agreements with ISDA to assist in this process. These new rate options may help to provide greater certainty for market participants in future. Continued cooperation between ISDA and the LMA will enable a more efficient transition from the existing IBORs to the new RFRs.

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