International Comparative Legal Guides

Derivatives 2021

A practical cross-border insight into derivatives

Second Edition

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Japanese Yen Interest Rate Benchmark Reform – Will the Multiple Paths Under the Multiple Benchmark Rate Regime in Japan Converge?

Nishimura & Asahi

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Toshiyuki Yamamoto

1 Updates on Japan's Movements in LIBOR Cessation

Last year, in *ICLG – Derivatives 2020*, we published the "Japanese Yen Interest Rate Benchmark Reform – Crossroad of the Local Movements in Japan and the Global Movement in the Derivatives Space" chapter regarding the progress of handling London Interbank Offered Rate ("**LIBOR**") cessation in Japan. Since one additional year has passed, there have been dramatic changes in Japanese LIBOR matters as well as global movements affecting the Japanese market.

The most recent version of the transition plan for JPY LIBOR at the time of writing is as of the end of March 2021.[1] For interest rate swaps referencing JPY LIBOR, the transition plan indicates "[a]dopt[ing] new quoting conventions for interest rate swaps based on TONA" and "[c]eas[ing] the initiation of new interest rate swaps referencing LIBOR" in the third quarter of 2021. The transition plan also addresses matters for loans and bonds such as ceasing new loan extensions/new bond issuances referencing LIBOR.

The below provides readers with updates on the market and some legal/regulatory matters, particularly for the derivatives space, in conjunction with Japanese Yen Interest Rate Benchmark Reform (section 2). Section 3 briefly explains the mechanism of the IBOR Fallbacks Supplement and ISDA 2020 IBOR Fallbacks Protocol, and section 4 presents the outlook/our thoughts.

2 Domestic and Global Movements Affecting the Japanese Market

1 Japanese Multiple Benchmark Rates – TONA, TORF and TIBOR

At present, there are several possible benchmark successors for JPY LIBOR in the Japanese interest rate market as follows (**Table 1**):

Table 1: Comparison – Multiple Benchmark Rates in Japan

Benchmark	Administrator	Explanation
TONA (Tokyo Overnight Average Rate)	Bank of Japan (the "**BoJ**")	■ Serves as a risk-free rate ("**RFR**") in Japan. ■ An overnight unsecured interbank interest rate based on actual transactions in the broker market.
TORF (Tokyo Term Risk Free Rate)	QUICK Benchmarks Inc.	■ Officially launched on April 26, 2021. ■ A forward-looking term RFR (i.e., setting in advance). ■ Data sources are market data relating to JPY overnight index swaps ("**OIS**").
JPY TIBOR (Tokyo Interbank Offered Rate)	JBA TIBOR Administration	■ Calculated and published by the administrator from April 1, 2014.[2] In July 2017, a TIBOR reform was implemented. ■ A term unsecured interbank interest rate in the unsecured call market based on reference bank submissions with a waterfall structure prioritising actual transaction data. ■ Setting in advance as per LIBOR.

In November 2020, market comments compiled by the Cross-Industry Committee on Japanese Yen Interest Rate Benchmarks (the "**Committee**"), established in August 2018 and of which the secretariat is the BoJ, revealed a preference for successor benchmarks for loans and bonds in the context of contractual fallback rates. The Committee proposed the following recommendations for waterfall structures of contractual fallback rates (**Table 2**), and a large majority agreed with these recommendations. As per Table 2, the first and second priorities are TORF and compounded TONA (setting in arrears), respectively.[3]

Table 2: Committee's Recommendation for Waterfall Structures of Contractual Fallback Rates

	Loans	Bonds
1st Priority	TORF	TORF
2nd Priority	Compounded TONA (setting in arrears)	Compounded TONA (setting in arrears)

	Loans	Bonds
3rd Priority	The rate that is recognised as appropriate by a lender and notified to a borrower (in proper consideration of recommendations by the relevant supervisory authorities or market practice)	Rate recommended by the authority-related committee
4th Priority	–	International Swaps and Derivatives Association, Inc. ("**ISDA**") fallback rate
5th Priority	–	Rates selected by issuers

For the derivatives space, conversely, the Sub-Group for the Development of Term Reference Rates under the Committee reported in March 2021 that a large majority supported TONA.[4] However, there is one caveat, which is that "[t]he respondents who supported TONA also deemed that using other alternative benchmarks including TORF and TIBOR shall not be precluded, as they expected that there would be demand for those alternative benchmarks depending on the purpose of trade". As per section 3, ISDA's IBOR Fallbacks Supplement uses TONA as a fallback rate for JPY LIBOR and JPY TIBOR.

2 Timeline for Cessation of JPY LIBOR; "Synthetic" JPY LIBOR for One Additional Year

As a global movement, on March 5, 2021, ICE Benchmark Administration Limited (the "**IBA**") and the UK Financial Conduct Authority (the "**UKFCA**") issued publications on future cessation of LIBOR.[5] According to the publications, there will be two paths for the future of JPY LIBOR as follows:

- spot-next, one-week, two- and 12-month JPY LIBOR settings: Permanent cessation after the end of 2021; and
- one-, three- and six-month JPY LIBOR settings: Non-representativeness after the end of 2021, but they are scheduled to continue until the end of 2022, one additional year, on a "synthetic" basis based on the UKFCA's exercise of a proposed new power.

In the backdrop of the separate but closely linked publications by the IBA and the UKFCA, the Japanese Financial Services Agency (the "**JFSA**") and the BoJ made public their joint statement on March 8, 2021.[6] The joint statement includes:

- synthetic JPY LIBOR, even if implemented, should not be used in new contracts and transactions since "[i]t is of utmost importance to steadily reduce the amount of contracts referencing JPY LIBOR to advance orderly transition away from JPY LIBOR"; and
- "synthetic JPY LIBOR should be considered a potential "safety net" and used only for legacy contracts that cannot feasibly be transitioned away from JPY LIBOR after proceeding thoroughly with actions". Further, "[i]t should also be noted that the [UK]FCA's proposal is to limit the publication period of synthetic JPY LIBOR to one year".

3 JFSA's Q&A on the Treatment of Legacy Contracts Under the OTC Derivatives Market Reforms

Japan has been one of the leading countries in implementing central clearing, trade reporting, platform trading and margin requirements under the over-the-counter ("**OTC**") derivatives market reforms after the global financial crisis.[7] In relation to this, on March 16, 2021, the JFSA published a Q&A on the treatment of legacy contracts under the OTC derivatives market reforms in relation to LIBOR cessation.[8]

The JFSA argues in this Q&A that amendments to legacy contracts cannot be generally considered barriers to grandfathering if they are due to technical changes regarding terms of transactions or stylistic changes that are required in day-to-day operations. In this regard, although a case-by-case analysis is required, amendments to reference rates in legacy contracts (including spread adjustments and cash settlements for mark-to-market differences) for purposes of the transition from LIBOR to alternative benchmark rates will not be considered barriers to grandfathering, and associated amendments to matters such as interest payment dates and notional amounts will also not be considered barriers to grandfathering if those amendments are minimally necessary for amending reference rates. This will also apply to amendments to reference rates based on triggering contractual fallback clauses as well as those to add fallback clauses to legacy contracts. However, it is important to note that the amendments above (other than those for adding fallback clauses to legacy contracts) will trigger trade reporting obligations.

4 JFSA's General Interpretation Regarding Japan-specific Laws and Regulations

On March 26, 2021, the JFSA published its general interpretations regarding the prohibition on compensation of loss (*sonshitsu hoten tou no kinshi*) and the prohibition on provision of special benefits (*tokubetsu rieki teikyou kinshi*) under the Financial Instruments and Exchange Act of Japan (the "**FIEA**") and its relevant cabinet office order, as well as the prohibition on banks wrongfully using advantageous positions in transactions (*yuuetsu teki chii no ranyou kinshi*) under the Banking Act of Japan and its regulation for enforcement.[9]

The JFSA's general interpretations assume that: a borrower enters into an interest rate swap for hedging floating rate (i.e., LIBOR) fluctuations of a loan; the interest rate swap has an industry-standard fallback clause (e.g., ISDA's IBOR Fallbacks Supplement) without cash settlement; and the borrower experiences a mark-to-market gain/loss as a result of triggering the fallback clause. In these scenarios, the JFSA provides market participants with "general" clearance/safe harbours for the prohibitions under the FIEA and the Banking Act.

5 Treatment by JSCC of Cleared Interest Rate Swaps

The Japan Securities Clearing Corporation (the "**JSCC**") clears certain plain-vanilla interest rate swap transactions referring to JPY LIBOR that are subject to mandatory clearing requirements under the FIEA. To handle LIBOR cessation, the JSCC plans to convert all interest rate swap cleared contracts whose floating rate option is JPY LIBOR to those referencing TONA (OIS) at a certain time to be specified by the JSCC. The time for conversion, which is to be determined later, will be a specified date sometime before the end of 2021 when cessation of JPY LIBOR publication is scheduled.[10]

3 IBOR Fallbacks Supplement and ISDA 2020 IBOR Fallbacks Protocol

1 Supplement to the 2006 ISDA Definitions and Related Protocol Finally Revealed

In a letter dated July 2016 from the Financial Stability Board (the "**FSB**") to ISDA, the FSB requested that ISDA coordinate

(internationally) to enhance the contractual robustness of derivatives transactions denominated in major currencies (including Japanese Yen) in preparation for IBOR cessation.

The 2006 ISDA Definitions are utilised in confirmation of individual derivatives transactions and provide the basic framework for privately negotiated interest rate and currency derivatives transactions. The definitions of IBORs, among many currencies, are set as defined terms (e.g., USD-LIBOR-BBA and JPY-LIBOR-BBA) in the 2006 ISDA Definitions.

A long time has passed since the FSB's request to ISDA, and on October 23, 2020, ISDA finally published the relevant documents for implementing fallback clauses; namely, the IBOR Fallbacks Supplement[11] (the "**Supplement**") and the ISDA 2020 IBOR Fallbacks Protocol (the "**Protocol**").[12]

- The Supplement provides contractual fallback provisions for IBORs so that they are replaced by RFRs, plus spreads. Market participants can implement contractual fallback provisions in newly executed derivatives transactions by incorporating the Supplement into transaction documents. All *new* derivatives transactions that incorporate the 2006 ISDA Definitions entered into on or after the effective date of the Supplement will include the fallbacks (counterparties will not have to take any additional steps).
- For existing derivatives transactions that refer to the 2006 ISDA Definitions, ISDA prepared the Protocol so that the Supplement will be incorporated into such *existing* derivatives transactions by adhering to the Protocol by both transaction parties.

The effective date of both the Supplement and the Protocol was set as January 25, 2021 by ISDA.

2 Discussion Points in the Supplement and Protocol

(a) Covered Currencies/IBORs/RFRs

The Supplement covers the following currencies/IBORs/RFRs. As you can see, major currencies are covered, and on the Japanese front, both LIBOR and TIBOR are captured. You can also see that TONA (not TORF or TIBOR) is utilised for fallback rates in the derivatives space.

Currency	IBOR	RFR for Fallback Rate
GBP (Sterling)	LIBOR	SONIA
CHF (Swiss Franc)	LIBOR	SARON
USD (US Dollar)	LIBOR	SOFR
EUR (Euro)	LIBOR EURIBOR	€STR
JPY (Japanese Yen)	LIBOR TIBOR/Euroyen TIBOR	TONA
AUD (Australian Dollar)	BBSW	AONIA
CAD (Canadian Dollar)	CDOR	CORRA
HKD (Hong Kong Dollar)	HIBOR	HONIA
SGD (Singapore Dollar)	SOR	Fallback to be based on USD/SGD FX transactions and SOFR
THB (Thai Baht)	THBFIX	Fallback to be based on USD/THB FX transactions and SOFR

(b) Trigger Events for Permanent Discontinuation and Non-representativeness – Index Cessation Event

If a certain trigger event occurs, contractual fallbacks will be enacted. Thus, the definition of "trigger event" serves a key role, and the following events are each defined as an "Index Cessation Event":

(i) a public statement or publication of information by or on behalf of the administrator of the Applicable Rate announcing that it has ceased or will cease to provide the Applicable Rate permanently or indefinitely, provided that, at the time of the statement or publication, there is no successor administrator that will continue to provide the Applicable Rate;

(ii) a public statement or publication of information by the regulatory supervisor for the administrator of the Applicable Rate, the central bank for the currency of the Applicable Rate, an insolvency official with jurisdiction over the administrator for the Applicable Rate, a resolution authority with jurisdiction over the administrator for the Applicable Rate, or a court or an entity with similar insolvency or resolution authority over the administrator for the Applicable Rate, which states that the administrator of the Applicable Rate has ceased or will cease to provide the Applicable Rate permanently or indefinitely, provided that, at the time of the statement or publication, there is no successor administrator that will continue to provide the Applicable Rate; or

(iii) if the Applicable Rate is Sterling LIBOR, Swiss Franc LIBOR, US Dollar LIBOR, Euro LIBOR or Yen LIBOR only, a public statement or publication of information by the regulatory supervisor for the administrator of such Applicable Rate announcing that (A) the regulatory supervisor has determined that such Applicable Rate is no longer, or as of a specified future date will no longer be, representative of the underlying market and economic reality that such Applicable Rate is intended to measure and that representativeness will not be restored, and (B) it is being made in the awareness that the statement or publication will engage certain contractual triggers for fallbacks activated by pre-cessation announcements by such supervisor (howsoever described) in contracts.

For items (i) and (ii), we can see the wording "permanently" or "indefinitely" to capture the permanent discontinuation status. We can also see that item (i) assumes the trigger events by the relevant administrator itself and that item (ii) assumes those by official bodies such as the regulatory supervisor and the central bank for the relevant administrator or the currency of the relevant IBOR. Items (i) and (ii) are generally understood to be "cessation triggers".

Item (iii) defines the so-called "pre-cessation trigger". The pre-cessation trigger intends to capture the "non-representativeness" of the five LIBOR currencies (Sterling, Swiss Franc, US Dollar, Euro and Japanese Yen) only. Non-representativeness of the five-currency LIBOR will be determined by the regulatory supervisor (i.e., the UKFCA), and an additional condition is that "it is being made in the awareness that the statement or publication will engage certain contractual triggers for fallbacks activated by pre-cessation announcements by such supervisor (howsoever described) in contracts". Whether the pre-cessation trigger should be embedded in the Supplement was at the centre of debates

among market participants as discussed in our 2020 publication, but the pre-cessation event trigger was finally added to the Supplement as one of the standard trigger events.

Importantly, the Supplement provides the definition of "Index Cessation Effective Date", which is separate from "Index Cessation Event". Normally, the effective date of a fallback rate is the first date on which the Applicable Rate is no longer provided. However, for LIBOR, which is also subject to the pre-cessation event trigger, the effective date of a fallback rate is the first date on which the Applicable Rate is either non-representative or no longer provided.

(c) Adjusted IBOR, Compounding Methods for RFRs and Publication Body

To account for any permanent discontinuation or non-representativeness of a relevant IBOR, amendments to the floating rate options in Section 7.1 of the 2006 ISDA Definitions for the relevant IBORs will be added. The form of such amendments is as follows:

- Firstly, a statement identifying the objective triggers that would activate the selected fallbacks as discussed in (b) above.
- Secondly, a description of the fallbacks that would apply upon the occurrence of that trigger, which will be: (i) the relevant RFR adjusted using methodologies to account for (A) the fact that the RFR is an overnight rate, and (B) the various premia included within the IBOR; and (ii) if the relevant RFR is permanently discontinued, one or more further fallbacks.

ISDA's material[13] shows a summary for USD LIBOR as follows:

> Following the occurrence of an Index Cessation Event and from the Index Cessation Effective Date:
>
> (1) References to USD LIBOR to be read as references to Fallback Rate (SOFR), i.e., term-adjusted SOFR plus spread.
>
> (2) If Fallback Rate (SOFR) is permanently discontinued, fallback to SOFR (as the underlying RFR) plus spread (this spread is the same spread that formed part of Fallback Rate (SOFR) and will be applied after making any necessary adjustments to SOFR for differences in term/tenor, based on the methodology for such adjustments in the Bloomberg Rule Book).
>
> (3) If SOFR is permanently discontinued, fallback to:
>
> (a) The Fed Recommended Rate plus spread.
>
> (b) The OBFR plus spread.
>
> (c) The FOMC Target Rate plus spread.
>
> (In each case, the spread is the same spread that formed part of Fallback Rate (SOFR) and will be applied after making any necessary adjustments to the Fed Recommended Rate/OBFR/FOMC Target Rate for differences in term/tenor.)

To construct a term rate (e.g., three months or six months) from an overnight RFR, compounding methods must be specified. Based on the feedback from market participants, the "compounded setting in arrears rate" has been adopted. More technically, a two-business-day backward shift adjustment has been added for operational and payment purposes so that the rate is to be known prior to the relevant payment date. For spread adjustments, the "historical mean/median approach" is applicable; more specifically, a historical median approach over a five-year lookback period has been adopted.

For rate calculations, Bloomberg Index Services Limited ("**BISL**") has been selected to calculate and publish adjustments related to fallbacks. BISL publishes compounded rates, spreads and the sum of the compounded rates and spreads (i.e., term rates derived from RFRs for fallbacks). On the technical front, the technical (mathematical) document for calculation methods titled "IBOR Fallback Rate Adjustments Rule Book" is publicly available.[14]

(d) Protocol Adherence and Occurrence of Index Cessation Event for LIBOR

According to the joint survey by the JFSA and the BoJ published on May 19, 2021 (with the time of the survey being as of the end of December 31, 2020),[15] 124 of the 128 Japanese financial institution respondents that entered into ISDA-governed derivatives agreements already adhered to or plan to adhere to the Protocol. This means that 96% (124 out of 128) of the Japanese financial institutions that are subject to ISDA-governed derivatives agreements will be subject to the Protocol. This is a huge percentage.

In response to the UKFCA's announcement dated March 5, 2021 (see section 2), ISDA confirmed that "[t]oday's announcement constitutes an index cessation event under the IBOR Fallbacks Supplement and the ISDA 2020 IBOR Fallbacks Protocol for all 35 LIBOR settings. As a result, the fallback spread adjustment published by Bloomberg is fixed as of the date of the announcement for all euro, sterling, Swiss franc, US dollar and yen LIBOR settings".[16]

According to ISDA's press release, more precisely, the fallbacks will automatically occur for outstanding derivatives contracts that incorporate the Supplement or are subject to adherence of the Protocol on the following dates:

- After December 31, 2021: For outstanding derivatives referenced to all Euro, Sterling, Swiss Franc and Yen LIBOR settings.
- After June 30, 2023: For outstanding derivatives referenced to all US Dollar LIBOR settings. Under the fallbacks methodology, the rate for the one-week and two-month US Dollar LIBOR settings will be computed by each calculation agent using linear interpolation between end-2021 and June 30, 2023, before falling back to the adjusted RFR plus spread after June 30, 2023.

BISL also published the fixed spread adjustments on its website.[17]

4 Will the Multiple Paths Under the Multiple Benchmark Rate Regime in Japan Converge?

In the derivatives space, it is apparent that TONA is an RFR to be used as a building block for the fallback rates applicable to derivatives transactions referring JPY LIBOR in the Supplement and Protocol. As noted above, a large majority of market participants also supported TONA for derivatives contracts. However, for loans and bonds, as we also saw, TORF was the first priority/most-supported alternative benchmark in the consultation by the Committee (see Table 2). Further, apart from the US and UK, Japan has another IBOR (i.e., TIBOR) to be continued after the end of 2021.

In these circumstances, we cannot avoid saying that Japan has a complex situation where (i) TONA is preferred for derivatives, typically used as a hedging tool for loans and bonds, and (ii) on the other hand, TORF, a forward-looking term RFR (setting in advance), which is apparently different from (compounded) TONA (setting in arrears), is preferred for loans and bonds.

There is a divergence in preference regarding interest rate benchmarks across products. In this regard, market participants will be required to seek a solution. The solution can be sought via the multiple paths under the Multiple Benchmark Rate Regime specific to Japan. One of the key elements should be ample liquidity of products.

Endnotes

1. https://www.boj.or.jp/en/finsys/libor/data/roadmap.pdf.
2. Before that, TIBOR was calculated by the Japanese Bankers Association and has a long history dating back to 1995.
3. https://www.boj.or.jp/en/paym/market/jpy_cmte/cmt201130b.pdf.
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Yusuke Motoyanagi is a partner at Nishimura & Asahi, specialising in capital markets, asset management, financial regulations and other financial and international transactions. He was admitted to the Bar in 2003 in Japan and to the New York Bar in 2011. He was educated at Waseda University (LL.B., 2001) and Columbia Law School (LL.M., 2010). He worked as a foreign temporary associate at Davis Polk & Wardwell from 2010 to 2011 and as a secondee at Deutsche Securities Inc. from 2011 to 2012.

Nishimura & Asahi
Otemon Tower, 1-1-2 Otemachi
Chiyoda-ku, Tokyo 100-8124
Japan

Tel: +81 3 6250 6437
Email: y.motoyanagi@nishimura.com
URL: www.nishimura.com

Toshiyuki Yamamoto is counsel at Nishimura & Asahi. His main practice areas are asset management and derivatives. He is also involved in finance transactions and regulatory matters as well as foreign regulatory defence and litigation. Prior to joining a Japanese law firm and starting his career as a lawyer in 2009, he worked in the field of securitisation at a domestic credit rating agency and at the Tokyo office of a global investment bank as an analyst. He is a certified member analyst of the Securities Analysts Association of Japan and a certified international investment analyst. He regularly serves as a speaker at conferences for the ISDA Master Agreement held by the International Swaps and Derivatives Association.

Nishimura & Asahi
Otemon Tower, 1-1-2 Otemachi
Chiyoda-ku, Tokyo 100-8124
Japan

Tel: +81 3 6250 6612
Email: to.yamamoto@nishimura.com
URL: www.nishimura.com

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