ICLG

The International Comparative Legal Guide to:

Lending & Secured Finance 2019

7th Edition

A practical cross-border insight into lending and secured finance

Allen & Overy LLP
Anderson Mori & Tomotsune
Asia Pacific Loan Market Association (APLMA)
Astrea
Baker & McKenzie LLP
Bravo da Costa, Saraiva – Sociedade de Advogados
Cadwalader, Wickersham & Taft LLP
Carey
Carey Olsen Jersey LLP
Cordero & Cordero Abogados
Criales & Urcullo
Cuatrecasas
Davis Polk & Wardwell LLP
Debevoise & Plimpton LLP
Dechert LLP
Dillon Eustace
Drew & Napier LLC
E & G Economides LLC
E. Schaffer & Co.
Fellner Wratzfeld & Partners
Freshfields Bruckhaus Deringer LLP
Fried, Frank, Harris, Shriver & Jacobson LLP
Gonzalez Calvillo, S.C.
Haynes and Boone, LLP
Hogan Lovells International LLP
Holland & Knight
HSBC
IKT Law Firm
Jadek & Pensa
JPM Janković Popović Mitić
Kelobang Godisang Attorneys
King & Wood Mallesons
Latham & Watkins LLP
Lee and Li, Attorneys-at-Law
Lloreda Camacho & Co.
Loan Market Association
Loan Syndications and Trading Association
Loyens & Loeff Luxembourg S.à r.l.
Macesic & Partners LLC
Maples Group
Marval, O'Farrell & Mairal
McMillan LLP
Milbank LLP
Morgan, Lewis & Bockius LLP
Morrison & Foerster LLP
Nielsen Nørager Law Firm LLP
Norton Rose Fulbright US LLP
Orrick Herrington & Sutcliffe LLP
Pestalozzi Attorneys at Law Ltd
Pinheiro Neto Advogados
PLMJ Advogados
Ploum
Proskauer Rose LLP
Rodner, Martínez & Asociados
Sardelas Liarikos Petsa Law Firm
Seward & Kissel LLP
Shearman & Sterling LLP
Skadden, Arps, Slate, Meagher & Flom LLP
Škubla & Partneri s. r. o.
SZA Schilling, Zutt & Anschütz Rechtsanwaltsgesellschaft mbH
Trofin & Asociații
TTA – Sociedade de Advogados
Wakefield Quin Limited
Walalangi & Partners (in association with Nishimura & Asahi)
Weil, Gotshal & Manges LLP
White & Case LLP

Contributing Editor
Thomas Mellor, Morgan, Lewis & Bockius LLP

Publisher
Rory Smith

Sales Director
Florjan Osmani

Account Director
Oliver Smith

Senior Editors
Caroline Collingwood
Rachel Williams

Editor
Sam Friend

Group Consulting Editor
Alan Falach

Published by
Global Legal Group Ltd.
59 Tanner Street
London SE1 3PL, UK
Tel: +44 20 7367 0720
Fax: +44 20 7407 5255
Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Stephens & George
Print Group
April 2019

Copyright © 2019
Global Legal Group Ltd.
All rights reserved
No photocopying

ISBN 978-1-912509-65-2
ISSN 2050-9847

Strategic Partners

Editorial Chapters:

1 **Loan Syndications and Trading: An Overview of the Syndicated Loan Market** – Bridget Marsh & Tess Virmani, Loan Syndications and Trading Association 1

2 **Loan Market Association – An Overview** – Nigel Houghton & Hannah Vanstone, Loan Market Association 6

3 **Asia Pacific Loan Market Association – An Overview** – Andrew Ferguson, Asia Pacific Loan Market Association (APLMA) 12

General Chapters:

4 **An Introduction to Legal Risk and Structuring Cross-Border Lending Transactions** – Thomas Mellor & Marcus Marsh, Morgan, Lewis & Bockius LLP 15

5 **Global Trends in the Leveraged Loan Market in 2018** – Joshua W. Thompson & Korey Fevzi, Shearman & Sterling LLP 20

6 **Developments in Delayed Draw Term Loans** – Meyer C. Dworkin & Samantha Hait, Davis Polk & Wardwell LLP 26

7 **Commercial Lending in a Changing Regulatory Environment, 2019 and Beyond** – Bill Satchell & Elizabeth Leckie, Allen & Overy LLP 30

8 **Acquisition Financing in the United States: Will the Boom Continue?** – Geoffrey R. Peck & Mark S. Wojciechowski, Morrison & Foerster LLP 34

9 **A Comparative Overview of Transatlantic Intercreditor Agreements** – Lauren Hanrahan & Suhrud Mehta, Milbank LLP 39

10 **A Comparison of Key Provisions in U.S. and European Leveraged Loan Agreements** – Sarah M. Ward & Mark L. Darley, Skadden, Arps, Slate, Meagher & Flom LLP 46

11 **The Global Subscription Credit Facility and Fund Finance Markets – Key Trends and Forecasts** – Michael C. Mascia & Wesley A. Misson, Cadwalader, Wickersham & Taft LLP 59

12 **Recent Developments in U.S. Term Loan B** – Denise Ryan & Kyle Lakin, Freshfields Bruckhaus Deringer LLP 63

13 **The Continued Growth of European Covenant Lite** – James Chesterman & Jane Summers, Latham & Watkins LLP 70

14 **Cross-Border Loans – What You Need to Know** – Judah Frogel & Jonathan Homer, Allen & Overy LLP 73

15 **Debt Retirement in Leveraged Financings** – Scott B. Selinger & Ryan T. Rafferty, Debevoise & Plimpton LLP 82

16 **Analysis and Update on the Continuing Evolution of Terms in Private Credit Transactions** – Sandra Lee Montgomery & Michelle Lee Iodice, Proskauer Rose LLP 88

17 **Secondments as a Periscope into the Client and How to Leverage the Secondment Experience** – Alanna Chang, HSBC 95

18 **Trade Finance on the Blockchain: 2019 Update** – Josias Dewey, Holland & Knight 98

19 **The Global Private Credit Market: 2019 Update** – Jeff Norton & Ben J. Leese, Dechert LLP 104

20 **Investment Grade Acquisition Financing Commitments** – Julian S.H. Chung & Stewart A. Kagan, Fried, Frank, Harris, Shriver & Jacobson LLP 109

21 **Acquisition Financing in Latin America: Navigating Diverse Legal Complexities in the Region** – Sabrena Silver & Anna Andreeva, White & Case LLP 114

22 **Developments in Midstream Oil and Gas Finance in the United States** – Elena Maria Millerman & John Donaleski, White & Case LLP 121

23 **Margin Loans: The Complexities of Pre-IPO Acquired Shares** – Craig Unterberg & LeAnn Chen, Haynes and Boone, LLP 127

24 **Credit Agreement Provisions and Conflicts Between US Sanctions and Blocking Statutes** – Roshelle A. Nagar & Ted Posner, Weil, Gotshal & Manges LLP 132

25 **SOFR So Good? The Transition Away from LIBOR Begins in the United States** – Kalyan ("Kal") Das & Y. Daphne Coelho-Adam, Seward & Kissel LLP 137

Continued Overleaf →

Further copies of this book and others in the series can be ordered from the publisher. Please call +44 20 7367 0720

Disclaimer
This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice.
Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.
This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

glg
global legal group

General Chapters:

26	**Developments in the Syndicated Term Loan Market: Will Historical Distinctions from the High-Yield Bond Market Be Restored?** – Joseph F. Giannini & Adrienne Sebring, Norton Rose Fulbright US LLP	141
27	**Green Finance** – Alex Harrison & Andrew Carey, Hogan Lovells International LLP	144
28	**U.S. Tax Reform and Effects on Cross-Border Financing** – Patrick M. Cox, Baker & McKenzie LLP	149

Country Question and Answer Chapters:

29	**Angola**	Bravo da Costa, Saraiva – Sociedade de Advogados / PLMJ: Bruno Xavier de Pina & Joana Marques dos Reis	159
30	**Argentina**	Marval, O’Farrell & Mairal: Juan M. Diehl Moreno & Diego A. Chighizola	165
31	**Australia**	King & Wood Mallesons: Yuen-Yee Cho & Elizabeth Hundt Russell	174
32	**Austria**	Fellner Wratzfeld & Partners: Markus Fellner & Florian Kranebitter	183
33	**Belgium**	Astrea: Dieter Veestraeten	193
34	**Bermuda**	Wakefield Quin Limited: Erik L Gotfredsen & Jemima Fearnside	199
35	**Bolivia**	Criales & Urcullo: Andrea Mariah Urcullo Pereira & Daniel Mariaca Alvarez	207
36	**Botswana**	Kelobang Godisang Attorneys: Wandipa T. Kelobang & Laone Queen Moreki	214
37	**Brazil**	Pinheiro Neto Advogados: Ricardo Simões Russo & Leonardo Baptista Rodrigues Cruz	221
38	**British Virgin Islands**	Maples Group: Michael Gagie & Matthew Gilbert	230
39	**Canada**	McMillan LLP: Jeff Rogers & Don Waters	237
40	**Cayman Islands**	Maples Group: Tina Meigh	247
41	**Chile**	Carey: Diego Peralta	255
42	**China**	King & Wood Mallesons: Stanley Zhou & Jack Wang	262
43	**Colombia**	Lloreda Camacho & Co.: Santiago Gutiérrez & Juan Sebastián Peredo	269
44	**Costa Rica**	Cordero & Cordero Abogados: Hernán Cordero Maduro & Ricardo Cordero B.	276
45	**Croatia**	Macesic & Partners LLC: Ivana Manovelo	284
46	**Cyprus**	E & G Economides LLC: Marinella Kilikitas & George Economides	292
47	**Denmark**	Nielsen Nørager Law Firm LLP: Thomas Melchior Fischer & Peter Lyck	300
48	**England**	Allen & Overy LLP: David Campbell & Oleg Khomenko	307
49	**Finland**	White & Case LLP: Tanja Törnkvist & Krista Rekola	316
50	**France**	Orrick Herrington & Sutcliffe LLP: Emmanuel Ringeval & Cristina Radu	324
51	**Germany**	SZA Schilling, Zutt & Anschütz Rechtsanwaltsgesellschaft mbH: Dr. Dietrich F. R. Stiller & Dr. Andreas Herr	335
52	**Greece**	Sardelas Liarikos Petsa Law Firm: Panagiotis (Notis) Sardelas & Konstantina (Nantia) Kalogiannidi	344
53	**Hong Kong**	King & Wood Mallesons: Richard Mazzochi & Khin Voong	352
54	**Indonesia**	Walalangi & Partners (in association with Nishimura & Asahi): Luky I. Walalangi & Siti Kemala Nuraida	360
55	**Ireland**	Dillon Eustace: Conor Keaveny & Richard Lacken	366
56	**Israel**	E. Schaffer & Co.: Ehud (Udi) Schaffer & Shiri Ish Shalom	375
57	**Italy**	Allen & Overy Studio Legale Associato: Stefano Sennhauser & Alessandra Pirozzolo	381
58	**Ivory Coast**	IKT Law Firm: Annick Imboua-Niava & Osther Tella	390
59	**Japan**	Anderson Mori & Tomotsune: Taro Awataguchi & Yuki Kohmaru	396
60	**Jersey**	Carey Olsen Jersey LLP: Robin Smith & Laura McConnell	404
61	**Luxembourg**	Loyens & Loeff Luxembourg S.à r.l.: Antoine Fortier-Grethen	414
62	**Mexico**	Gonzalez Calvillo, S.C.: José Ignacio Rivero Andere & Jacinto Avalos Capin	422
63	**Mozambique**	TTA – Sociedade de Advogados / PLMJ: Gonçalo dos Reis Martins & Nuno Morgado Pereira	430

Continued Overleaf

glg
global legal group

Country Question and Answer Chapters:

64	**Netherlands**	Ploum: Tom Ensink & Alette Brehm	437
65	**Portugal**	PLMJ Advogados: Gonçalo dos Reis Martins	445
66	**Romania**	Trofin & Asociații: Valentin Trofin & Mihaela Atanasiu	452
67	**Russia**	Morgan, Lewis & Bockius LLP: Grigory Marinichev & Alexey Chertov	462
68	**Serbia**	JPM Janković Popović Mitić: Nenad Popović & Nikola Poznanović	470
69	**Singapore**	Drew & Napier LLC: Pauline Chong & Renu Menon	477
70	**Slovakia**	Škubla & Partneri s. r. o.: Marián Šulík & Zuzana Moravčíková Kolenová	487
71	**Slovenia**	Jadek & Pensa: Andraž Jadek & Žiga Urankar	494
72	**South Africa**	Allen & Overy LLP: Lionel Shawe & Lisa Botha	504
73	**Spain**	Cuatrecasas: Manuel Follía & Iñigo Várez	514
74	**Sweden**	White & Case LLP: Carl Hugo Parment & Tobias Johansson	525
75	**Switzerland**	Pestalozzi Attorneys at Law Ltd: Oliver Widmer & Urs Klöti	532
76	**Taiwan**	Lee and Li, Attorneys-at-Law: Hsin-Lan Hsu & Odin Hsu	541
77	**UAE**	Morgan, Lewis & Bockius LLP: Victoria Mesquita Wlazlo & Amanjit K. Fagura	549
78	**USA**	Morgan, Lewis & Bockius LLP: Thomas Mellor & Rick Eisenbiegler	564
79	**Venezuela**	Rodner, Martínez & Asociados: Jaime Martínez Estévez	576

EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Lending & Secured Finance*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of lending and secured finance.

It is divided into three main sections:

Three editorial chapters. These are overview chapters and have been contributed by the LSTA, the LMA and the APLMA.

Twenty-five general chapters. These chapters are designed to provide readers with an overview of key issues affecting lending and secured finance, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in lending and secured finance laws and regulations in 51 jurisdictions.

All chapters are written by leading lending and secured finance lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Thomas Mellor of Morgan, Lewis & Bockius LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

Alan Falach LL.M.
Group Consulting Editor
Global Legal Group
Alan.Falach@glgroup.co.uk

SOFR So Good? The Transition Away from LIBOR Begins in the United States

Kalyan ("Kal") Das

Seward & Kissel LLP

Y. Daphne Coelho-Adam

Introduction

Since the 1980s, the London Interbank Offered Rate ("LIBOR"), the benchmark index that reflects the rate at which banks borrow money from each other on an uncollateralised basis, evolved to become the foundation on which interest rates on various loans and financial transactions throughout the world are calculated. LIBOR is determined by taking the average value of the actual or estimated interest rates leading global are paying to borrow from one another, which were reported daily. Following the financial crisis of 2007–2008, LIBOR's reputation was damaged by charges that such reporting banks manipulated the rate before and during the financial crisis, taking larger profits from derivatives based on the manipulated rates. By 2012, regulators in a number of countries, including the UK Serious Fraud Office and the United States Congress had commenced investigations into LIBOR manipulation. As a result, in 2014, the Intercontinental Exchange ("ICE") assumed administration of LIBOR, and the ICE Benchmark Administration ("IBA") established a new oversight committee and introduced new surveillance systems and analysis techniques which subjected LIBOR submissions to closer scrutiny.

Faith in LIBOR as a reliable reference rate, however, quickly declined after the manipulation charges were acknowledged in the public domain and as a result, in 2014, the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York (the "New York Fed") convened the U.S. Alternative Reference Rates Committee ("ARRC") in order to identify an alternative to U.S. Dollar LIBOR. In July 2017, the UK's Financial Conduct Authority announced that LIBOR would be phased out by 2021.

2018 Developments – Alternatives to LIBOR

At the beginning of April 2018, the New York Fed took the first significant step towards the transition away from LIBOR by publishing three alternative reference rates. The alternative reference rates are based on overnight repurchase agreement transactions which are collateralised by U.S Treasury securities. Each of the alternative reference rates are calculated based on transaction data from an underlying liquid market rather than subjective input. LIBOR, on the other hand, is formulated from pricing contributions from 17 panel banks rather than robust transaction data.

The first alternative rate is the Tri-Party General Collateral Rate ("TGCR"), which is a measure of rates on overnight, specific-counterparty tri-party general collateral repurchase transactions secured by Treasury securities. The underlying securities of a general collateral transaction are not identified until the terms of the trade are agreed to. The TGCR is calculated as a volume weighted median of transaction-level tri-party repurchase data collected from The Bank of New York Mellon.

The second alternative rate is the Broad General Collateral Rate (the "BGCR"), which is a measure of rates on overnight Treasury general collateral repurchase transactions. The underlying securities of a general collateral transaction are not identified until the terms of the trade are agreed to. The BGCR is calculated as a volume weighted median of transaction-level tri-party repurchase data collected from The Bank of New York Mellon as well as GCF repurchase transaction data obtained from DTCC Solutions LLC.

The ARRC, which was formed by the New York Fed to address the discontinuance of LIBOR, identified the third, and now leading, alternative reference rate as the Secured Overnight Financing Rate ("SOFR"). SOFR is an index that reflects a broad measure of the cost of borrowing cash overnight collateralised by Treasury securities. SOFR includes all trades in the BGCR plus bilateral Treasury general collateral repurchase transactions cleared through the Delivery-versus-Payment service offered by the Fixed Income Clearing Corporation. The New York Fed has supported the adoption of SOFR as the leading index for U.S. dollar-based derivatives and loans to replace the dependence on LIBOR before the 2021 LIBOR phaseout deadline.

The framework needed to transition to SOFR is well under way. The Federal Reserve Bank has begun publishing SOFR, industry organisations have published papers and advisories setting forth best practices for transitioning to SOFR and institutions are establishing internal procedures to adapt to the adoption of SOFR. In addition, certain finance transactions have recently closed utilising a SOFR construction as the benchmark rate, including issuances by Fannie Mae, Freddie Mac, Federal Home Loan Bank, Toyota Motor Credit Corporation, and New York's Metropolitan Transit Authority, among others.

LIBOR Fallbacks – The ARRC Consultations

The ARRC held a public roundtable on July 19, 2018, to recap the LIBOR succession plan and educate the financial market on contract fallback language for Floating Rate Notes ("FRN"), corporate loans, securitisations and derivatives which should properly document the transition to a new reference rate. Following the roundtable, in September of 2018, the ARRC went on to publish a series of consultations on LIBOR fallbacks, including a Floating Rate Note consultation, a syndicated loan consultation, a bilateral loan consultation and a securitisation consultation. Each consultation addresses the question of what rate does a loan fall back to when LIBOR disappears, and concludes that a SOFR-based successor rate is appropriate. LIBOR fallback language is comprised of three

© Published and reproduced with kind permission by Global Legal Group Ltd, London

components: first, a trigger event to prompt the transition from LIBOR to a replacement rate; second, a successor rate to actually replace LIBOR in the contract; and third, the process by which the replacement rate is implemented.

The Trigger

The trigger event which prompts the conversion from LIBOR to a new reference rate will most commonly be LIBOR cessation, but may include pre-cessation triggers in the event of a temporary discontinuation of LIBOR, an unannounced stop to LIBOR or a material change to LIBOR. In each consultation, the ARRC identifies the occurrence of one or more of five events as a "Benchmark Discontinuation Event": (1) a public statement/publication of information by the benchmark administrator that it has or will cease to provide the benchmark, provided that at the time there is no successor administrator to continue to provide the benchmark; (2) a public statement/publication of information by the regulatory supervisor of, central bank for the currency of, insolvency official/resolution authority/or court with jurisdiction over the benchmark administrator, stating that the administrator has or will cease to continue to provide the benchmark, provided that at the time there is no successor administrator to continue to provide the benchmark; (3) the benchmark rate is not published for five consecutive business days and is not temporary as declared by the benchmark administrator or regulatory supervisor and cannot be determined by reference to an interpolated rate; (4) a public statement/publication of information by the benchmark administrator that is has invoked or will invoke its insufficient submissions policy; or (5) a public statement/publication of information by the regulatory supervisor for the benchmark administrator announcing that the benchmark is no longer representative or may no longer be used.[1]

The Successor Rate – SOFR

Each ARRC consultation looks primarily to SOFR as a first line replacement rate for LIBOR. The approach differs for each product, with two approaches to implementing LIBOR fallback language emerging – the amendment approach and the hardwired approach. Since SOFR, unlike LIBOR, is an overnight, secured rate, it is likely to be lower than LIBOR, which also presents the need for a spread adjustment, incorporated into the fallback mechanics, to account for some of the differences between SOFR and LIBOR and to make SOFR comparable to LIBOR as an effective replacement rate. The approaches, mechanics and terms are generally similar, but differ depending on the financial product, in order to adapt to specific circumstances and applicable contracts.

Floating Rate Notes and Securitisations

For FRN and securitisations, the ARRC proposes a hardwired approach employing fallback provisions in the form of a waterfall of possible successor rates together with a spread adjustment. The waterfall, or "hardwired" approach, varies in each consultation. For FRN and securitisations, the waterfalls are essentially the same, with the exception of an additional Step 3 comprised of Spot SOFR for FRN for a total of six steps rather than five.

The FRN Replacement Benchmark Waterfall includes six steps for determining the replacement rate: Step 1: Term SOFR recommended by the relevant government body plus spread; Step 2: Compounded SOFR plus spread; Step 3: Spot SOFR plus spread; Step 4: a replacement rate recommended by the relevant governmental body plus spread; Step 5: ISDA replacement rate at such time plus spread; and Step 6: a replacement rate determined by the issuer or its designee plus spread.

For securitisations, the ARRC proposes a five-step replacement benchmark waterfall: Step 1: Term SOFR plus spread; Step 2: Compounded SOFR plus spread; Step 3: a replacement rate recommended by the relevant governmental body plus spread; Step 4: ISDA replacement rate at such time plus spread; and Step 5: a replacement rate proposed by the designated transaction representative (as identified in the relevant transaction documents).

In December 2018, the Structured Finance Industry Group ("SFIG") published a LIBOR Task Force Green Paper setting forth recommended best practices for the transition from LIBOR to a new benchmark.[2] The recommendations focus on new securitisations (non-legacy) and proposes fallback language for US securitisation transactions. Much like the proposal set forth in the ARRC securitisation consultation, the SFIG recommendation is based on a benchmark discontinuance event (including pre-cessation triggers) that serves as a trigger to transition from LIBOR to a waterfall of fallbacks, beginning with a forward-looking Term SOFR-based benchmark, then a daily Compounded SOFR or average daily SOFR, then an overnight SOFR rate and ending with an alternate rate approved by an investor vote if SOFR is unavailable. A tiered approach to determining the spread, while also preserving the sponsor's ability to designate a proposed spread, subject to investor approval, is also suggested.

Corporate Loans and Bilateral Loans – The Amendment Approach *vs*. the Hardwired Approach

For the loan market, two approaches to implementing LIBOR fallback language have emerged – the amendment approach and the hardwired approach. The ARRC's syndicated loans consultation and bilateral loans consultation are similar and each provide for both a hardwired approach via a replacement rate waterfall and an amendment approach. The waterfall approach for each is essentially the same in the first two steps: Step 1: Term SOFR or if not available, then interpolated SOFR; and Step 2: Compounded SOFR. However, while the waterfall for bilateral loans in Step 3 reverts to an amendment approach to select a replacement rate in the event that a replacement rate cannot be determined in the first two steps in the waterfall, the waterfall for syndicated loans includes an additional step of overnight SOFR, before defaulting to an amendment approach.

Similarly, the waterfall for the replacement benchmark spread (adjustment) also includes a third option for bilateral loans. For each, in the first instance the spread adjustment is determined or calculated as selected, endorsed or recommended by the relevant government body, and if not available, then the spread adjustment is determined in accordance with the ISDA method. If a replacement reference rate is selected by the lender in the case of a bilateral loan, then the spread adjustment is selected by the lender as well.

The differences do not end there. Given the two products differ, their proposed amendment approaches differ as well to account for those differences. While the triggers, replacement reference rate and replacement benchmark spread adjustment for both are essentially the same, the mechanism to amend the credit agreement, naturally differs. For each, the trigger is a benchmark discontinuance event or a determination by the lender/required lenders (or the loan agent in the case of syndicated loans) that new or amended loans are incorporating a new benchmark interest rate to replace LIBOR. The replacement reference rate for each is either an alternate benchmark rate agreed between the agent and the borrower, in the case of syndicated loans, or between the borrower and the lender (or as agreed in an amendment), in the case of bilateral loans. The amendment mechanism for

© Published and reproduced with kind permission by Global Legal Group Ltd, London

syndicated loans requires negative consent of required lenders for a benchmark discontinuance event and the affirmative consent of required lenders if the loan agent or required lenders determine that new or amended loans are incorporating a new benchmark. Bilateral loans differ in that for each trigger an amendment delivered by the lenders to the borrower (which may be subject to negative consent by the borrower) is the mechanism.

The Loan Syndications and Trading Association ("LSTA"), an active member of the ARRC, is chair of the ARRC's Business Loans Working Group which is focused on solutions for the LIBOR transition for syndicated and bilateral loans, and is a member of the ARRC's Securitization Working Group, representing the interest of collateralised loan obligation transactions ("CLOs"), and has published many advisories, articles and guidance on the LIBOR transition. As the LSTA points out, the amendment approach is a good preliminary solution for the syndicated loan market, given the ease and frequency with which loans are amended over their lifespan. Such approach provides the added benefit of not needing to rely on terms which do not yet exist and preserves the ability to leave the replacement rates and spreads to be selected in the future when more information on the options is available.[3] The downside, as the LSTA notes, is the possibility of disruption in the loan market in the future when such amendments are needed, and the fact that the amendment approach can be impacted by market cycles.

The LSTA also rightly points out that synching between products, particularly CLOs and syndicated loans, is necessary given that CLOs hold more than $580 billion of syndicated loans.[4] Of particular concern is basis risk which may be introduced if the loans held by a CLO utilise or flip to SOFR before LIBOR is discontinued, such that the CLOs' assets are tied to SOFR while its liabilities are tied to LIBOR. Although unlikely, it is also possible that the loan benchmark and CLO benchmark may differ in the event they follow their respective benchmark waterfalls and land at different replacement rates. It is something market participants are encouraged to consider.

Paced Transition Plan

In addition to the proposed alternatives to LIBOR published in each of its consultations, the ARRC also proposed a paced transition plan from LIBOR to SOFR, outlining milestones to be reached between now and 2021 to ensure a smooth transition.[5] As a first step, the ARRC's paced transition plan begins with a focus in 2018 and 2019 on creating a baseline level of liquidity for derivatives contracts referencing SOFR. The second step, targeted during 2019, is to further increase familiarity and understanding of SOFR over longer terms with increased trading activity in futures and overnight index swaps, followed in 2020 by central counterparty clearing houses offering members the choice of clearing swap contracts using SOFR. Each of the foregoing steps are in preparation for 2021's roll-out and establishment of SOFR term rates.

Legacy Transactions

Despite all of the proposals emerging from the ARRC and various industry groups, legacy transactions will remain a challenge. A paced transition plan to move new transactions from a LIBOR-based benchmark to a SOFR-based benchmark can be considered, negotiated and codified in new deals, but what about existing deals? For deals pegged to LIBOR with no defined alternative reference rate specified in the contracts, how are parties to proceed when LIBOR is no longer available? It seems an amendment approach, which would likely involve unanimous investor consent, may be the only option, but that may prove administratively challenging while also a substantial burden on the market if an urgent need to transition strikes all at once. In addition, imposition of the determination of a move to SOFR on any particular transaction party, such as a loan agent or trustee, is most likely not suggested by legacy transaction documentation and is likely not an acceptable approach for such transaction parties from a risk allocation perspective. How the proposed approaches to new transactions across products and asset classes are accepted and implemented may provide some guidance to parties of legacy transactions regarding which alternative benchmarks are available and best suited to their needs. Once a market consensus is reached, amendments may be entered into prospectively to address the almost certain cessation of LIBOR. It remains to be seen how legacy transactions will be addressed, but in the meantime, market participants must remain vigilant and informed and be prepared to act prior to a Benchmark Discontinuation Event with respect to legacy transactions.

Conclusion

Despite all of the developments and progress in moving the market forward toward an orderly transition away from LIBOR as 2021 approaches, the amount of work which remains to be undertaken by market participants in the transition period could be vast and should not be underestimated. Mechanisms for closing out legacy contracts will need to be addressed in order to meet the demands of market participants who anticipated pre-determined and forward-looking floating rate payment structures. Market participants should monitor the loan market for the adoption of alternative index rates, review safeguards and amendment procedures in agreements while continuing to review how the discontinuance of LIBOR impacts existing loan agreements and other transaction-related documentation.

Endnotes

1. "ARRC Consultation Regarding More Robust LIBOR Fallback Contract Language for New Issuances of LIBOR Floating Rate Notes", September 24, 2018 available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2018/ARRC-FRN-Consultation.pdf; "ARRC Consultation Regarding More Robust LIBOR Fallback Contract Language for New Originations of LIBOR Syndicated Business Loans", September 24, 2018 available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2018/ARRC-Syndicated-Business-Loans-Consultation.pdf; "ARRC Consultation Regarding More Robust LIBOR Fallback Contract Language for New Originations of LIBOR Bilateral Business Loans", December 7, 2018 available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2018/ARRC-Bilateral-Business-Loans-Consultation.pdf; "ARRC Consultation New Issuances of LIBOR Securitizations", December 7, 2018 available at https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2018/ARRC-Securitizations-Consultation.pdf.
2. "SFIG LIBOR Task Force Green Paper: A Set of Recommended Best Practices for LIBOR Benchmark Transition", December 18, 2018 available at http://www.sfindustry.org/news/sfig-publishes-libor-green-paper.
3. "ARRC Consultation; Spotlight on the Amendment Approach" October 30, 2018 available at https://www.lsta.org/advocacy-and-regulatory/key-issues-and-topics#ui-accordion-yw5-header-4.
4. "LIBOR Fallbacks: Synching Loans and CLOs" January 10, 2019 available at https://www.lsta.org/advocacy-and-regulatory/key-issues-and-topics#ui-accordion-yw5-header-4.
5. "Timeline for the Paced Transition Plan adopted by the ARRC on October 31, 2017" available at https://www.newyorkfed.org/medialibrary/microsites/arrc/files/2017/October-31-2017-ARRC-minutes.pdf.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Kalyan (“Kal”) Das
Seward & Kissel LLP
One Battery Park Plaza
New York, NY 10004
USA

Tel: +1 212 574 1391
Email: das@sewkis.com
URL: www.sewkis.com

Kalyan (“Kal”) Das is the head of the Global Bank and Institutional Finance & Restructuring Practice Group at Seward & Kissel. He maintains offices in New York City and London, England, although he spends most of his time in the Firm’s New York office. Kal is a member of the Firm’s Energy Finance Restructuring Team, a highly focused and specialised cross-disciplinary team dedicated to energy sector bankruptcies and restructurings. He and his team are currently involved in a number of high-profile restructurings/bankruptcies in the energy sector. Kal is admitted to practise law in New York, the United Kingdom (England & Wales), Australia and India. He received a Barrister-at-Law degree from The Lincoln’s Inn in 1979 and an LL.M. from New York University School of Law in 1989.

Y. Daphne Coelho-Adam
Seward & Kissel LLP
One Battery Park Plaza
New York, NY 10004
USA

Tel: +1 212 574 1233
Email: coelho-adam@sewkis.com
URL: www.sewkis.com

Y. Daphne Coelho-Adam is counsel in the Corporate Finance Group of Seward & Kissel LLP. Her practice focuses on representing clients (including banks, broker-dealers, hedge funds, investment advisors and other entities) in both par and distressed secondary market transactions related to both U.S. and international assets. She has extensive experience with distressed investments in bank debt, bankruptcy trade claims, and distressed securities. Daphne also has experience working on complex financial transactions, including secured and unsecured debt transactions, asset securitisations, structured finance transactions and restructuring transactions, both in a judicial and non-judicial setting. She also has also represented trustees, collateral agents, lenders and other service providers in domestic and international default and workout situations, including experience working on some of the largest restructurings of complex structured finance transactions. Daphne received a B.A. from the University of Virginia, and a J.D. from Vanderbilt University Law School.

SEWARD & KISSEL LLP

Seward & Kissel LLP has long been considered a leading law firm in the financial services industry, particularly in the role of advising domestic and international banks and financial institutions in respect of complex and innovative structures. The Firm’s Global Bank and Institutional Finance & Restructuring Practice Group is recognised around the world to be the largest and the leading group of its type in the world, advising banks and financial institutions in the Americas, Europe and Asia. Lawyers in the Practice Group represent banks and financial institutions as trustees, master servicers, servicers, bondholders, investors, distressed trade brokers, hedge fund administrators and liquidity providers in financing transactions and are therefore thoroughly familiar with issues that arise from all sides of a transaction.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Current titles in the ICLG series include:

- Alternative Investment Funds
- Anti-Money Laundering
- Aviation Law
- Business Crime
- Cartels & Leniency
- Class & Group Actions
- Competition Litigation
- Construction & Engineering Law
- Copyright
- Corporate Governance
- Corporate Immigration
- Corporate Investigations
- Corporate Recovery & Insolvency
- Corporate Tax
- Cybersecurity
- Data Protection
- Employment & Labour Law
- Enforcement of Foreign Judgments
- Environment & Climate Change Law
- Family Law
- Financial Services Disputes
- Fintech
- Franchise
- Gambling
- Insurance & Reinsurance
- International Arbitration
- Investor-State Arbitration
- Lending & Secured Finance
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions
- Mining Law
- Oil & Gas Regulation
- Outsourcing
- Patents
- Pharmaceutical Advertising
- Private Client
- Private Equity
- Product Liability
- Project Finance
- Public Investment Funds
- Public Procurement
- Real Estate
- Securitisation
- Shipping Law
- Telecoms, Media & Internet
- Trade Marks
- Vertical Agreements and Dominant Firms

glg global legal group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: info@glgroup.co.uk

www.iclg.com