

**DEALING WITH LIBOR CESSATION IN INTERNATIONAL ARBITRATION: SOME SUGGESTIONS**

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**I. INTRODUCTION**

The London Inter-Bank Offered Rate ('LIBOR') was one of the most important and widely used interest rate indices in the world. At one point of time, about US\$ 300 trillion worth contracts world-over were indexed to LIBOR and it was commonly used in high value commercial transactions.<sup>1</sup>

In 2012, an article in The Financial Times exposed the manipulation of LIBOR rates by bankers for personal gain. This revelation sparked investigations and led to the transfer of LIBOR administration to the Intercontinental Exchange ('ICE') Benchmark Administration ('IBA') in 2014. The UK Financial Conduct Authority ('UKFCA' or 'FCA'), which was responsible for regulating the LIBOR, imposed fines on several banks involved in the manipulation and implemented enhanced technology and surveillance measures to safeguard LIBOR's integrity.<sup>2</sup>

Notwithstanding the investigations and the reforms undertaken, the credibility of the LIBOR was severely hit. In July 2017, nearly five years after the Financial Times op-ed, the UKFCA stated that it was not sustainable to prolong the LIBOR beyond 2021 since the banks were not lending to each other as much as they had previously and that there were not enough transactions in certain currencies to make a good estimate of the rates.

With this announcement, the commercial world began looking for how to deal with the cessation of LIBOR. The important question was how to address the retirement of LIBOR insofar as agreements indexed to LIBOR were concerned. The problem was exacerbated since national legal systems did not prescribe the interest rate alternative to LIBOR for a particular currency, such as British Pounds or US dollars.

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<sup>1</sup> See, Part II of this paper.

<sup>2</sup> See, Part III of this paper.

A national legal system may announce the interest rate equivalent to LIBOR for its currency. A typical example is the USA, which announced the alternative to LIBOR for US dollars.<sup>3</sup> However, where the law applicable to the agreement is Indian law, the default interest rate as prescribed in Indian law is applicable, which is the Interest Act, 1978, and not the equivalent of LIBOR for US dollars when the currency of the agreement is US dollars.

One solution to this problem is for the parties to renegotiate their agreements and choose a mutually agreeable index. Another solution is for countries to provide legislative solutions. For instance, many states in the US came up with legislation which sought to replace US LIBOR indexed contracts, and securities with an alternative reference rate.<sup>4</sup> Likewise, UK's Critical Benchmarks (References and Administrators' Liability) Act, 2021 contains a detailed framework for LIBOR cessation.<sup>5</sup> The other is to let arbitral tribunals/ courts decide the issue, which could be followed in subsequent cases.

This paper addresses how international arbitral tribunals and courts world over have dealt with the issue of LIBOR retirement. The issue as to cessation of LIBOR is at times left unaddressed by counsels/ parties and leads to uncertainties on how arbitral tribunals deal with this issue. Hence, this paper suggests the way pleadings could be structured to address this issue. The larger purpose of this endeavour is to present an overview of how LIBOR cessation has been dealt with by adjudicatory forums, so that this may be of use to courts/ arbitral tribunals and parties in India and elsewhere on the matter.

For this purpose, this paper is structured in the following manner: Part II discusses the LIBOR and the use of LIBOR in commercial agreements and international investment treaties. Part III traces the history of LIBOR and its retirement. Part IV deals with how international tribunals and domestic courts have dealt with contracts and treaties linking the applicable interest rate with LIBOR since its retirement. Awards and decisions where different approaches to LIBOR cessation have been adopted are illustratively discussed in Part IV. Part V concludes by

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<sup>3</sup> Federal Reserve Bank of New York, Press Release: ARRC Formally Recommends Term SOFR (29 July 2021), [https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC\\_Press\\_Release\\_Term\\_SOFR.pdf](https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Press_Release_Term_SOFR.pdf) (accessed 5 March 2024).

<sup>4</sup> Osler, Legislative Solutions to U.S. Dollar LIBOR Cessation (19 March 2021), <https://www.osler.com/en/insights/updates/legislative-solutions-to-u-s-dollar-libor-cessation/> (accessed 25 June 2024).

<sup>5</sup> Herbert Smith Freehills, Final Part of UK LIBOR Legislative Solution Receives Royal Assent (17 December 2021), <https://www.herbertsmithfreehills.com/notes/bankinglitigation/2021-12/final-part-of-uk-libor-legislative-solution-receives-royal-assent> (accessed 25 June 2024).

recommending the pleadings/ submissions to be adopted by parties and the way courts/ arbitral tribunals can decide on alternatives to LIBOR in the wake of LIBOR retirement.

## II. LIBOR IN COMMERCIAL AGREEMENTS AND INTERNATIONAL INVESTMENT TREATIES

The LIBOR used to be administered by the British Bankers' Association ('BBA') and was calculated across ten currencies for different periods, ranging from overnight to one year.<sup>6</sup> As the name suggests, LIBOR refers to the interest rate of unsecured borrowing by banks from one another.<sup>7</sup>

LIBOR has been used as the applicable interest rate in various financial loan agreements such as swaps and futures<sup>8</sup>, at least since 1970.<sup>9</sup> It has also been used in commercial mortgages, loan agreements, and even student loans.<sup>10</sup> At its peak, agreements worth US\$ 300 trillion used LIBOR as the applicable interest rate index.<sup>11</sup>

LIBOR rates in agreements are typically stated as: "LIBOR + x%, where x refers to the percentage points above the LIBOR rate of a particular currency with the relevant maturity term stated in the agreement. For instance, Article 11.4 of the Model Production Sharing Contract of Timor Leste states:

*"Any amount not paid in full when due shall bear interest, compounded on a monthly basis, at an annual rate equal to one (1) month term LIBOR (London Interbank Offer Rate) for United States Dollar deposits as published by the Intercontinental Exchange for Benchmark*

<sup>6</sup> ICE Benchmark Administration, Roadmap for ICE LIBOR (18 March 2016), p. 4, [https://www.ice.com/publicdocs/ICE\\_LIBOR\\_Roadmap0316.pdf](https://www.ice.com/publicdocs/ICE_LIBOR_Roadmap0316.pdf) (accessed 6 March 2024).

<sup>7</sup> For a detailed account of how LIBOR was calculated, see, Thomas Heidorn & Rebecca Meier, US Dollar Swaps after LIBOR, Frankfurt School - Working Paper Series, No. 235, Frankfurt School of Finance & Management (2024), <https://www.econstor.eu/bitstream/10419/283009/1/1880608936.pdf> (accessed 27 March 2024), p. 8- 10.

<sup>8</sup> David Ho & David R. Skeie, LIBOR: Origins, Economics, Crisis, Scandal, and Reform (1 March 2014), FRB of New York Staff Report No. 667, <https://ssrn.com/abstract=2423387> (accessed 4 March 2024), p. 2.

<sup>9</sup> ICE Benchmark Administration, Roadmap for ICE LIBOR (18 March 2016), p. 4, [https://www.ice.com/publicdocs/ICE\\_LIBOR\\_Roadmap0316.pdf](https://www.ice.com/publicdocs/ICE_LIBOR_Roadmap0316.pdf) (accessed 6 March 2024).

<sup>10</sup> *Ibid.*, p. 2-3.

<sup>11</sup> The Wheatley Review of LIBOR: Final Report (September 2012), p. 7, [https://assets.publishing.service.gov.uk/media/5a7b3fe2e5274a319e77e076/wheatley\\_review\\_libor\\_finalreport\\_280912.pdf](https://assets.publishing.service.gov.uk/media/5a7b3fe2e5274a319e77e076/wheatley_review_libor_finalreport_280912.pdf) (accessed 4 March 2024) ('*Wheatley Review Report*').

*Administration (IBA), plus two (2) percentual points, on and from the due date until the date the principal and interest accrued thereon are paid in full.”<sup>12</sup>*

Thus, the above interest rate clause has the following components:

- Interest rate index used being LIBOR.
- LIBOR rates being published by the Intercontinental Exchange for Benchmark Administration (the part about usage is already covered in the previous point).
- Currency being US Dollars.
- Interest being compounded monthly.
- The term of the LIBOR, i.e., the term of the borrowing being on a monthly basis. The deleted line is not required.
- Premium being two percentage points above the LIBOR rate.

These components form a typical clause providing for the applicable interest rate index which are usually reckoned by parties.

It is not that the LIBOR rates are used only in commercial/ financing agreements. From 1985 to 2022, at least 354 investment treaties between States explicitly used LIBOR as the applicable interest rate index.<sup>13</sup> The first investment treaty to refer to LIBOR explicitly was the China Kuwait Bilateral Investment Treaty (**‘BIT’**), 1985.<sup>14</sup>

The use of LIBOR was the highest between 1995 and 2003 and then it radically decreased. At its peak, thirty-one investment treaties referred explicitly to LIBOR in 1996 and this number reduced to zero in 2020.<sup>15</sup> In 2020, the use of LIBOR in investment treaties virtually became NIL. The below graphic depicts this.<sup>16</sup>

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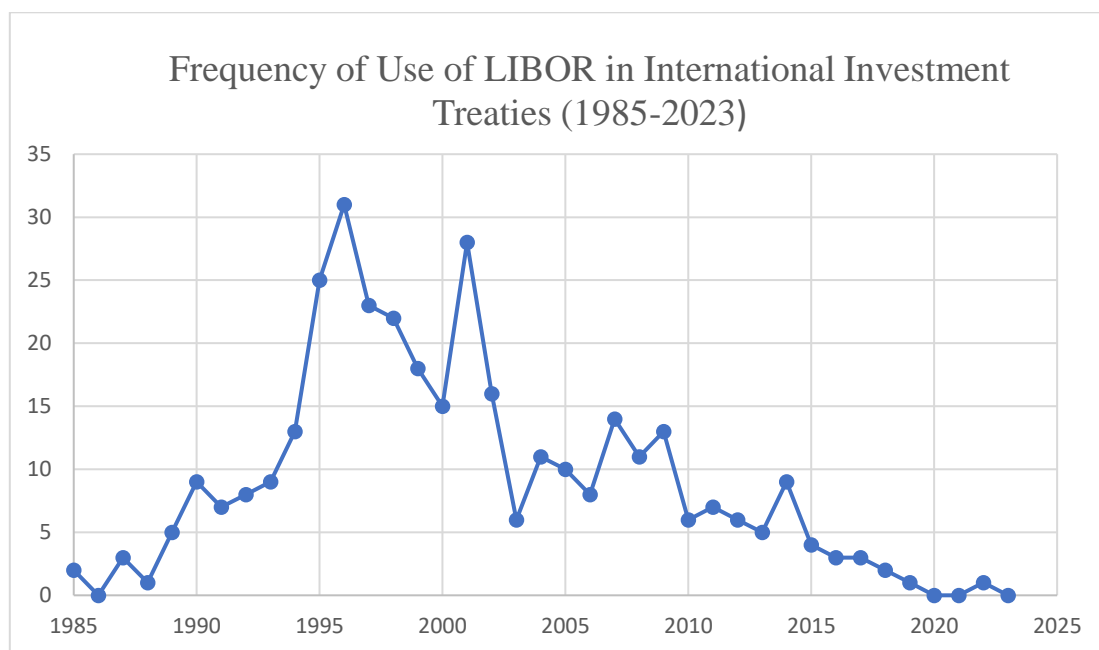
<sup>12</sup> Model Production Sharing Contract for the Onshore of Timor-Leste (2021), <https://resourcecontracts.org/contract/ocds-591adf-6678047627/download/pdf> (accessed 1 March 2024).

<sup>13</sup> The list of treaties referencing LIBOR between 1985 to 2022 is available at <https://docs.google.com/spreadsheets/d/1AFp0lpocQR6WaxaDhfHHE4juCaeLPfnG/edit?usp=sharing&oid=102151753336716892926&rtpof=true&sd=true>

<sup>14</sup> Available at <https://edit.wti.org/document/show/68ada9a9-a0b2-4e36-843d-05ad91b84df9?textBlockId=955c8ee5-7437-421f-8cf9-c24d2595e6fe&page=1> (accessed 26 March 2024).

<sup>15</sup> Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6443/download> (accessed 25 June 2024)

<sup>16</sup> The graphic is derived from data obtained from treaties available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6443/download> (accessed 25 June 2024). Treaties referencing LIBOR between 1985 to 2022 which is the basis of the graph is available at



Surprisingly, LIBOR finds explicit mention in the Hungary Oman BIT, 2022<sup>17</sup>, despite widespread news about the cessation of LIBOR.<sup>18</sup> Article 6 thereof deals with expropriation. Article 6(3), which concerns interest rate, reads:

*“The compensation shall include interest calculated on 6 (six) months LIBOR basis from the date of expropriation to the date of actual payment and shall be effectively realisable and freely transferable in a Freely Convertible Currency at the market exchange rate prevailing on the time of transfer.”*

The BIT has been signed in February 2022 and employs LIBOR despite clear indications right from 2019 that LIBOR would cease to be published.<sup>19</sup> At least two treaties used the LIBOR in 2018<sup>20</sup> and one treaty used it in 2019.<sup>21</sup>

<https://docs.google.com/spreadsheets/d/1AFp0lpocQR6WaxaDhfHHE4juCaeLPfnG/edit?usp=sharing&oid=102151753336716892926&rtpof=true&sd=true>

<sup>17</sup> Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6443/download> (accessed 26 March 2024).

<sup>18</sup> See, Part III of this paper.

<sup>19</sup> Available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/6443/download> (accessed 25 June 2024).

<sup>20</sup> Belarus Turkey BIT, 2018, Article 6(4) and Qatar Togo BIT, 2018, Article 5(2).

<sup>21</sup> Belarus Hungary BIT, 2019, Articles 2 and 6(1).

Insofar as the Indian practice in investment treaties is concerned, seven BITs explicitly refer to LIBOR as the interest rate, as the below table shows:

<b>S. No.</b>	<b>BIT</b>	<b>Date of signature</b>	<b>Date of Entry into Force</b>	<b>Current Status</b>
1	India Italy BIT, 1995	23.11.1995	26.03.1998	Terminated
2	India Qatar BIT, 1999	07.04.1999	15.12.1999	Terminated
3	India Kuwait BIT, 2001	27.11.2001	28.06.2003	Terminated
4	Belarus India BIT, 2002	27.11.2002	23.11.2003	Terminated
5	India North Macedonia BIT, 2008	17.03.2008	17.10.2008	Terminated
6	India Lithuania BIT, 2011	31.03.2011	01.12.2011	In force
7	India United Arab Emirates BIT, 2013	12.12.2013	21.08.2014	In force

Indian treaty practice suggests that India has favoured either a six-month LIBOR<sup>22</sup> or has merely chosen LIBOR without elaborating on the applicable loan tenor (i.e., one month, three month, six months, or other tenor).<sup>23</sup> Lack of specific choice of the loan tenor may lead to uncertainties on the specific rate applicable. This would entail that the parties lead evidence on the appropriate loan tenor and for the tribunal to decide on the same.

Arbitral tribunals under investment treaties have commonly used LIBOR + 2% while awarding interest.<sup>24</sup> Even in the absence of explicit mention in the investment treaties, arbitral tribunals in investor-State arbitrations have awarded interest on damages indexed at LIBOR rates.<sup>25</sup>

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<sup>22</sup> India Italy BIT, 1995, Article 5(5); India Qatar BIT, 1999, Article 5(2); India Kuwait BIT, 2001, Article 7(1)(b); India UAE BIT, 2013, Article 7(1)(b).

<sup>23</sup> Belarus India BIT, 2002, Article 5(1); India North Macedonia BIT, 2008, Article 5(1); India Lithuania BIT, 2011, Article 5(1).

<sup>24</sup> See, for instance, Award in Bacilio Amorrortu v. Republic of Peru, PCA Case No. 2020-11 (5 July 2022), Para 695, <https://www.italaw.com/sites/default/files/case-documents/italaw170969.pdf> (accessed 8 March 2024).

<sup>25</sup> See, for instance, Award in Rusoro Mining Limited v. The Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/12/5 (22 August 2016), Para 837, holding: “LIBOR is an international commercial benchmark: the interest rate at which banks can borrow funds from other banks in the London interbank market. LIBOR is published daily for different maturities and currencies and is universally accepted as a valid reference for the calculation of variable interest rates”.

### III. LIBOR & ITS RETIREMENT

Since 2009, regulators across the world, including the UK Financial Services Authority, and regulators in USA, Canada, Japan, Switzerland, and the European Union, began investigating possible manipulation of LIBOR rates.<sup>26</sup>

On 27 July 2012, The Financial Times published an op-ed piece by Douglas Keenan about LIBOR manipulation since 1991.<sup>27</sup> According to the op-ed, the bankers were understating or overstating the rates and profiting from trades. The op-ed stated that the LIBOR rates were not determined by the three month actual market rates but were determined artificially by asking the banks about the rates through a poll and eliminating the highest and the lowest rates and thereafter averaging out the rates. Keenan argued that although the difference between the actual and the reported rate was miniscule, given that LIBOR affected contracts linked to trillions of dollars, the total amount impacted was huge. The op-ed piece also disclosed that an investigation was being carried out in parallel by the House of Commons Treasury committee. This revelation sparked investigations and eventually led to the transfer of LIBOR administration to the IBA in 2014.<sup>28</sup>

This was not the first time the credibility of the LIBOR was questioned.<sup>29</sup> For instance, in a seminal paper titled “Does the LIBOR Reflect Banks’ Borrowing Costs”, Connan Snider and Thomas Youle argued that there was evidence that banks had large portfolio exposures to the LIBOR and had earned profits owing to LIBOR’s quick decrease in rate and conjectured that the portfolio exposures could have been the source of misreporting incentives.<sup>30</sup> The manipulation, it was alleged, was done to the tune of billions of dollars.

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<sup>26</sup> *Wheatley Review Report*, p. 5.

<sup>27</sup> Douglas Keenan, My Thwarted Attempt to Tell of Libor Shenanigans, Financial Times (27 July 2012), <https://www.ft.com/content/dc5f49c2-d67b-11e1-ba60-00144feabdc0> (accessed 21 May 2024).

<sup>28</sup> David Hou & David Skeie, LIBOR: Origins, Economics, Crisis, Scandal, and Reform, Federal Reserve Bank of New York Staff Reports, no. 667 (March 2014), [https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr667.pdf](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr667.pdf) (accessed 25 June 2024).

<sup>29</sup> See, for instance, Rosa M. Abrantes-Metz & Sumanth Addanki, Is the Market Being Fooled? An Error-Based Screen for Manipulation (August 2007), <https://ssrn.com/abstract=1007348>; Rosa M. Abrantes-Metz *et al*, Libor Manipulation? 36 *Journal of Banking & Finance* 136- 150 (2012).

<sup>30</sup> Snider, Connan Andrew and Youle, Thomas, Does the LIBOR Reflect Banks' Borrowing Costs? (April 2, 2010), <https://ssrn.com/abstract=1569603> (accessed 27 February 2024)

In 2012, the UK Financial Services Authority imposed a penalty of about GBP 59 million on Barclays Bank Plc. for misconduct relating to LIBOR and the Euro Interbank Offered Rate (EURIBOR).<sup>31</sup> The House of Commons constituted a Treasury Committee to inquire into LIBOR manipulation. A Report was submitted in 2012 by the Committee. The Report noted that LIBOR and EURIBOR were manipulated between 2005 and 2008 by Barclays Bank Plc. It noted that the bank made US Dollar LIBOR and EURIBOR submissions after considering the requests made by its interest rates derivative traders.

The impact of the manipulation was so much that the Report concurred with the observations of the UK Financial Services Authority that the manipulation "*created the risk that the integrity of LIBOR and EURIBOR would be called into question and that confidence in or the stability of the UK financial system would be threatened*". The Report concluded by noting that these manipulations reduced trust and confidence in the markets.

Subsequent news reports and investigations led to transfer of administration from the British Bankers' Association to the Intercontinental Exchange (ICE) Benchmark Administration (IBA) in 2014. Fines were imposed on several banks which were involved in the manipulation. LIBOR was upgraded with new technology and surveillance tools to ensure credibility.<sup>32</sup>

Notwithstanding the investigations and the reforms undertaken, the credibility of the LIBOR took a severe hit. In June 2017, the UKFCA published a consultation paper titled "Powers in relation to LIBOR contributions"<sup>33</sup> wherein it stated:

*"A key consideration in whether and for how long the continuation of LIBOR is essential for market integrity will be the availability of credible alternative interest rate benchmarks, particularly the risk-free rates on which work is under way in relation to many currencies in response to the recommendations in the Financial Stability Board's report".<sup>34</sup>*

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<sup>31</sup> Report of the House of Commons Treasury Committee: Fixing LIBOR: Some Preliminary Findings (9 August 2012), <https://publications.parliament.uk/pa/cm201213/cmselect/cmtreasy/481/48102.htm> (accessed 29 February 2024).

<sup>32</sup> ICE Benchmark Administration, Roadmap for ICE LIBOR (18 March 2016), [https://www.theice.com/publicdocs/ICE\\_LIBOR\\_Roadmap0316.pdf](https://www.theice.com/publicdocs/ICE_LIBOR_Roadmap0316.pdf) (accessed 6 March 2024).

<sup>33</sup> Financial Conduct Authority, Consultation Paper CP17/15: Powers in Relation to LIBOR Contributions (June 2017), <https://www.fca.org.uk/publication/consultation/cp17-15.pdf> (accessed 6 March 2024).

<sup>34</sup> *Ibid*, p. 6.



On 27 July 2017, nearly five years after the Financial Times op-ed, the UKFCA stated that it was not sustainable to prolong the LIBOR beyond 2021 for the reason that the banks were not lending to each other as much as they had previously and that there were not enough transactions in certain currencies so as to make a good estimate of the rates.<sup>35</sup> Thus began the steps to retire the LIBOR.

At that time, there were concerns as to the availability of alternative interest rates.<sup>36</sup> In April 2017, a working group, known as the Risk-Free Rate Working Group in the UK selected SONIA (Sterling Over Night Index Average) as the replacement for the LIBOR.<sup>37</sup> In the US, SOFR (Secured Overnight Financial Rate) is being used. There have been many alternatives proposed but all these options, including SONIA, are specific currency based. Further, the SONIA is an “overnight rate” while LIBOR used to publish a three-month rate as well. Both were not comparable. The banks agreed to continue to contribute to LIBOR till the end of 2021 for the market to transition from LIBOR to alternative rates.<sup>38</sup>

On 5 March 2021, the FCA announced the cessation of the thirty-five LIBOR settings which were then being published by the IBA.<sup>39</sup> About twenty six LIBOR settings were to be ceased by the end of 2021 and certain US dollars LIBOR settings were to cease by 30 June 2023.<sup>40</sup> The FCA stated that LIBOR rates which were to be continued till the specified periods were “synthetic” in that they did not represent the underlying market and were continued to be published “to assist legacy contract holders”.<sup>41</sup>

The publication of “synthetic” LIBOR rates was pursuant to the exercise of the power to require continued publication of those rates, in accordance with Article 21(3) of the Benchmarks

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<sup>35</sup> Andrew Bailey, The Future of LIBOR (27 July 2017), <https://www.fca.org.uk/news/speeches/the-future-of-libor> (accessed 6 March 2024).

<sup>36</sup> Andrew Bailey, The Future of LIBOR (27 July 2017), <https://www.fca.org.uk/news/speeches/the-future-of-libor> (accessed 6 March 2024); Bank of England, Record of the Financial Policy Committee Meeting on 20 September 2017 (3 October 2017), Para 91, <https://www.bankofengland.co.uk/-/media/boe/files/record/2017/financial-policy-committee-meeting-september-2017> (accessed 6 March 2024).

<sup>37</sup> Bank of England, SONIA Recommended as the Sterling near Risk-Free Interest Rate Benchmark (28 April 2017), <https://www.bankofengland.co.uk/news/2017/april/sonia-recommended-as-the-sterling-near-risk-free-interest-rate-benchmark>

<sup>38</sup> Financial Conduct Authority, About LIBOR Transition (2 September 2019), <https://www.fca.org.uk/markets/libor-transition> (accessed 6 March 2024).

<sup>39</sup> Financial Conduct Authority, FCA Announcement on Future Cessation and Loss of Representativeness of the LIBOR Benchmarks (5 March 2021), <https://www.fca.org.uk/publication/documents/future-cessation-loss-representativeness-libor-benchmarks.pdf> (accessed 6 March 2024).

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, Para 13.

Regulation, and as per the decision of the FCA dated 10 September 2021.<sup>42</sup> In April 2023, the UKFCA decided to continue the publication of “synthetic” US LIBOR rates till 30 September 2024.<sup>43</sup>

In India, in July 2021, the Reserve Bank of India issued an advisory to banks, financial institutions and Non Banking Financial Companies (NBFCs) to transition from LIBOR by ceasing to refer LIBOR in contracts, except for managing risks arising out of LIBOR contracts, to cease adoption of the Mumbai Interbank Forward Outright Rate (MIFOR), which references the LIBOR, and to refer to fallback clauses adopted by various institutions such as the International Swaps and Derivatives Association, Indian Banks’ Association, etc.<sup>44</sup>

The Reserve Bank of India issued another circular on 12 May 2023 advising banks and financial institutions “*to ensure that no new transaction undertaken by them or their customers rely on or are priced using the US\$ LIBOR or the MIFOR*” and to develop systems and processes to transition away from LIBOR by 1 July 2023.<sup>45</sup>

Associations/ organisations which publish standard form contracts linking the interest to LIBOR and related LIBOR rates have also published amendments or revisions to such forms incorporating suitable alternatives.<sup>46</sup>

Thus, given the scandals and the loss of confidence of the business community and the financial regulators on LIBOR and its related publications, the commercial world has moved away from LIBOR.

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<sup>42</sup> Article 21(3), Benchmarks Regulation – Notice Of First Decision (10 September 2021), <https://www.fca.org.uk/publication/libor-notices/article-21-3-benchmarks-regulation-first-decision-notice.pdf> (accessed 6 March 2024).

<sup>43</sup> Financial Conduct Authority, FCA Announces Decision on Synthetic US dollar LIBOR (3 April 2023), <https://www.fca.org.uk/news/news-stories/fca-announces-decision-synthetic-us-dollar-libor> (accessed 6 March 2024).

<sup>44</sup> Reserve Bank of India, Roadmap for LIBOR Transition (8 July 2021), <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=12128&Mode=0> (accessed 6 March 2024).

<sup>45</sup> Reserve Bank of India, LIBOR Transition (12 May 2023), [https://m.rbi.org.in/Scripts/BS\\_CircularIndexDisplay.aspx?Id=12503](https://m.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx?Id=12503) (accessed 6 March 2024).

<sup>46</sup> See, for instance, the ISDA 2020 IBOR Fallbacks Protocol of the International Swaps and Derivatives Association, Inc., <https://assets.isda.org/media/3062e7b4/08268161-pdf/> (accessed 3 April 2024); the Model Joint Operating Agreement (2023) of the Association of International Energy Negotiators uses SOFR instead of the LIBOR. See, Bracewell, The 2023 AIEN Model Form JOA Placing ESG Issues at the Heart of Oil and Gas Operations (3 March 2023), <https://www.jdsupra.com/legalnews/the-2023-aien-model-form-joa-placing-7785304/> (accessed 4 April 2024).

#### IV. COMMERCIAL & INVESTMENT DISPUTES IN THE WAKE OF LIBOR RETIREMENT

Unfortunately, parties to agreements, especially the long term ones, which referred to LIBOR have been unable to modify them by mutual agreement to provide alternatives to LIBOR. Consequently, the issue relating to applicable interest rate remains a contested issue in disputes emanating out of LIBOR indexed agreements. This part analyses various decisions of courts/ arbitral tribunals deciding on the claim for interest rate based on LIBOR in international disputes.

Arbitral tribunals in investor-State arbitrations commonly award interest based on LIBOR rates.<sup>47</sup> Interest adds to a significant portion of monetary awards. Since 2000, interest has added around 50% of money to damages awarded in non-ICSID arbitral awards.<sup>48</sup> As Chapter II noted, given the prevalence of investment treaties using LIBOR, this is not surprising.

Interest has been regarded as an “under-pleaded” area of law.<sup>49</sup> Except for a mention or a claim on interest rate in the pleadings, parties do not specifically devote attention in their pleadings to the claim on interest or the interest rate. Owing to the retirement of LIBOR and the general impact of an interest claim on damages, it would do well for the parties to devote specific attention to interest claims.

#### Prominent Awards in Investor-State Arbitrations regarding LIBOR Cessation

This portion of the paper analyses prominent arbitral awards in investor-State arbitration that determine the applicable interest rate in the wake of LIBOR cessation.

#### Deutsche Telekom v. India

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<sup>47</sup> PriceWaterCoopers, International Arbitration Damages Study (2023), p. 10, <https://www.pwc.co.uk/forensic-services/assets/international-arbitration-damages-study.pdf> (accessed 4 March 2024); Tiago Duarte-Silva and Swati Kanoria, The Importance of Interest in Arbitral Awards (February 2022), p. 1, [https://media.crai.com/wp-content/uploads/2022/02/09124409/CRA\\_IA\\_Insights-the-importance-of-interest-in-arbitral-awards.pdf](https://media.crai.com/wp-content/uploads/2022/02/09124409/CRA_IA_Insights-the-importance-of-interest-in-arbitral-awards.pdf) (accessed 4 March 2024)

<sup>48</sup> Tiago Duarte-Silva and Swati Kanoria, The Importance of Interest in Arbitral Awards (February 2022), p. 1, [https://media.crai.com/wp-content/uploads/2022/02/09124409/CRA\\_IA\\_Insights-the-importance-of-interest-in-arbitral-awards.pdf](https://media.crai.com/wp-content/uploads/2022/02/09124409/CRA_IA_Insights-the-importance-of-interest-in-arbitral-awards.pdf) (accessed 4 March 2024)

<sup>49</sup> Global Arbitration Review, An Unexpected Interest in Interest (12 May 2015), <https://globalarbitrationreview.com/article/unexpected-interest-in-interest> (accessed 7 December 2023).

In *Deutsche Telekom v. India* (PCA Case No. 2014-10), arbitration was invoked by Deutsche Telekom against the Republic of India under the Germany India BIT, 1995. The Claimant, in its pleadings in 2018, sought damages and claimed interest at LIBOR + 4% compounded annually. However, the Claimant revised the claim for interest in its post-hearing brief submitted in June 2019. It is worth replicating the relief prayed for regarding interest in the post-hearing brief:

*“The Claimant relies on its Request for Relief as set out in its Reply on Quantum, subject to amending paragraph (b) such that interest is calculated at the rate of LIBOR (or any other comparable rate in case LIBOR should be discontinued in the future) plus 4% in line with the suggestion in paragraph 228 above.”*

Thus, the Claimant at the end of the arbitral proceeding sought to revise the claim for interest by seeking calculation of interest at a “comparable rate” in case LIBOR discontinued.

The tribunal passed the award in May 2020 and awarded damages in favour of the Claimant. It also allowed the claim for interest at “6-month USD LIBOR (or any other comparable rate in case LIBOR were to be discontinued in the future) plus 2% p.a., compounded semi-annually, starting to run 30 days after the date of this award until payment in full”.<sup>50</sup> Thus, while the tribunal allowed the claim for interest at LIBOR, it reduced the premium over LIBOR from 4% to 2%.

The tribunal contemplated that EURIBOR was a comparable rate.<sup>51</sup> The Award clearly recognised the possibility of LIBOR being discontinued and awarded a rate comparable to the applicable LIBOR rate in case it was discontinued. However, in the operative portion of the Award, it did not specify the comparable rate.<sup>52</sup>

### **Makae Europe v. Saudi Arabia**

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<sup>50</sup> Final Award in *Deutsche Telekom AG v. The Republic of India* (27 May 2020), Paras 357(a) and (c), <https://www.italaw.com/sites/default/files/case-documents/italaw16518.pdf> (accessed 27 February 2024) (“*Deutsche Telekom v. India*”).

<sup>51</sup> *Deutsche Telekom v. India*, Para 316.

<sup>52</sup> *Deutsche Telekom v. India*, Para 357.

In *Makae Europe SARL v. Kingdom of Saudi Arabia* (ICSID Case No. ARB/17/42)<sup>53</sup>, both parties sought interest at six-month LIBOR + 2% interest compounded semi-annually.<sup>54</sup> The Claimant additionally proposed that the tribunal should apply a fixed interest rate of 2.19%, which was the LIBOR rate as on the notional date - 11 May 2021, plus 2%.<sup>55</sup>

The Tribunal partially accepted the suggestion of the Claimant and awarded a fixed interest of 2.16% compounded on a semi-annual basis instead of fixing an alternative reference rate.<sup>56</sup>

### **Venezuela US S.R.L. v. Venezuela**

In the Quantum Award in *Venezuela US S.R.L. v. The Bolivarian Republic of Venezuela* (PCA Case No. 2013-34)<sup>57</sup>, the Tribunal noted that the Claimant claimed USD LIBOR + 10% as the applicable interest rate but awarded twelve-month USD LIBOR + 4% compounded annually.<sup>58</sup>

The Tribunal also held that if the twelve-month USD LIBOR became inoperative for any reason, interest was to be calculated on any amount outstanding at a rate “*generally considered equivalent to twelve-month USD LIBOR plus a margin of four percent (4%) with annual compounding*”.<sup>59</sup>

### **JSC Tashkent Mechanical Plant v. Kyrgyz Republic**

In *JSC Tashkent Mechanical Plant & Others v. Kyrgyz Republic* (ICSID Case No. ARB(AF)/16/4)<sup>60</sup>, the BIT provided for LIBOR<sup>61</sup> and the Claimant recognised that the normal practice was to award LIBOR plus an appropriate margin but specifically requested the

<sup>53</sup> Award in *Makae Europe SARL v. Kingdom of Saudi Arabia*, ICSID Case No. ARB/17/42 (30 August 2021), <https://www.italaw.com/sites/default/files/case-documents/italaw170019.pdf> (accessed 5 March 2024) (‘*Makae Europe v. Saudi Arabia*’).

<sup>54</sup> *Makae Europe v. Saudi Arabia*, Para 201.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, Paras 202 and 203(d).

<sup>57</sup> Final Award (Quantum) in *Venezuela US S.R.L. v. The Bolivarian Republic of Venezuela*, PCA Case No. 2013-34 (4 November 2022), <https://www.italaw.com/sites/default/files/case-documents/180629.pdf> (accessed 5 March 2024) (‘*Venezuela US v. Venezuela*’).

<sup>58</sup> *Venezuela US v. Venezuela*, 107, Para 3.

<sup>59</sup> *Ibid.*, Para 107.4.

<sup>60</sup> Award in *JSC Tashkent Mechanical Plant & Others v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/16/4 (17 May 2023), <https://www.italaw.com/sites/default/files/case-documents/180245.pdf> (accessed 5 March 2024) (‘*JSC Tashkent v. Kyrgyz Republic*’).

<sup>61</sup> *JSC Tashkent v. Kyrgyz Republic*, Para 785.

Tribunal to award the 10-year US Treasury rate as the applicable interest rate index since LIBOR was to be phased out.<sup>62</sup>

The Tribunal found that LIBOR + 4% compounded annually was the normally used interest rate index for awarding interest by other investment tribunals and since the BIT explicitly mentioned LIBOR, it considered interest at LIBOR + 4% compounded annually as reasonable.<sup>63</sup>

The tribunal also took note of the fact that LIBOR was to cease and therefore considered it “prudent” to provide clarity on the award of interest if LIBOR ceased. Instead of replacing LIBOR as the applicable interest rate, as the Claimant had desired, the Tribunal went on to hold that when LIBOR ceased, the applicable interest rate was to be 10-year US Treasury rate + 4% compounded annually.<sup>64</sup> The Tribunal partially accepted the Claimant’s submission as regards the interest rate being 10-year US Treasury rate on the ground that the Respondent did not object to the Claimant’s submission in this regard.

It is important that in case one of the parties proposes an interest rate that is alternative to LIBOR, the other party ought to address that argument, failing which, it is possible that the tribunal/ court could decide in favour of the former owing to default of the latter in addressing the proposed interest rate.

### **JSC DTEK Krymenergo v. Russian Federation**

The Arbitral Award dated 1 November 2023 in the investor-State dispute between *JSC DTEK Krymenergo v Russian Federation (PCA Case No. 2018-41)*<sup>65</sup> under the Russia Ukraine BIT, 1998 is a recent attempt at comprehensively addressing the issue of LIBOR retirement. This is a case where the BIT specifically provided for LIBOR as the applicable interest rate for compensation owing to expropriation. Article 5(2) of the Treaty stated:

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<sup>62</sup> *Ibid*, Para 668.

<sup>63</sup> *Ibid*, Para 785.

<sup>64</sup> *Ibid*, Para 786.

<sup>65</sup> Award dated 1 November 2023 in *JSC DTEK Krymenergo v Russia*, PCA Case No. 2018-41, <https://www.italaw.com/sites/default/files/case-documents/180426.pdf> (accessed November 22, 2023) (‘**JSC DTEK v. Russia**’).

*“2. The amount of such compensation shall correspond to the market value of the expropriated investments immediately before the date of expropriation or before the fact of expropriation became officially known, while compensation shall be paid without delay, including interest accruable from the date of expropriation until the date of payment, **at the interest rate for three-month deposits in US dollars on the London Interbank Market (LIBOR) plus 1%, and shall be effectively disposable and freely transferable**”.* (emphasis added).

The Claimant in the arbitration contended that it should be awarded interest at the rate related to yield to maturity on US dollars denominated sovereign bonds of Russia.<sup>66</sup> On the other hand, the Respondent (Russian Federation) argued for LIBOR + 1% as provided in Article 5(2).<sup>67</sup>

The arbitral award noted the lack of assistance from Counsel of both parties on the issue of cessation of LIBOR rates.<sup>68</sup> Despite the disagreement, neither party to the dispute assisted the arbitral tribunal in dealing with the cessation of publication of LIBOR rates and the tribunal noted:

*“972. The Tribunal notes that, on 30 June 2023, the LIBOR rate for three-month deposits ceased to exist. Despite being aware of this situation and having ample opportunity to submit arguments on this point, the Parties did not do so.”*<sup>69</sup>

Nevertheless, the Tribunal decided that the applicable interest rate was the LIBOR rate as specified in Article 5(2) of the Agreement.<sup>70</sup> The tribunal also noted that until then LIBOR was considered as the universally accepted reference rate for calculating the applicable interest<sup>71</sup> and that the LIBOR ceased to exist.<sup>72</sup>

Despite the lack of assistance, the tribunal directed the parties to reach an agreement on the alternative interest rate within forty five days from the date of the award and held that in case parties were unable to reach an agreement, the applicable interest rate index was to be the

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<sup>66</sup> JSC DTEK v. Russia, ¶ 953

<sup>67</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*, ¶ 972.

<sup>70</sup> *Ibid.*, ¶ 967.

<sup>71</sup> *Ibid.*, ¶ 969.

<sup>72</sup> *Ibid.*, ¶ 972.

Secured Overnight Financing Rate ('SOFR').<sup>73</sup> The Tribunal chose SOFR in view of the recommendations of the Federal Reserve Bank of New York that SOFR was the alternative to LIBOR.<sup>74</sup> Since there were multiple SOFR rates published, the tribunal also offered clarity on which of the SOFR rates was to be taken in the following words: “*Since the applicable LIBOR rate is the three-month rate, the SOFR replacement, if applicable, should be the 90-day SOFR average rate published by the Federal Reserve Bank of New York.*”<sup>75</sup>

Accordingly, the tribunal decided that the LIBOR rate for three month deposits in US\$ or the equivalent SOFR was the applicable interest rate index.<sup>76</sup>

Thus, many arbitral awards have moved away from LIBOR to alternatives such as EURIBOR<sup>77</sup>, fixed interest rate<sup>78</sup>, SOFR<sup>79</sup>, USD Prime rate<sup>80</sup>, 10-year US treasury rates<sup>81</sup>, Wall Street Journal Prime Rate<sup>82</sup>, equivalent bank rates of specific jurisdictions such as the Federal

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<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.*, citing Federal Reserve Bank of New York, Press Release: ARRC Formally Recommends Term SOFR (29 July 2021), [https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC\\_Press\\_Release\\_Term\\_SOFR.pdf](https://www.newyorkfed.org/medialibrary/Microsites/arrc/files/2021/ARRC_Press_Release_Term_SOFR.pdf) (accessed 5 March 2024).

<sup>75</sup> JSC v. Russia, ¶ 973.

<sup>76</sup> For a detailed account of calculation of the SOFR, see, Thomas Heidorn & Rebecca Meier, US Dollar Swaps after LIBOR, Frankfurt School - Working Paper Series, No. 235, Frankfurt School of Finance & Management (2024), <https://www.econstor.eu/bitstream/10419/283009/1/1880608936.pdf> (accessed 27 March 2024), p. 12-15.

<sup>77</sup> See, for instance, Final Award in Antonio del Valle Ruiz v. Spain, PCA Case No. 2019-17 (13 March 2023), Paras 800(f) and (g), <https://www.italaw.com/sites/default/files/case-documents/italaw171384.pdf> (accessed 6 March 2024); Award in Sevilla Beheer B.V. and others v. Kingdom of Spain, ICSID Case No. ARB/16/27 (22 May 2023), Para 222(ii), <https://www.italaw.com/sites/default/files/case-documents/18020.pdf> (accessed 5 March 2024)

<sup>78</sup> See, for instance, Makae Europe v. Saudi Arabia, Para 201; Award in Infracapital F1 v. Spain, ICSID Case No. ARB/16/18 (2 May 2023), Paras 219 (2) and (5), <https://www.italaw.com/sites/default/files/case-documents/italaw171392.pdf> (accessed 5 March 2024).

<sup>79</sup> See, for instance, Award in CC/Devas (Mauritius) Ltd., Devas Employees Mauritius Private Limited and Telcom Devas Mauritius Limited v. Republic of India, PCA Case No. 2013-09 (13 October 2020), Paras 663(d) and (h) <https://www.italaw.com/sites/default/files/case-documents/italaw170005.pdf> (accessed 5 March 2024); Award in Niko Resources (Bangladesh) Ltd. v. Bangladesh Petroleum Exploration & Production Company Limited and Bangladesh Oil Gas and Mineral Corporation, ICSID Case No. ARB/10/18 (24 September 2021), Para 375(8), <https://www.italaw.com/sites/default/files/case-documents/180447.pdf> (accessed 5 March 2024); Award in Marko Mihaljevic v. Republic of Croatia, ICSID Case No. ARB/19/35 (19 May 2023), Para 152(c), <https://www.italaw.com/sites/default/files/case-documents/18029.pdf> (accessed 5 March 2024)

<sup>80</sup> See, for instance, Award in Nachingwea U.K. Limited (UK) v. Tanzania, ICSID Case No. ARB/20/38 (14 July 2023), Para 413(4), <https://www.italaw.com/sites/default/files/case-documents/180253.pdf> (accessed 5 March 2024).

<sup>81</sup> See, for instance, JSC Tashkent v. Kyrgyz Republic, Para 786.

<sup>82</sup> See, for instance, Award in Bridgestone Licensing v. Panama, ICSID Case No. ARB/16/34 (14 August 2020), Para 590, <https://www.italaw.com/sites/default/files/case-documents/italaw11771b.pdf> (accessed 6 March 2024).



Reserve Bank of New York<sup>83</sup>, Central Bank of Ecuador<sup>84</sup>, Emirates Inter Bank Offer Rate<sup>85</sup>, etc.<sup>86</sup>

In those arbitral awards, tribunals do not merely state in general terms that an equivalent of LIBOR would apply<sup>87</sup> but specify the index that would be applicable in place of LIBOR. There have been examples of a few cases where synthetic LIBOR rates have been applied, with or without premium added.<sup>88</sup> But such decisions are rare.

### Position under English Law

The English Commercial Court laid down a set of default rules in dealing with cessation of US LIBOR rates. In *Lonestar Communications Corporation LLC v. Daniel Kaye*<sup>89</sup> (“*Lone Star*”), the Commercial Court put to rest the debate between whether LIBOR or US Prime Rate was the appropriate interest rate for US\$ awards.

Prior to the aforesaid Commercial Court’s decision in March 2023, there was divergence in the views of the English Court as to whether LIBOR or US Prime Rate was to be used for interest on US\$. While some decisions concluded that US Prime Rate was the appropriate rate<sup>90</sup>, some

<sup>83</sup> See, for instance, Award in *Garcia Armas v. Bolivarian Republic of Venezuela*, PCA Case No. 2013-03 (26 April 2019), Para 572, <https://www.italaw.com/sites/default/files/case-documents/italaw11124.pdf> (accessed 5 March 2024);

<sup>84</sup> See, for instance, Award in *Inter Rao V. CELEC (ECUADOR)*, CAM Caso No. 3568-18 (29 May 2023), <https://www.italaw.com/sites/default/files/case-documents/180303.pdf> (accessed 5 March 2024).

<sup>85</sup> Partial Award on Remedies in *Crescent Petroleum v. Nigeria* (27 September 2021), Para 887.D, <https://www.italaw.com/sites/default/files/case-documents/italaw170264.pdf> (accessed 7 March 2024).

<sup>86</sup> For an overview of key interest rate indices in various jurisdictions, see, Thomas Heidorn & Rebecca Meier, *US Dollar Swaps after LIBOR*, Frankfurt School - Working Paper Series, No. 235, Frankfurt School of Finance & Management (2024), <https://www.econstor.eu/bitstream/10419/283009/1/1880608936.pdf> (accessed 27 March 2024), p. 16.

<sup>87</sup> Final Award in *Zhongshan Fucheng v. Nigeria* (26 March 2021), Para 198(c)(vi), <https://www.italaw.com/sites/default/files/case-documents/italaw170108.pdf> (accessed 7 March 2024); *Venezuela US v. Venezuela*, Para 107.4.

<sup>88</sup> See, for instance, Award in *PACC Offshore Services v. United Mexican States*, ICSID Case No. UNCT/18/5 (9 May 2022), Paras 54- 57 and 60(c), <https://www.italaw.com/sites/default/files/case-documents/italaw170564.pdf> (accessed 8 March 2024); Final Award on Costs in *Bacilio Amorrortu v. Republic of Peru*, PCA Case No. 2020-11 (25 October 2022), Para 46(ii), <https://www.italaw.com/sites/default/files/case-documents/italaw170804.pdf> (accessed 8 March 2024).

<sup>89</sup> [2023] EWHC 732 (Comm) (30 March 2023).

<sup>90</sup> See, for instance, *Kuwait Airways Corp v Kuwait Insurance Co (No. 3)*, [2000] 1 All ER (Comm) 973, 992; *Mamidoil-Jetoil v. Okta Crude Oil Refinery*, [2002] EWHC 2462 (Comm), Para 16; *Certain Underwriters at Lloyd’s London v. Syria*, [2018] EWHC 385 (Comm), Para 82; *Pisante v. Logothetis*, [2022] EWHC 2575 (Comm), Para 74; *Phones 4U Ltd v EE Ltd & Ors (Re Interest and Permission to Appeal)* [2023] EWHC 3378 (Ch) (12 January 2024), Para 5.

ruled in favour of LIBOR.<sup>91</sup> This issue was finally settled in *Lone Star*, where the English Commercial Court laid down default rules to deal with the situation:

- **Default Rule 1:** The default interest rate for awards in US Dollars by the English Commercial Court were to be based on US Prime, irrespective of:
  - the place of operations of the Claimant; or
  - the nature of the claim, maritime or otherwise.
  
- **Default Rule 2:** No uplift over US Prime would be the default rule. However, even in the absence of evidence, in some cases, it would be obvious that the claimant would have to pay a higher rate to borrow US dollars as compared to a bank's most creditworthy customers. In such cases, courts could order US Prime with uplift of 1% or 2% for certain types of claimants.
  
- **Default Rule 3:** Uplifts higher than 1% or 2% would require evidence to justify interest awards.

Default Rule 1 noted above (default interest rate to be based on US Prime) is subject to evidence on the use of another rate.

The default rules determined in *Lone Star* have been followed in various other decisions in the UK.<sup>92</sup>

### **Pleadings relating to Interest Rate indexed to LIBOR**

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<sup>91</sup> See, for instance, *Fiona Trust v. Privalov*, [2011] EWHC 664 (Comm), Para 15; *Vis Trading Co Ltd v. Nazarov*, [2013] EWHC 491 (QB), Paras 10- 14; *Orexim Trading Ltd v. Mahavir Port and Terminal Private Limited*, [2019] EWHC 2338; *Trafigura Maritime Logistics Pte Ltd v. Clearlake Shipping Pte Ltd*, [2022] EWHC 2625 (Comm), Para 2.

<sup>92</sup> *Rolls-Royce Holdings Plc v Goodrich Corporation* [2023] EWHC 2002 (Comm); *Delivery Hero SE v Mastercard Asia/Pacific Pte Ltd* [2023] EWHC 1827 (Comm); *Celestial Aviation Services LTD v UniCredit Bank AG, London Branch* [2023] EWHC 1071 (Comm), Paras 20-21. Some decisions of English Courts have provided for US Prime as the appropriate rate without reference to *Lone Star*. See, for instance, *Suppipat & Ors v Narongdej & Ors* [2023] EWHC 1988 (Comm) (31 July 2023).

Many litigating parties whose contracts were based on LIBOR have sought alternative reliefs in their pleadings. For instance, in *Zhongshan Fucheng v. Nigeria*<sup>93</sup>, while seeking interest with reference to LIBOR, the petition for enforcement also added in parenthesis that if the USD LIBOR and the GBP LIBOR ceased to exist, the applicable interest rate would be equivalent to USD LIBOR and GBP LIBOR, respectively, plus 2% compounded on a monthly basis, including the date of payment.<sup>94</sup>

The formulation of the relief sought on interest is quoted below:

*“vii. interest on the sums specified on all the amounts specified in subparagraphs (iv) and (v) above from the day after the Award until payment at the one month GBP LIBOR rate plus 2 per cent for each year, or proportion thereof, such interest to be compounded monthly, until and including the date of payment (and should, for any reason, GBP LIBOR cease to be operative while any amount remains outstanding, the interest due shall from that date onward be calculated on the basis of whatever rate is generally considered equivalent to GBP LIBOR plus 2%, compounded monthly, until and including the date of payment)”.*

Some petitions for enforcement of arbitral awards do not contain specific pleadings to that effect, although the award may note that the applicable interest rate after the cessation of LIBOR would be the interest rate considered equivalent to LIBOR. For instance, in *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia*<sup>95</sup>, one of the prayers was for interest rate linked to LIBOR, but the petition also footnoted the relevant portion of the arbitral award sought to be enforced which provided for an interest rate equivalent to LIBOR without mentioning such alternative explicitly.<sup>96</sup>

On the other hand, some petitions for enforcing arbitral awards do not pray for an equivalent of LIBOR. Take the case of *Oschadbank v. Russian Federation*<sup>97</sup>, where the petition did not contain any prayer seeking interest at a rate equivalent to LIBOR. This may not be good

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<sup>93</sup> Petition to Enforce Arbitral Award (2022), in *Zhongshan Fucheng v. Nigeria*, US District Court, <https://www.italaw.com/sites/default/files/case-documents/180228.pdf> (accessed November 22, 2023).

<sup>94</sup> *Ibid*, Para 5(a)(vii).

<sup>95</sup> Petition to Enforce Arbitral Award (2023), in *MOL Hungarian Oil and Gas Company Plc v. Republic of Croatia*, US District Court, <https://www.italaw.com/sites/default/files/case-documents/italaw171244.pdf> (accessed November 22, 2023).

<sup>96</sup> *Ibid*, Footnote 9.

<sup>97</sup> Petition to Confirm Foreign Arbitral Award (2023), in *Oschadbank v. Russian Federation*, <https://www.italaw.com/sites/default/files/case-documents/italaw171277.pdf> (accessed 22 November 2023).

practice, although it may be difficult for enforcement petitions to go beyond the arbitral award. This will depend on each jurisdiction and the important issue would be whether a court at enforcement stage would be willing to apply an equivalent of LIBOR even if the arbitral award does not so provide. Absent such indications in that jurisdiction, it is prudent to specifically pray for applicability of an equivalent or comparable rate to LIBOR in petitions for enforcing arbitral awards.

## V. CONCLUSION

In the last few years, many parties to international arbitration whose contracts were linked to LIBOR, have sought alternative reliefs in their pleadings or have amended/ revised the reliefs sought to address the issue of LIBOR cessation. It would be beneficial for parties in pending arbitrations/ litigations to plead or amend their pleadings to address LIBOR cessation and propose alternatives to LIBOR. Respondents who face such a situation would do well to examine if the proposed alternatives are in line with the agreed rate or applicable rate and if not, object to, or propose other alternatives. If respondents are silent, tribunals/ courts may deem such silence to be acquiescence and decide in favour of claimants.

Where parties are silent on the question, it would be beneficial for arbitral tribunals/ trial courts to invite submissions from parties on the same.<sup>98</sup> An uncertain arbitral award is not in the interest of any stakeholder of arbitration, including parties, arbitrators, arbitral institutions, supervising courts, etc. Wherever permissible, arbitral tribunals could issue advisories or adopt guidelines while dealing with LIBOR cessation. Even where arbitral awards providing for LIBOR are sought to be enforced, it would do well for parties to plead for applying an interest rate index equivalent to LIBOR, at least from the date of LIBOR cessation.

SOFR seems to have been suggested as the possible replacement to US LIBOR, but it has also been criticised as not representing commercial rates since SOFR is based on loans which are backed by US treasury bonds which are risk free, and thus does not reflect credit risk and does

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<sup>98</sup> See, for instance, Award in PACC Offshore Services v. United Mexican States, ICSID Case No. UNCT/18/5 (9 May 2022), Para 54, <https://www.italaw.com/sites/default/files/case-documents/italaw170564.pdf> (accessed 8 March 2024)

not respond to the market as LIBOR did.<sup>99</sup> The English Commercial Court has sought to apply the US Prime Rate as the default interest rate for US Dollar awards. However, US Prime Rate has been viewed as increasing borrowing loan costs if adopted as a replacement for LIBOR.<sup>100</sup>

Irrespective of the relative merits of various alternative reference rates, it is the duty of Counsel to best represent their clients and to assist the tribunal in reaching a fair award. Hence, it is not proper for Counsel to be silent on the issue of the applicable interest rate index. While many tribunals took the initiative to invite submissions from parties on LIBOR cessation<sup>101</sup>, Counsel should take proactive steps for bringing this issue to the attention of the tribunals. Failure to do so might reflect negatively on the performance of Counsel.

Depending on the subject-matter, parties could structure their pleadings on interest in such a way as to apply LIBOR until its cessation and seek the alternative rate (such as US Prime or SOFR, if in Dollars, or other equivalents) after the date of cessation. They could also pray for fixation of any other rate as alternative, in addition to the alternative suggested by the party. Suitable justification for claiming increase beyond the relevant rates is also required to be pleaded. Hence, pleadings may be drafted or amended accordingly for addressing the issue.

Contract law of each jurisdiction usually provides for default interest rates where an agreement is silent or where the term in the agreement providing for default interest rate is unenforceable. In the Indian context, for instance, Section 3(1) of the Interest Act, 1978 provides for the applicable interest rate which is the *“highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve*

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<sup>99</sup> Award in PACC Offshore Services v. United Mexican States, ICSID Case No. UNCT/18/5 (9 May 2022), Para 55, <https://www.italaw.com/sites/default/files/case-documents/italaw170564.pdf> (accessed 8 March 2024). See also, The Board of the International Organisation of Security Commissions, Statement on Alternatives to USD Libor (3 July 2023), <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD738.pdf> (accessed 3 April 2024)(expressing that caution should be employed in adopting the alternative rates, including SOFR), and Urban J. Jermann, Is SOFR better than LIBOR? (18 April 2019), <https://ssrn.com/abstract=3361942> (accessed 22 May 2024), p. 1-2.

<sup>100</sup> Nathan J Moore & Dana Bradley, LIBOR Fallback to Prime May Increase Corporate Loan Costs (26 October 2023), <https://www.wilmerhale.com/insights/client-alerts/20231026-libor-fallback-to-prime-may-increase-corporate-loan-costs> (accessed 22 May 2024)/

<sup>101</sup> See, for instance, Award in PACC Offshore Services v. United Mexican States, ICSID Case No. UNCT/18/5 (9 May 2022), Para 54, <https://www.italaw.com/sites/default/files/case-documents/italaw170564.pdf> (accessed 8 March 2024)

*Bank of India*".<sup>102</sup> This is subject to a contract providing otherwise.<sup>103</sup> Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 provides for interest at the rate specified in the Interest Act, 1978. These rules are default rules.

Section 3(1) of the (Indian) Interest Act, 1978 allows parties to contract around the default rule and provides for an agreed interest rate. The default rate provided in the Interest Act, 1978 is reflective of the market interest rate for Indian Rupees and not for US Dollars or other currency. If parties had agreed to LIBOR, making applicable the default interest rate provided in the Interest Act, 1978 or in the Arbitration and Conciliation Act, 1996 might lead to unjust results.<sup>104</sup>

Therefore, if the currency of the contract is other than Indian Rupee, the Interest Act, 1978 or the Arbitration and Conciliation Act, 1996 may not reflect the equivalent market rate. In such cases, it would do well for arbitral tribunals and courts to apply alternatives and that too from the date when LIBOR ceased.

SOFR reflects the "*cost of borrowing cash overnight collateralized by Treasury securities*".<sup>105</sup> On the other hand, US Prime Rate is the interest rate that the largest twenty five commercial banks<sup>106</sup> in the United States charge their "*most creditworthy customers for loans*".<sup>107</sup> Based on the arbitral awards and decisions discussed above, it appears that arbitral tribunals and courts in India would have to decide to adopt either the SOFR or the US Prime Rate in place of LIBOR.

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<sup>102</sup> Section 3(1) read with Section 2(b) of the Interest Act, 1978.

<sup>103</sup> Section 3(3)(a)(i) of the Interest Act, 1978.

<sup>104</sup> Section 31(7)(b) speaks of interest rate at 2% above the current rate of interest as defined in Section 2(b) of the Interest Act, 1978. "Current rate of interest" as per the Interest Act, 1978 refers to "*the highest of the maximum rates at which interest may be paid on different classes of deposits (other than those maintained in savings account or those maintained by charitable or religious institutions) by different classes of scheduled banks in accordance with the directions given or issued to banking companies generally by the Reserve Bank of India under the Banking Regulation Act, 1949 (10 of 1949).*"

<sup>105</sup> Federal Reserve Bank of New York, Secured Overnight Financing Rate Data, <https://www.newyorkfed.org/markets/reference-rates/sofr> (accessed 22 May 2024). For a detailed account of calculation of SOFR, see, Federal Reserve Bank of New York, Calculation Methodology for the TGCR, BGCR, and SOFR, [https://www.newyorkfed.org/markets/reference-rates/additional-information-about-reference-rates#tgcr\\_bgcr\\_sofr\\_calculation\\_methodology](https://www.newyorkfed.org/markets/reference-rates/additional-information-about-reference-rates#tgcr_bgcr_sofr_calculation_methodology) (accessed 22 May 2024).

<sup>106</sup> Federal Reserve, What is the prime rate, and does the Federal Reserve set the prime rate? [https://www.federalreserve.gov/faqs/credit\\_12846.htm](https://www.federalreserve.gov/faqs/credit_12846.htm) (accessed 22 May 2024).

<sup>107</sup> James Chen, Prime Rate: Definition and How It Works (16 April 2024), <https://www.investopedia.com/terms/p/primerate.asp> (accessed 22 May 2024).