



**AWARDS OF INTEREST IN INTERNATIONAL COMMERCIAL
ARBITRATION:
NEW YORK LAW AND PRACTICE**

COMMITTEE ON INTERNATIONAL COMMERCIAL DISPUTES

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Interest on damages awarded by an arbitral tribunal can be a significant component of a prevailing party's total recovery in international commercial arbitration. Uncertainty exists, however, with respect to the criteria that international arbitrators should apply in determining pre-award and post-award interest. One question that arises in domestic and international arbitrations governed by New York substantive law and seated in New York is whether the prejudgment interest provisions contained in Sections 5001, 5002 and 5004 of the New York Civil Practice Law and Rules ("N.Y.C.P.L.R." or "C.P.L.R.") apply to the determination of pre-award or post-award interest. The answer to the question whether arbitrators are obligated to (or should) apply New York's nine percent statutory prejudgment interest rate can have a substantial economic impact on the parties in an arbitration.

Part I of this report sets forth an executive summary.

Part II provides a discussion of the standards applicable to interest determinations in international commercial arbitrations, with a focus on arbitrations that are both governed by New York substantive law and seated in New York.¹

Appendix A sets forth summaries of pre-award and post-award interest determinations of arbitral tribunals in approximately 45 international commercial arbitrations governed by New York substantive law.

Appendix B sets forth summaries of New York federal and state court decisions reviewing arbitral awards of interest in post-award proceedings brought under Chapter 1 of the Federal Arbitration Act, 9 U.S.C. §§ 1–16; the United Nations Convention on the Recognition

¹ This report proposes a step-by-step approach that international arbitrators may apply to the determination of interest in international commercial arbitrations generally, and not merely in international commercial arbitrations governed by New York substantive law and seated in New York. This report does not address, however, the choice of law issues that may arise when the arbitral law of the seat of arbitration may conflict on the question of interest with the substantive law governing the dispute because no such conflict exists between New York arbitral law and New York substantive law. The report addresses the law of the seat of arbitration principally as a factor that arbitrators may wish to consider as one indication of party intent.

and Enforcement of Foreign Arbitral Awards, enacted as Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201–208 (the “New York Convention”); or New York State’s arbitration statute, C.P.L.R. Article 75.

I. Executive Summary

International arbitrators have discretion to apply or not to apply New York’s statutory prejudgment interest provisions to the determination of pre-award and post-award interest in an international commercial arbitration governed by New York substantive law and seated in New York, in the Committee’s view, for several reasons. First, the text of C.P.L.R. Sections 5001 and 5002 contains numerous terms (including references to “the court’s discretion,” “the cause of action,” “the jury,” and “the clerk of the court”) indicating that these sections are intended to apply only to court proceedings, not arbitration. Second, the legislative history of C.P.L.R. Section 5004, which sets the prejudgment interest rate applicable under Sections 5001 and 5002, indicates that the New York State Legislature (the “NY Legislature”) adopted a fixed rate of nine percent in part in consideration of factors that are not directly related to the compensatory purpose of an award of interest and that arbitrators may or may not deem relevant to the award of interest in international arbitration. In particular, the NY Legislature’s adoption of a fixed rate in 1972 reflected its desire to simplify the calculation of interest by the courts; in 1981, after market rates of interest had risen into the high teens, the NY Legislature increased the fixed rate from six to nine percent in part to discourage defendants from using delay tactics in court proceedings. Third, although New York’s highest court has not had occasion to address squarely the applicability, or not, of New York’s prejudgment interest provisions to international or domestic arbitration, the State’s Appellate Divisions have held that these provisions do not necessarily

apply to arbitrations and that an arbitral tribunal's decision on this question is not subject to review by the courts.²

New York courts acknowledge that, in the absence of express party agreement on the interest rate to be applied, arbitrators have discretion to determine interest based on a broad range of considerations. It may be appropriate for an arbitral tribunal to determine pre-award and post-award interest in accordance with New York's prejudgment interest provisions if, by way of example only: evidence exists that the parties intended for the statutory prejudgment interest rate to apply, or no case is made in favor of applying a different rate, or the choice of interest rate would not have a significant economic impact one way or another. Arbitrators also have discretion to take into consideration that, as already noted, the NY Legislature adopted a fixed rate in part for the administrative convenience of the courts. Moreover, arbitrators may choose to consider to what extent New York's nine percent rate differs from market rates prevailing during the pre-award period and/or economic factors specific to the parties such as their cost of funds. However arbitrators may choose to exercise their discretion to determine interest, in order to facilitate international enforcement the Committee recommends that the tribunal set forth clearly in its award the basis for its interest determination.

In the Committee's view, thoughtful consideration of two guiding principles common to New York law and to international arbitration – the freedom of contracting parties to agree on the terms of their relationship, and the compensatory purpose of interest – should guide arbitrators in prioritizing the many factors that they may consider in awarding interest in a particular case. Generally, the more clearly a factor reflects the intent of the parties, the higher the priority an arbitral tribunal should give to that factor. A focus on party intent generally leads

² See, e.g., *Penco Fabrics, Inc. v. Bogopulsky, Inc.*, 146 N.Y.S.2d 514, 515 (1st Dep't 1955); *Dermigny v. Harper*, 6 N.Y.S.3d 561, 562 (2d Dep't 2015); *Rothermel v. Fidelity & Guarantee Ins. Underwriters, Inc.*, 721 N.Y.S.2d 565, 566 (3d Dep't 2001).

to an examination of key factors in the following order: (a) contractual stipulations on interest rates to be applied to one or more aspects of the contract; (b) guidance that may be found in the arbitration rules chosen by the parties regarding the award of interest; (c) the substantive law governing the merits of the case; and (d) the arbitration law of the seat of the arbitration. An arbitral tribunal should consider these indicators of party intent in light of the underlying compensatory purpose of interest awards subject to narrow exceptions based on public policy.

An arbitral tribunal engaged in the reasonable exercise of its discretion may seek guidance in appellate court decisions that set forth guidelines for trial courts to follow in exercising their discretion to award prejudgment interest in federal question and admiralty cases. For example, the guidelines set forth by the federal Court of Appeals for the Seventh Circuit call upon the district courts to award prejudgment interest at the market rate, which may be either (a) the actual rate that the losing party must pay to borrow money or (b) the U.S. prime rate, which is a market-based estimate.³ Counsel may wish to alert arbitrators to this case law and/or to the various approaches that economists employ in calculating the amount of prejudgment (or pre-award) interest necessary to compensate the prevailing party for the loss of use of its money.

Summaries of arbitral awards set forth in Appendix A to this report suggest that uncertainty exists with respect to the criteria that international arbitrators should apply in determining pre-award and post-award interest. International arbitrators generally give effect to contractual stipulations on interest; however, arbitral practice varies with respect to the determination of interest in the absence of such stipulations. Arbitrators in a significant minority of the surveyed awards expressly determined that New York's nine percent prejudgment interest

³ *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331-35 (7th Cir. 1992).

provisions do not apply to the determination of interest in international arbitration.⁴ A majority of the awards surveyed awarded interest, typically with little or no analysis, in accordance with New York's prejudgment interest provisions.⁵ The Committee hopes that this report will serve to enhance consistency and predictability in the analysis underpinning the award of interest in international arbitrations governed by New York substantive law.

II. Standards Governing the Award of Interest by International Arbitrators

Generally, interest on amounts awarded in arbitration may accrue during three periods: (a) the period from the date the prevailing party's claim arose to the date of the award (pre-award interest); (b) the period from the date of the award to the date of entry of judgment enforcing the award (post-award, prejudgment interest); and (c) the period from the date of entry of judgment to the date of payment (post-judgment interest).

The confidentiality of the arbitral process presents an obstacle to the collection of reliable statistics. The summaries of awards set forth in Appendix A indicate, however, that commercial arbitrators grant pre-award interest to the prevailing party as a matter of course and sometimes grant post-award, prejudgment interest.

A. Pre-Award Interest

Recent commentaries on the award of interest in international arbitration illustrate the complexity of the subject and prompt this Committee to propose that, in international commercial arbitration governed by New York substantive law, arbitrators apply a step-by-step approach to their determination of pre-award interest.⁶

⁴ See Appendix A, rows 1 to 8.

⁵ See *id.*, rows 17 to 42.

⁶ See, e.g., GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3105 (2014) ("The interplay between differing national laws dealing with interest, as well as national characterizations of interest rules and national choice-of-law rules, can be metaphysical in their theoretical complexity."); Thierry J. Senechal & John Y. Gotanda, *Interest as Damages*, 47 COLUMBIA J. TRANSNAT'L L. 491 (2009); Andrea Giardina, *Issues of Applicable*

The standards that govern the pre-award interest determination in any given arbitration will depend on factors including (a) the terms of the parties' contract, (b) the applicable arbitration rules, (c) the law governing the merits, and/or (d) the applicable arbitration law. The Committee proposes that arbitrators prioritize these factors according to how clearly and directly each factor reflects the intent of the parties as to the principles that should govern in the event of an arbitrated dispute between them. The recommended order of priority acknowledges and gives effect to (a) the contracting parties' broad autonomy, under the law of international commercial arbitration applicable in New York, to agree on the law and procedures that apply to their dispute, and (b) the emphasis in the New York law of contract interpretation on construing agreements in accordance with the parties' intent as expressed in the language of their agreement.⁷

Each step in the Committee's suggested methodology is explained *seriatim* below. The last subsection (subsection II.A.5) provides general guidelines that arbitrators may decide to follow in exercising the discretion that they will often possess with respect to the determination of pre-award interest in arbitrations governed by New York substantive law.

Law and Uniform Law on Interest: Basic Distinctions in National and International Practice, in INTEREST, AUXILIARY AND ALTERNATIVE REMEDIES IN INTERNATIONAL ARBITRATION 129 (Filip de Ly & Laurent Lévy eds., 2008); Matthew Secomb, *A Uniform, Three-step Approach to Interest Rates in International Arbitration*, in INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION 431 (Stefan M. Kröll et al. eds., 2011). See also J. Martin Hunter & Volker Triebel, *Awarding Interest in International Arbitration: Some Observations Based on a Comparative Study of the Laws of England and Germany*, 6(1) J. INT'L ARB. 7 (1989); David J. Branson & Richard E. Wallace, *Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach*, 28 VA. J. INT'L L. 919 (1988); J. Gillis Wetter, *Interest as an element of damages in the arbitral process*, 5 INT'L FIN. L. REV. 20 (1986).

⁷ See, e.g., BORN, *supra* note 6 at 102 (noting the New York Convention's "emphatic recognition of the predominant role of party autonomy in the arbitral process"); *Sec. Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 325 (2d Cir. 2004) (Federal Arbitration Act "requires arbitration proceed *in the manner provided for in the parties' agreement*") (internal quotation marks, alteration and citation omitted; emphasis in original); *Greenfield v. Phillis Records, Inc.*, 98 N.Y.2d 562, 569 (2002) ("The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent.") (citation omitted); *Slatt v. Slatt*, 64 N.Y.2d 966, 967 (1985) ("In adjudicating the rights of parties to a contract, courts . . . are required to discern the intent of the parties[.]").

1. Contractual Stipulations on Interest

The first step in the Committee’s suggested methodology is for arbitrators to determine whether the parties’ contract establishes how interest is to be assessed in the arbitration. Subject to limited exceptions discussed below, contractual stipulations governing the assessment of interest on the damages awarded by a court or tribunal are valid and enforceable under the laws of most jurisdictions (including New York).⁸

Contracts occasionally include a clause that specifically sets the rate of interest on damages or on a particular category of damages.⁹ If the contract contains such a clause, and if the clause applies to the damages awarded, it is appropriate for arbitrators to determine pre-award interest in accordance with it, subject to the considerations discussed below. More often, the parties’ contract will contain a “late payment” clause or other similar type of clause stipulating how interest is to be assessed on amounts past due under the contract.¹⁰ Such a clause typically addresses such matters as when interest begins to accrue on an amount due, the rate at which it accrues, whether the interest is simple or compound, and, if it is compound, the compounding period.

In the Committee’s view, generally it is appropriate for arbitrators to apply a late payment or other similar clause if the losing party’s breach consists of a failure to make or delay

⁸ See, e.g., *NML Capital v. Republic of Argentina*, 17 N.Y.3d 250, 258 (2011) (*NML I*) (“When a claim is predicated on a breach of contract, the applicable rate of prejudgment interest varies depending on the nature and terms of the contract.”); 10 JACK B. WEINSTEIN, HAROLD L. KORN & ARTHUR R. MILLER, *NEW YORK CIVIL PRACTICE* ¶ 5004.01a, at 50-79 (2016) (“The parties may establish, by contract, the rate of interest to be paid until entry of judgment[.]”); English Arbitration Act 1996, § 49(1) (“The parties are free to agree on the powers of the tribunal as regards the award of interest.”).

⁹ Following is an example of a clause addressing the assessment of interest on a particular category of damages: “[Any amount of unpaid Seller Damages] that is ultimately determined to have been due on any Damages Due Date shall bear interest at the Default Rate . . . from such Damages Due Date until the date of payment.”

¹⁰ Following is an example of a late payment clause: “Unless otherwise specified, all sums due under the Contract shall be paid within forty five (45) days from the date on which the obligation to pay was incurred. All sums due by one Party to the other under the Contract shall, for each day such sums are overdue, bear interest compounded daily at the applicable LIBOR plus two (2) percentage points.”

in making a required payment under the contract. Arbitrators should exercise caution, however, in deciding whether to grant pre-award interest in accordance with a late payment clause on damages awarded for breaches of contract not involving non-payment or late payment.¹¹ If an arbitral tribunal decides that an interest rate in a late payment clause is not relevant to the determination of pre-award interest on damages awarded for other kinds of breaches, the arbitrators should proceed to the next step in the methodology suggested herein.

In certain limited circumstances, arbitrators may decline to award interest in accordance with a contractual stipulation. For example, if a contractual stipulation on interest is invalid under the usury law of the jurisdiction whose law governs the parties' contract, arbitrators should decline to enforce the stipulation and consider other methods of calculating interest.¹² Usury laws may be subject, however, to exceptions rendering them inapplicable to pre-award and post-award interest. For example, New York's civil usury law, which prohibits charging more than sixteen percent interest per year, does not preclude applying a contractually stipulated rate to pre-award and post-award interest in a commercial dispute because the usury law does not apply to interest on defaulted obligations.¹³

¹¹ See, e.g., *Allenby, LLC v. Credit Suisse AG*, 25 N.Y.S.3d 1, 6 (1st Dep't 2015) (contractual stipulation on interest applied only to delayed settlement, not damages awarded by court for breach of contract); *Ross v. Ross Metals Corp.*, 976 N.Y.S.2d 485, 487-88 (2d Dep't 2013) (contractual stipulation on interest was basis for calculating monthly payments due under contract, but did not apply to damages awarded by court for defendant's breach of its obligation to make such payments); *NML I*, 17 N.Y.3d at 261-62 (clause in bond documents providing that interest would accrue at specified rate "until the principal is paid" applied to damages awarded by court for Argentina's breach of its obligation to make bi-annual interest payments to bondholders). In drafting a late payment or other similar clause, contract drafters may wish to make clear whether the clause is intended to apply to the determination of interest on the damages awarded for a contractual breach not consisting of a failure to make a required payment or of a delay in making a required payment.

¹² The validity of a contractual stipulation on interest is generally determined by the law governing the parties' contract. See Restatement (Second) Conflict of Laws § 207 cmt. e (1971) ("[The law governing the parties' contract] determines the validity of an express contractual provision for the payment of a stipulated rate of interest."); DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS (15th ed.) § 7-089 ("[W]hether an express undertaking to pay interest is lawful or whether it is made invalid wholly or partly by legislation referring to usury or money-lending depends on whether that legislation forms part of the law applicable to the contract.").

¹³ See, e.g., *Bloom v. Trepma Constr. Corp.*, 289 N.Y.S.2d 447, 448 (2d Dep't 1968), *aff'd*, 23 N.Y.2d 730 (1968) (provision in note fixing interest due after default at rate in excess of statutory maximum was valid and

In addition, the public policy of some countries may prohibit the charging of any interest or the charging of interest at a high rate.¹⁴ If an arbitration is seated in such a country, or if enforcement is likely to be sought in such a country, the tribunal may decline to give effect to an otherwise valid contractual stipulation on interest in order to minimize the risk that its award will be vacated (annulled) by a court of the seat or denied enforcement in other courts on public policy grounds.¹⁵ Alternatively, arbitrators may issue a partial award granting the principal amount of damages and a separate partial award granting interest as a possible device to insulate the former award from vacatur at the seat or a refusal to enforce on public policy grounds.¹⁶

2. Arbitration Rules

The second step in the Committee’s suggested methodology, to be followed if the parties’ contract does not contain a provision governing the assessment of interest on damages awarded,

enforceable); *Manfra, Tordella & Brookes, Inc. v. Bunge*, 794 F.2d 61, 63 n.3 (2d Cir. 1986) (“the [New York] usury laws do not apply to defaulted obligations”). New York’s civil usury law also does not apply if the principal amount involved is greater than \$250,000, and it cannot be interposed as a defense by corporations or other business entities. See N.Y. Gen. Oblig. Law §§ 5-501(1), (2), (6)(a), 5-521 (McKinney 2016); N.Y. Banking Law § 14a-(1) (McKinney 2016). New York’s criminal usury law (which prohibits charging more than 25% interest per year) does not apply to defaulted obligations or if the principal amount involved is greater than \$2.5 million. See N.Y. Penal Law §§ 190.40, 190.42; N.Y. Gen. Oblig. Law § 5-501(6)(b); *Bristol Inv. Fund, Inc. v. Carnegie Int’l Corp.*, 310 F. Supp. 2d 556, 563-64 (S.D.N.Y. 2003).

¹⁴ For example, the public policy of some countries prohibits the charging of any interest on the ground that it violates Islamic law. See ABDUL HAMID EL-AHDAB & JALAL EL-AHDAB, *ARBITRATION WITH THE ARAB COUNTRIES* 632 (2011) (“contracts relating to interest . . . are considered to be against [Saudi Arabian] public policy”). New York’s public policy against usury is coterminous with its usury laws. Accordingly, the charging of interest at a high rate does not violate New York public policy unless it runs afoul of New York’s usury laws. See *NML Capital v. Republic of Argentina*, 621 F.3d 230, 238-39 (2d Cir. 2010) (*NML II*) (enforcement of 101% annual interest rate on notes issued by Argentina in principal amount of \$102 million did not violate New York public policy because New York’s civil and criminal usury laws do not apply where the principal amount involved exceeds \$250,000 and \$2.5 million, respectively).

¹⁵ Article 50(2) of Saudi Arabia’s Arbitration Law (promulgated on April 16, 2012) provides that “[t]he competent court shall, on its own initiative, annul an arbitral award if it includes anything contrary to the rules of Islamic law and the laws of the Kingdom.” See also, e.g., UNCITRAL Model Law on International Commercial Arbitration, Art. 34(2)(b)(ii) (court at seat of arbitration may set aside award if it finds that “the award is in conflict with the public policy of [the seat]”); New York Convention, Art. V(1)(e) (court in country where recognition and enforcement is sought may refuse recognition and enforcement if award “has been set aside . . . by a competent authority of the country in which . . . that award was made”).

¹⁶ Article V(2)(b) of the New York Convention provides that a court may refuse to recognize or enforce a foreign award if “recognition or enforcement of the award would be contrary to the public policy of [the] country [where recognition and enforcement is sought].”

is for arbitrators to look to the arbitration rules chosen by the parties for any provisions regarding the award of interest. The rules of several leading international arbitral institutions grant arbitrators discretion to award such interest as they consider appropriate.¹⁷ For example, Article 31(4) of the International Arbitration Rules (the “Rules”) of the American Arbitration Association’s International Centre for Dispute Resolution (the “ICDR”) (“ICDR Article 31(4)”) provides as follows: “[T]he tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law(s).” By contrast, the UNCITRAL Arbitration Rules and the rules of several other leading institutions, including the ICC, Hong Kong International Arbitration Centre (the “HKIAC”) and Swiss Chambers, are silent with respect to the award of interest.

In view of the frequent use of the ICDR Rules in international commercial arbitrations governed by New York substantive law, the requirement under ICDR Article 31(4) that the tribunal “tak[e] into consideration the contract and applicable law(s)” in exercising its discretion to award interest raises three noteworthy issues.¹⁸ First, arbitrators might well ponder the meaning of “taking into consideration the [parties’] contract.” In the Committee’s view, if the contract contains a clause that specifically addresses the assessment of interest on the amounts

¹⁷ See ICDR International Arbitration Rules, Art. 31(4) (quoted in text); LCIA Arbitration Rules, Art. 26.4 (“Unless the parties have agreed otherwise, the Arbitral Tribunal may order that simple or compound interest shall be paid by any party on any sum awarded at such rates as the Arbitral Tribunal decides to be appropriate (without being bound by rates of interest practised by any state court or other legal authority) in respect of any period which the Arbitral Tribunal decides to be appropriate ending not later than the date upon which the award is complied with.”); SIAC Arbitration Rules, Rule 32.9 (“The Tribunal may award simple or compound interest on any sum which is the subject of the arbitration at such rates as the parties may have agreed or, in the absence of such agreement, as the Tribunal determines to be appropriate, in respect of any period which the Tribunal determines to be appropriate.”); WIPO Arbitration Rules, Art. 62(b) (“The Tribunal may award simple or compound interest to be paid by a party on any sum awarded against that party. It shall be free to determine the interest at such rates as it considers to be appropriate, without being bound by legal rates of interest, and shall be free to determine the period for which the interest shall be paid.”); JAMS International Arbitration Rules, Art. 35.7 (same as Article 31(4) of ICDR Rules); DIFC-LCIA Arbitration Rules, Art. 26.4 (same as Article 26.4 of LCIA Rules).

¹⁸ This language is repeated in the September 2016 revisions to the JAMS International Arbitration Rules. See JAMS International Arbitration Rules, Art. 35.7.

awarded, respect for party autonomy typically would suggest that arbitrators determine interest in accordance with that clause rather than exercise their discretion under ICDR Article 31(4), at least in part because “specific terms [of a contract] . . . are given greater weight than general language.”¹⁹ The reference to “taking into consideration” the parties’ contract in ICDR Article 31(4) appears to acknowledge that an arbitral tribunal has discretion to consider whether to determine interest in accordance with a contractual stipulation on interest, such as a late payment clause, that does not strictly apply, by its terms, to damages awarded for reasons other than late payment.²⁰

Second, arbitrators may wish to consider what laws are included within the term “applicable law(s)” in ICDR Article 31(4). In the Committee’s view, the term includes the substantive law(s) governing the parties’ contract.²¹ The Committee considers that the term “applicable laws(s)” may be understood also to include the arbitration law of the arbitral seat when it addresses an arbitral tribunal’s remedial powers.²² In addition, arbitrators exercising discretion under ICDR Article 31(4) may take into consideration the public policies of the arbitral seat and of any jurisdiction where the award is likely to be enforced, even though such

¹⁹ RESTATEMENT (SECOND) OF CONTRACTS § 203(c) (1981). *See generally* *County of Suffolk v. Long Island Lighting Co.*, 266 F.3d 131, 139 (2d Cir. 2001) (“It is axiomatic that courts construing contracts must give specific terms and exact terms greater weight than general language.”) (internal quotation marks, ellipsis and citations omitted).

²⁰ *See, e.g.*, ICC Award No. 7622, ICC International Court of Arbitration Bulletin 15(1) (2004), at 79 (applying contract rate even though it did not apply to damages awarded); ICC Award No. 6219, ICC International Court of Arbitration Bulletin 3(1) (1992), at 22 (same). *See also* Secomb, *supra* note 6, at 432.

²¹ Paragraph (1) of Article 31 provides in pertinent part that “[t]he arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute.” Prior to the 2014 revisions to the ICDR Rules, the predecessor article to ICDR Article 31(4) required that the tribunal take into consideration the contract and “applicable law” (singular). *See* ICDR International Arbitration Rules (as amended and effective June 1, 2009), Art. 28(4). No commentary on the 2014 revisions to the Rules addresses the change from the singular to the optional plural in the interest provision.

²² *See* subsection II.A.4 below.

public policies might not be viewed as falling within the ordinary meaning of “applicable law(s).”

Third, when “taking into consideration the . . . applicable law(s)” in accordance with ICDR Article 31(4), arbitrators may wish to consider what effect they should give to the law governing the parties’ contract.²³ As discussed in subsection II.A.3 below, many jurisdictions have enacted statutory provisions specifying how interest shall be assessed on the damages component of court judgments. Arbitrators exercising their discretion under ICDR Article 31(4) may deliberate on the meaning of “taking into consideration” such statutory provisions. The question takes on practical significance when the statutory provisions call for the application to court judgments of a rate of interest that materially overcompensates or undercompensates the prevailing party in light of prevailing market rates of interest or the prevailing party’s actual cost of funds.²⁴

In the Committee’s view, ICDR Article 31(4) allows an arbitral tribunal, in the exercise of its discretion, to determine pre-award and post-award interest wholly or partially in accordance with the statutory prejudgment interest provisions applicable to court judgments

²³ The same question could be asked with respect to the arbitration law of the seat. As discussed in subsection II.A.4 below, however, all of the arbitration laws surveyed that address the awarding of interest either (a) grant the tribunal discretion to award such interest as it considers appropriate or (b) provide that the tribunal may award interest, without addressing the standard that the tribunal should apply in making such an award. Accordingly, no conflict generally will arise between the standard for awarding interest under Article 31(4) of the ICDR Rules and the standard for awarding interest under the arbitration law of the seat.

²⁴ New York’s statutory prejudgment interest rate of nine percent, enacted by the NY Legislature when market rates were even higher, exceeds market rates of interest generally prevailing in the United States at the time of this report. By contrast, the statutory interest rates of some other jurisdictions may be set below commercially available rates. For example, the French Civil Code allows for the award of simple interest at the “legal rate,” which is fixed by the French Minister of Economy every six months based on the European Central Bank’s benchmark rate and commercial lending rates in France. See CODE CIVIL [C. CIV.] art. 1231-7 (Fr.); Decree No. 2014-947 of August 20, 2014 Relating to the Legal Rate of Interest (amending Article L. 313-2 of the Monetary and Financial Code). As of June 2017, the French legal rate was only 0.90% per year. Some jurisdictions have adopted a statutory prejudgment interest rate that continuously floats by reference to a benchmark rate. For example, the Delaware Code provides for a “legal rate” of five percent over the Federal Reserve discount rate. See DEL. CODE ANN. tit. 6, § 2301(a). The Delaware courts generally award prejudgment interest at the legal rate defined by Section 2301(a). See, e.g., *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 226 (Del. 2005) (“the legal rate [defined by Section 2301(a)] has historically been considered as the ‘benchmark’ for prejudgment interest”).

under the law governing the parties' contract. For example, if interest only begins to accrue under that law from the date of a formal demand for payment, arbitrators would have discretion to award interest from that date; at the same time, they could determine the interest rate based on commercial considerations and without regard for any statutory prejudgment interest rate under the applicable law.

An arbitral tribunal would also have discretion, in the Committee's view, to award interest under ICDR Article 31(4) based exclusively on commercial considerations and without any regard for statutory interest provisions applicable to court judgments under the law governing the parties' contract.²⁵ In the Committee's view, an award of interest based exclusively on commercial considerations would be in accord with party expectations that reasonably arise (subject to specific evidence to the contrary) from ICDR Article 31(4)'s grant of discretion to the tribunal to award such interest "as it considers appropriate."

3. Law Governing the Merits

Courts have held that the purpose of pre-award interest is to compensate the prevailing party for the loss of use of money that the prevailing party was entitled to receive from the date its claim arose until the date of the award.²⁶ Because pre-award interest is an element of

²⁵ Subsection II.A.5 below sets forth general guidelines that a tribunal may choose to follow in determining an appropriate interest rate, whether interest is simple or compound, and, if compound, the compounding period.

²⁶ See, e.g., *NML I*, 17 N.Y.3d at 266 ("[T]he function of prejudgment interest is to compensate the creditor for the loss of use of money the creditor was owed during a particular period of time.") (internal citations omitted); *Kassis v. Teachers' Ins. & Annuity Ass'n*, 786 N.Y.S.2d 473, 474 (1st Dep't 2004) ("The purpose of prejudgment interest is to compensate parties for the loss of the use of money they were entitled to receive, taking into account the time value of money.") (internal quotation marks and citation omitted).

complete compensation for the claim,²⁷ the Committee's view is that it should generally be determined in accordance with the same law that governs liability and damages.²⁸

This choice-of-law approach accords with New York's choice-of-law rules.²⁹ It also accords with Comment (e) to Section 207 of the Restatement (Second) of Conflict of Laws, which provides that the law governing the parties' contract "determines whether plaintiff can

²⁷ See, e.g., *West Virginia v. United States*, 479 U.S. 305, 310 (1987) ("Prejudgment interest is an element of complete compensation."). In the international context, see 2010 UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS ("UNIDROIT PRINCIPLES") Art. 7.4.2(1) ("The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance.").

²⁸ Most international arbitration rules grant arbitrators discretion to apply the law or rules of law they determine to be appropriate, in the absence of party agreement as to the applicable law. See, e.g., ICDR Arbitration Rules, Art. 31(1) ("Failing such an agreement by the parties [on the substantive law(s) or rules of law applicable to the dispute], the tribunal shall apply such law(s) or rules of law as it determines to be appropriate."); ICC Arbitration Rules, Art. 21(1) ("In the absence of any such agreement [on the rules of law applicable to the merits of the dispute], the arbitral tribunal shall apply the rules of law which it determines to be appropriate."). International arbitrators reasonably may conclude that a generic choice-of-law clause specifying the law governing the parties' contract does not encompass an agreement that that law shall govern the determination of pre-award interest, given that interest is generally considered as incidental to the damages awarded on the main claim. Cf. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58-64 (1995) (interpreting generic choice-of-law clause referring to "the laws of the State of New York" as encompassing New York's substantive rights and obligations, but not its prohibition on the award of punitive damages by arbitrators). Nonetheless, as explained in this subsection, it would generally be appropriate for international arbitrators to determine pre-award interest in accordance with the law governing the parties' contract, because interest is an element of complete compensation for the main claim.

Gary Born distinguishes, for choice-of-law purposes, between an arbitral tribunal's authority to award interest and the standards governing the exercise of that authority. BORN, *supra* note 6 at 3103-06. According to Professor Born, "the better view appears to be that, absent contrary agreement, questions concerning the arbitrators' authority to award interest are better regarded as subject to the law of the arbitral seat" because "[i]t is that law which is generally regarded as having the closest connection to questions concerning the tribunal's powers." *Id.* at 3104. As discussed in subsection II.A.4.a below, both federal and New York arbitral law grant arbitrators broad remedial powers that include the power to award interest, absent party agreement to the contrary. Professor Born further suggests that international arbitrators should "apply the law of the currency in which any award is made to determine the substantive standards, including the applicable interest rates, for any award of interest," although he recognizes that "arbitrators have in practice generally looked to the substantive law governing the parties' underlying claims for standards regarding interest." *Id.* at 3105-06.

²⁹ See, e.g., *Schwimmer v. Allstate Ins. Co.*, 176 F.3d 648, 650 (2d Cir. 1999) ("Under New York choice of law rules, the law of the jurisdiction that determines liability governs the award of pre-judgment interest."); *Davenport v. Webb*, 11 N.Y.2d 392, 394-95 (1962) (prejudgment interest is substantive issue controlled by law governing merits); *Sirie v. Godfrey*, 196 A.D. 529, 539 (1st Dep't 1921) (entitlement to prejudgment interest was governed by French law, which was law governing parties' contract). The choice-of-law rules of some other jurisdictions may treat prejudgment interest as a procedural matter governed by the law of the forum. See BORN, *supra* note 6, at 3105.

recover interest, and, if so, the rate, upon damages awarded him for the period between the breach of contract and the rendition of judgment.”³⁰

a. New York Substantive Law Relating to the Award of Interest by International Arbitrators

If New York substantive law governs the merits of the parties’ dispute, international arbitrators should consider what standards, if any, that law imposes on the award of interest in international arbitration. One question that frequently arises in practice is whether New York’s prejudgment interest provisions contained in C.P.L.R. Sections 5001, 5002 and 5004 apply to the determination of interest in arbitration. For the reasons set forth in this subsection, it is the Committee’s view that international arbitrators (a) are not bound to apply these provisions and (b) have discretion under New York’s substantive common law to award such interest as they consider appropriate.

i. Inapplicability of New York’s Prejudgment Interest Provisions to International Arbitration

C.P.L.R. Sections 5001, 5002 and 5004 provide for mandatory prejudgment interest, at an annual rate of nine percent and on a simple-interest basis, upon any sum awarded by a New York State court for breach of contract.³¹ Although these provisions are found in the Civil Practice Law and Rules, state and federal courts have found them to be substantive for choice-of-law and *Erie* purposes.³² Whether these statutory prejudgment interest provisions apply in arbitration

³⁰ RESTATEMENT (SECOND) CONFLICT OF LAWS § 207 cmt. e (1971). *See also id.* § 171 cmt. c (law governing tort liability and damages “determines whether the plaintiff can recover interest and, if so, at what rate for a period prior to the rendition of judgment as part of the damages for a tort”).

³¹ N.Y.C.P.L.R. §§ 5001(a), 5002, 5004 (McKinney 2016); *Long Playing Sessions, Inc. v. Deluxe Labs., Inc.*, 514 N.Y.S.2d 737, 738 (1st Dep’t 1987) (court may award only simple interest under C.P.L.R. §§ 5001 and 5004).

³² *See, e.g., Davenport*, 11 N.Y.2d at 394-95 (prejudgment interest is substantive issue controlled by law governing merits); *Paine Webber Jackson & Curtis, Inc. v. Winters*, 579 A.2d 545, 551-53 (Conn. App. Ct. 1990) (N.Y.C.P.L.R. § 5001 is rule of substantive law to be applied by Connecticut courts if New York law governs merits); *Schwimmer*, 176 F.3d at 650 (prejudgment interest is substantive issue for *Erie* purposes). *See also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 207 cmt. e (1971); *id.* § 171 cmt. c. Under the *Erie* doctrine, a U.S. federal court hearing a claim brought under state law must apply state rules that the court considers “substantive”

does not turn, however, on whether they are characterized as substantive or procedural for purposes of determining their applicability in state or federal court.³³ Rather, the Committee considers the key question to be whether the provisions are directed to the determination of interest not only by a court, but also by arbitrators. As shown by the summaries of awards in Appendix A of this report, arbitrators have not always considered this question or answered it in a consistent manner.

In the Committee’s view, based upon the statutory language and New York case law, New York’s statutory prejudgment interest provisions are binding only in court proceedings and not in arbitration. Several sections of the C.P.L.R. support this conclusion. First, C.P.L.R. Section 101 provides that the Civil Practice Law and Rules “shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges.”³⁴ The inclusion of New York’s prejudgment interest provisions in a statute that governs civil proceedings in the courts of the state and before “all judges” indicates that the NY Legislature intended for the interest provisions to be applicable in court proceedings, not in arbitration. The C.P.L.R. does address certain limited aspects of arbitration in its Article 75, generally considered to be the first

under federal law, while applying federal rules that it considers “procedural” under federal law. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). It is beyond the scope of this report to address whether courts outside the United States apply New York’s prejudgment interest provisions if New York substantive law governs the merits of the parties’ dispute.

³³ One reason courts have characterized statutory prejudgment interest provisions as substantive for choice-of-law and *Erie* purposes is to discourage forum shopping by plaintiffs, who otherwise might choose to sue in a particular court to take advantage of that forum’s statutory prejudgment interest rate. *See, e.g., Jarvis v. Johnson*, 668 F.2d 740, 745 (3d Cir. 1982) (“[I]f [Pennsylvania’s prejudgment interest statute] is not applied in the federal courts, an incentive for forum shopping in diversity actions may well result. We can readily foresee that many plaintiffs would sue in Pennsylvania state court to take advantage of [Pennsylvania’s prejudgment interest statute] and thus to recover considerable additional damages.”). This anti-forum-shopping rationale does not support the application of statutory prejudgment interest provisions in arbitration, however, because the parties to an arbitration agreement cannot shop for a forum after the agreement to arbitrate has been signed. And unlike the rules that govern court jurisdiction, the parties’ choice of a seat of arbitration in international arbitration frequently reflects a determination that the seat has *no* connection with the parties or the dispute. There is, therefore, little reason for an arbitral tribunal to reach the same result that a court at the seat would reach.

³⁴ N.Y.C.P.L.R. Section 105(d) defines “civil judicial proceeding” as “a prosecution, other than a criminal action, of an independent application to a court for relief.”

arbitration statute in the United States and a model used in the drafting of the Federal Arbitration Act.³⁵ Article 75 makes no reference, by cross-reference or otherwise, to the issue of interest awards in arbitration.

Second, New York's prejudgment interest provisions are part of C.P.L.R. Article 50, entitled "Judgments Generally." N.Y.C.P.L.R. Section 5011 defines "judgment" as "the determination of the rights of the parties in an action or special proceeding and may be either interlocutory or final." Arbitration does not qualify as an "action" or as a "special proceeding" under the N.Y.C.P.L.R.³⁶ The inclusion of the prejudgment interest provisions in an article relating to "judgments" is a further indication that the NY Legislature intended for the interest provisions to apply only to civil proceedings in New York State's courts.

Third, N.Y.C.P.L.R. Sections 5001 and 5002 contain numerous terms indicating that they are intended to apply only in court proceedings. Subdivision (a) of Section 5001 provides, in full, as follows:

Actions in which recoverable. Interest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion.

Subdivision (a) thus refers to "action[s]" both in its title and in its text. As already noted, arbitration does not qualify as an "action" under the C.P.L.R. The reference to the "court's discretion" to award interest in equitable actions further suggests that the NY Legislature, in its enactment of Section 5001, considered only court proceedings. So, too, do the references in subdivisions (b) and (c) of Section 5001 and in Section 5002 to "the cause of action," "the jury," "the court," "motion," "the clerk of the court" and "any action."

³⁵ See *Southland Corp. v. Keating*, 465 U.S. 1, 34 (1984).

³⁶ See, e.g., N.Y.C.P.L.R. §§ 103(b), 105(b), 304, 7502(a).

The legislative history of C.P.L.R. Section 5004, which fixes the prejudgment interest rate applicable under Sections 5001 and 5002 at nine percent, further supports the conclusion that these sections are intended to apply only in court proceedings, not in arbitration. The NY Legislature adopted the fixed nine percent rate in part for reasons not directly related to the compensatory purpose of an interest award and not necessarily relevant to the award of interest in international arbitration.

The highest court of the State of New York, the New York Court of Appeals (“NY Court of Appeals”) explained as follows:

Prior to 1972, CPLR 5004 provided that “[i]nterest shall be at the legal rate, except where otherwise prescribed by statute.” The “legal rate” was then based upon the variable rate of interest on the loan or forbearance of money as set by the Banking Board, or, if no rate had been prescribed by the Banking Board, the rate of 6% per annum (see, 1972 Report of NY Law Rev Commn, 1972 NY Legis Doc No. 65 [C], reprinted in 1972 McKinney’s Session Laws of NY, at 3226). However, in its review of the provision, the Law Revision Commission recommended that the rate be fixed at 6% based upon the following reasons: (1) 6% was the historical rate from 1879; (2) the interest rate for a loan or forbearance was not logically or necessarily related to the rate for judgments; (3) a fixed rate would facilitate the administrative act of entering judgments with interest “without possible controversy over different rates for different periods;” and (4) the power of the Banking Board to set such rates was due to expire later that year. Accordingly, in 1972, CPLR 5004 was amended to set a fixed interest rate on judgments at “six per centum per annum” (L 1972, ch 358).

However, in the years that followed, interest rates soared in an inflationary market. The 1981 Report of the Advisory Committee on Civil Practice noted reports where defendants had exploited the system by investing and accruing interest on funds which would otherwise have been used to pay judgment creditors (1981 McKinney’s Session Laws of NY, at 2658). Increased returns were facilitated through such delaying tactics as “the prosecution of unmeritorious appeals and eschewing reasonable settlements” (Mem of Assemblyman Goldstein, 1981 NY Legis Ann, at 148). Although arguments had been made “to reinstate the market rate under CPLR 5004” (1981 McKinney’s Session Laws of NY, at 2658; see also, Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 5004), the Advisory Committee then recommended increasing the fixed rate payable on judgments from 6 to 9%. The recommendation was enacted in 1981 (see, L 1981, ch 258) and the rate has remained unchanged since.

Rodriguez v. New York City Housing Authority, 91 N.Y.2d 76, 78-79 (1997). The NY Legislature thus appears to have adopted a fixed rate of six percent in 1972 based upon a complex set of public policy goals not all of which were directly related to determining an appropriate level of compensation in a particular case.³⁷ In 1981, after market rates had risen into the high teens, the NY Legislature increased the fixed rate from six percent to nine percent, in part, to discourage defendants from using delay tactics in court proceedings.³⁸

The NY Court of Appeals has not had occasion to address squarely the applicability, or not, of New York State's prejudgment interest provisions to international or domestic arbitration. It can reasonably be surmised that this is due, at least in part, to the very limited grounds available to challenge an arbitral award or to resist its enforcement. New York's courts have consistently rejected, however, applications to modify an award or to grant pre-award interest in circumstances where the award allegedly did not comply with New York's prejudgment interest provisions.

The leading case in this area is *Penco Fabrics, Inc. v. Bogopulsky, Inc.*, 146 N.Y.S.2d 514 (1st Dep't 1955), in which the Appellate Division, First Department, held that "[t]he right to interest involves questions of fact and law that are within the purview of the arbitrators." *Id.* at 515. The arbitral tribunal had awarded damages for breach of contract, but it had not granted any pre-award interest, even though Section 480 of the then Civil Practice Act, the predecessor to C.P.L.R. Section 5001, provided for mandatory prejudgment interest in breach of contract

³⁷ The six percent rate adopted in 1972 was close to the market rates in effect at the time. During 1972, the U.S. prime rate ranged from 4.50% to 6.00%. See http://www.fedprimerate.com/wall_street_journal_prime_rate_history.htm.

³⁸ During 1981, the U.S. prime rate ranged from 15.75% to 21.50%. See *id.*

actions.³⁹ The Appellate Division denied the award-creditor's request for pre-award interest, reasoning as follows:

The mere fact that the award was silent on the question did not mean that the arbitrators did not consider the question and did not operate to enable the court to allow such interest. Provisions of law applicable to judicial actions and proceedings do not necessarily apply to arbitrations. Parties who submit their controversies to arbitration forego those provisions and leave all questions of law and fact to the arbitrators.

Id. The Appellate Division characterized the grant of pre-award interest as a mixed question of law and fact for the tribunal to decide and held that a tribunal's decision on that question is not subject to review by the courts.⁴⁰

Three Appellate Division cases holding that a domestic arbitral tribunal's power to grant pre-award interest stems from its broad remedial powers under New York arbitral law (without any mention of C.P.L.R. Section 5001) support the conclusion that New York State's prejudgment interest provisions do not apply in arbitration.⁴¹ *Levin & Glasser, P.C. v. Kenmore Property, LLC*, 896 N.Y.S.2d 311 (1st Dep't 2010), is typical of these three cases. The award-creditor in *Levin & Glasser* requested that the court grant pre-award interest on the damages

³⁹ Section 480 of the then Civil Practice Act provided as follows:

In every action wherein any sum of money shall be awarded by verdict, report, or decision upon a cause of action for the enforcement of or based upon breach of performance of a contract, express or implied, interest shall be recovered upon the principal sum, whether theretofore liquidated or unliquidated, and shall be added to and be a part of the total sum awarded.

N.Y. Civil Practice Act § 480 (as amended in 1927).

⁴⁰ In subsequent cases, the Appellate Division has reaffirmed that “in a contract dispute brought before an arbitrator[,] the question of whether interest from the date of the breach of the contract should be allowed in an arbitration award is a mixed question of law and fact for the arbitrator to determine.” *Levin & Glasser, P.C. v. Kenmore Property, LLC*, 896 N.Y.S.2d 311, 312 (1st Dep't 2010) (internal quotation marks, alteration and citation omitted). See also, e.g., *Dermigny v. Harper*, 6 N.Y.S.3d 561, 562 (2d Dep't 2015) (“[B]ecause the arbitration award did not include a provision awarding the defendant [pre-award] interest, the court was without power to award [such] interest.”); *Rothermel v. Fidelity & Guarantee Ins. Underwriters, Inc.*, 721 N.Y.S.2d 565, 566 (3d Dep't 2001) (“the question as to whether pre-award interest is to be allowed is for the arbitrator to determine”); *Gruberg v. Cortell Group, Inc.*, 531 N.Y.S.2d 557, 558 (1st Dep't 1988).

⁴¹ See *Levin & Glasser, P.C. v. Kenmore Property, LLC*, 896 N.Y.S.2d 311 (1st Dep't 2010); *West Side Lofts, Ltd. v. Sentry Contracting, Inc.*, 751 N.Y.S.2d 475, 476 (1st Dep't 2002); *Rosenblum v. Aetna Cas. & Sur. Co.*, 439 N.Y.S.2d 482, 483 (3d Dep't 1981).

awarded by the tribunal, contending that the tribunal had lacked the authority to award interest under the arbitration rules of New York's Fee Dispute Resolution Program, which are silent on this issue. *Id.* at 312-13. The Appellate Division rejected this contention on the ground, *inter alia*, that a tribunal's "broad authority to resolve disputes" under New York arbitral law includes the power to award interest. *Id.* The fact that the court rested its decision on a tribunal's broad remedial powers under New York arbitral law rather than on C.P.L.R. Section 5001 suggests that the court did not consider Section 5001 in the context of arbitration.⁴²

Three New York federal district courts appear to have assumed, notwithstanding several reported Appellate Division decisions, that New York State's prejudgment interest provisions apply in domestic arbitration.⁴³ In each case, the award-creditor claimed that the tribunal had "manifestly disregarded" the law by failing to grant pre-award interest in accordance with C.P.L.R. Section 5001. The district courts rejected this argument in each of the three cases on grounds other than the non-applicability of C.P.L.R. Section 5001 in arbitration (a point that does not appear to have been argued).⁴⁴ In view of (a) the principle that, in order to establish manifest

⁴² See also *West Side Lofts*, 751 N.Y.S.2d at 476 (arbitrator did not exceed his powers by awarding interest; court did not refer to C.P.L.R. § 5001 but instead cited *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 308 (1984), which held that arbitrator "may do justice as he sees it"); *Rosenblum*, 439 N.Y.S.2d at 483 (arbitrators had power to rule on pre-award interest based on their broad power to fashion awards to achieve just results).

⁴³ See *Sayigh v. Pier 59 Studios, L.P.*, No. 11-CV-1453, 2015 U.S. Dist. LEXIS 27139, at *33-*36 (S.D.N.Y. Mar. 5, 2015); *Shamah v. Schweiger*, 21 F. Supp. 2d 208, 217 (E.D.N.Y. 1998); *Nicoletti v. E.F. Hutton & Co.*, 761 F. Supp. 312, 315 (S.D.N.Y. 1991).

⁴⁴ In *Sayigh*, the district court held that the tribunal had not manifestly disregarded the law because (1) the petitioner's claim arose under a human rights statute and (2) C.P.L.R. Section 5001(a) requires the award of interest only on sums awarded for breach of contract or interference with property. *Sayigh*, 2015 U.S. Dist. LEXIS 27139, at *35. In *Shamah*, the district court concluded that both arbitral tribunals and federal district courts exercising diversity jurisdiction have discretion to award interest at a rate lower than the applicable state statutory prejudgment interest rate, although it erroneously based that conclusion on a Second Circuit decision which held only that in the narrow circumstances of that particular case, the district court had not abused its discretion by using a rate lower than the applicable Vermont statutory prejudgment interest rate. See *Shamah*, 21 F. Supp. 2d at 217 (citing *Chandler v. Bombardier Capital, Inc.*, 44 F.3d 80, 84 (2d Cir. 1994)). In *Nicoletti*, the district court reasoned that "[a]lthough petitioner's claim sounded in contract, the arbitrators may have concluded that [his] entitlement was equitable rather than contractual, and that therefore interest was discretionary [under C.P.L.R. Section 5001(a)]." *Nicoletti*, 761 F. Supp. at 315.

disregard of the law, “[t]he governing law alleged to have been ignored by the arbitrators must be well defined, explicit, and clearly applicable”,⁴⁵ (b) the text of the C.P.L.R.; and (c) the Appellate Division’s observation in *Penco Fabrics* that New York’s prejudgment interest provisions “do not necessarily apply to arbitrations,” 146 N.Y.S.2d at 515, counsel for the award-debtor in each of the three cases had available, in opposition to the manifest disregard challenge, a further argument that C.P.L.R. Section 5001 is not “clearly applicable.”⁴⁶

ii. Pre-Award Interest Under New York’s Substantive Common Law

In the Committee’s view, New York’s substantive common law allows an arbitral tribunal to award interest as an element of damages on the main claim(s).⁴⁷ After the enactment of New York’s first prejudgment interest statute in 1920, New York courts have held that they may award prejudgment interest only on the basis of specific statutory authority.⁴⁸ Prior to the

⁴⁵ *Merrill Lynch, Pierce, Fenner & Smith v. Bobker*, 808 F.2d 930, 934 (2d Cir. 1986).

⁴⁶ In *Moran v. Arcano*, No. 89 Civ 6717, 1990 U.S. Dist. LEXIS 9349 (S.D.N.Y. July 27, 1990), Judge Haight of the District Court for the Southern District of New York stated in *dictum* and without referring to C.P.L.R. Section 5001 that “[w]hether interest is taxed on a claim prior to the entry of an arbitration award is within the discretion of the arbitrators.” *Id.* at *6. Judge Haight thus appears to have concluded, *sub silentio*, that C.P.L.R. Section 5001 does not apply in arbitration. However, neither of the two cases that he cited in support of this statement so held. See *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59, 63 (3d Cir. 1986) (holding that district court should have granted post-award, prejudgment interest because, while arbitrators had included pre-award interest in their award, they “lacked authority to decide the entirely separate question of prejudgment interest on the amount confirmed by the district court judgment”); *Brandeis Intsel Ltd. v. Calabrian Chemicals Corp.*, 656 F. Supp. 160, 170 (S.D.N.Y. 1987) (confirming award that included pre-award interest granted by arbitrators under English law; arbitration seated in London and parties’ contract governed by English law).

A Massachusetts appellate court has held squarely that, under Massachusetts law, “[a]n arbitrator’s award of interest, when made as a component of an award, is an integral part of the total remedy that he fashions and, as such, is not subject to the statutory provisions which apply to court-awarded interest on contract claims.” *Blue Hills Reg’l Dist. Sch. Comm. v. Flight*, 409 N.E.2d 226, 235 (Mass. App. Ct. 1980). The Massachusetts statutory prejudgment interest provisions are worded similarly to the New York provisions. See MASS. GEN. LAWS ch. 231, § 6C (2016) (“In all actions based on contractual obligations, upon a verdict, finding or order for judgment for pecuniary damages, interest shall be added by the clerk of the court to the amount of damages, at the contract rate, if established, or at the rate of twelve percent per annum from the date of the breach or demand.”).

⁴⁷ Some commentators argue that, as a general matter, “[c]laimants would be more accurately compensated for the loss of use of their money if they received interest as damages, as opposed to interest on damages.” SENECHAL & GOTANDA, *supra* note 6 at 514. See also SECOMB, *supra* note 6, at 443-44.

⁴⁸ See, e.g., *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 851 (2d Cir. 1992) (“The right to interest [under New York law] is purely statutory and in derogation of the common law and it cannot be extended beyond

enactment of that statute, New York common law allowed courts to award prejudgment interest in breach of contract actions with interest running from the date on which the defendant could have ascertained the damages with reasonable certainty.⁴⁹ The Committee believes that, because New York's prejudgment interest provisions do not apply in arbitration, the proscription on non-statutory interest under New York law also does not apply in arbitration. Moreover, the availability of pre-award interest under New York's substantive common law accords both with (a) the historical allowance of prejudgment interest under the common law and (b) the compensatory purpose of such interest.⁵⁰

In addition, as discussed in subsection II.A.4.a below, federal and New York arbitral law both grant arbitrators broad remedial powers that include the discretionary power to award interest on damages. In the Committee's view, an arbitral tribunal may consider the law regarding its remedial powers, including its discretionary power to award interest, to be substantive law for purposes of choice-of-law analysis, particularly if the tribunal is seated in a jurisdiction that treats arbitrators' remedial powers as a question of substantive law.⁵¹

the statutory regulations or limitations.”) (internal quotation marks and citation omitted); *Two Clinton Square Corp. v. Computerized Recovery Sys., Inc.*, 446 N.Y.S.2d 663, 664 (4th Dep't 1981) (“interest should not be awarded without specific legislative authority”); *United Bank Ltd. v. Cosmic Int'l, Inc.*, 542 F.2d 868, 878 (2d Cir. 1976) (“This Court has repeatedly held that since CPLR § 5001 is obviously phrased in mandatory terms, New York law does not permit the trial court to exercise any discretion with regard to prejudgment interest determinations.”).

⁴⁹ See, e.g., *Faber v. City of New York*, 222 N.Y. 255, 262 (1918) (“[I]f a claim for damages [on account of breach of contract] represents a pecuniary loss, which may be ascertained with reasonable certainty as of a fixed day, then interest is allowed from that day.”).

⁵⁰ In 1927, the New York State Legislature amended the State's prejudgment interest statute to allow the courts to award prejudgment interest on the principal amount of damages “whether theretofore liquidated or unliquidated.” Shortly thereafter, the NY Court of Appeals held that retrospective application of the amendment to contracts entered into before its enactment did not violate the non-impairment clause of the U.S. Constitution because the amendment “prevents an escape . . . from the real obligation to make full compensation for breach of contract” and “vindicates a preexisting right to compensation for breach of contract.” *J.B. Preston Co. v. Funkhouser*, 261 N.Y. 140, 145 (1933).

⁵¹ See BORN, *supra* note 6, at 3068 (“[I]n many jurisdictions, the arbitrators' remedial powers are treated as an aspect of the substantive dispute between the parties.”).

One question that may arise is whether an international arbitral tribunal, in exercising discretion to award interest under New York law, should apply New York's prejudgment interest provisions even though they are not directed to the determination of interest by arbitrators. Given that C.P.L.R. Section 5001 has been characterized as substantive for choice-of-law and *Erie* purposes, one might argue that an award of interest under this section ordinarily would accord with the parties' reasonable expectations if they have chosen New York law as the law governing their relationship. Moreover, the Appellate Division recently stated that New York's "statutory nine percent rate [is] presumptively fair and reasonable, irrespective of the lower interest rate in the current market," although it made this statement in an equitable action in which it upheld the trial court's awarding of six percent interest.⁵²

Arbitrators have discretion to determine interest based primarily on commercial considerations and to consider New York's statutory prejudgment interest provisions in the light of commercial realities, for three main reasons.

First, as discussed above, the NY Legislature adopted a fixed nine percent prejudgment interest rate in part for reasons not directly related to the compensatory purpose of an interest award and not necessarily relevant to the award of interest in international arbitration.

Second, the award of nine percent simple interest in accordance with New York's statutory prejudgment interest provisions may materially overcompensate or undercompensate the prevailing party for the loss of use of its funds.⁵³

⁵² *Gourary v. Gourary*, 943 N.Y.S.2d 80, 82 (1st Dep't 2012).

⁵³ In some cases, even in the current low rate environment, the award of nine percent interest in accordance with New York's statutory prejudgment interest provisions may *undercompensate* the prevailing party for the loss of use of its funds. As noted above, a court may award only simple interest under C.P.L.R. Sections 5001 and 5004. In the commercial world, however, interest on a debt is almost always compounded; for this reason, an arbitral tribunal exercising its discretionary power to award interest under New York's substantive common law may choose to award interest on a compound basis. Depending on various factors such as the compounding interval and the length of the pre-award period, compound interest calculated at today's low market rates may exceed simple interest

Third, given the broad remedial powers of arbitrators under both federal and New York arbitral law and the many uncertainties at the time of contract regarding possible future disputes, commercial parties and their counsel may reasonably expect an arbitral tribunal to exercise discretion to award such interest as it considers appropriate. Of course, if for any reason the parties express a different expectation, for example by fixing the pre-award interest rate in advance, they are free to do so in their contract or in a stipulation entered during arbitration.⁵⁴

During a period when New York's statutory prejudgment interest rate is substantially higher or lower than market rates, factors that may weigh in favor of application of the statutory rate in a specific case may include, in the judgment of the tribunal, a showing of party intent that the statutory prejudgment interest rate be applied; the absence of any case made in favor of applying a different rate; or a lack of significant economic impact on the interest calculation in a particular case. Moreover, if both parties argue that New York's statutory prejudgment interest provisions govern their respective claims for pre-award interest, a tribunal could reasonably infer agreement between the parties that the statutory prejudgment interest rate applies in their arbitration.⁵⁵

On the other hand, arbitrators have discretion to consider factors that may weigh against application of New York's statutory prejudgment interest rate in a time of low market interest rates, including the NY Legislature's desire to set the prejudgment interest rate at a level close to or below the market rates at the time the statutory rate was chosen; the NY Legislature's concern

calculated at New York's nine percent statutory prejudgment rate. In the Committee's view, this possibility confirms that it may be appropriate for arbitrators to award interest based on commercial considerations.

⁵⁴ See subsection II.A.1 *supra*.

⁵⁵ Arbitrators may also exercise their discretion to apply New York's statutory prejudgment interest provisions if they take the view that it would be desirable, as a general matter, that the relief granted coincide precisely with the relief that a court hearing the same claim would grant. In the Committee's view, a tribunal may consider how a court would decide the same question but retains discretion, under well-settled federal and New York State arbitral law, to consider other factors in shaping the tribunal's remedy. See subsection II.A.4.a below.

for easing administrative burdens on the courts; and the extent to which current market rates of interest may adequately discourage the use of delay tactics in arbitration.⁵⁶

iii. Inapplicability of Section 5-501(1) of New York’s General Obligations Law to Pre-Award Interest

An arbitral tribunal may also wish to consider whether it would be appropriate to award interest at New York’s statutory default rate of interest for loan obligations, as established by Section 5-501(1) of the State’s General Obligations Law (“G.O.L.”). G.O.L. Section 5-501(1) provides that “[t]he rate of interest, as computed pursuant to this title, upon the loan or forbearance of any money, goods, or things in action . . . shall be six per centum per annum unless a different rate is prescribed in section fourteen-a of the banking law.”

In *Sedlis v. Gertler*, 554 N.Y.S.2d 614 (1st Dep’t 1990), the Appellate Division held that an arbitrator should have granted pre-award interest at the six percent rate set by G.O.L. Section 5-501(1) because the parties’ contract provided that late payments would bear interest at New York’s “legal rate.” *Id.* at 616. Relying on C.P.L.R. Section 7511(c)(1), which provides that the court shall modify an award if “there was a miscalculation of figures . . . in the award,” the Appellate Division modified the arbitrator’s award (which granted twelve percent pre-award interest) to provide for interest at the six percent rate. *Id.* The Appellate Division’s modification

⁵⁶ New York’s maintenance of the nine percent statutory prejudgment interest rate in the current low rate environment may also be intended to encourage defendants to settle claims brought against them. *See Oden v. Schwartz*, 71 A.3d 438, 457 (R.I. 2013) (upholding constitutionality of Rhode Island’s statutory prejudgment interest rate of twelve percent in medical malpractice actions on ground that this rate is “rationally related to a legitimate state interest of promoting settlement as well as compensating an injured plaintiff for the loss of the use of money to which he or she is legally entitled”). However, any possible state interest in promoting settlement of claims appears to be related to the efficient administration of justice by the courts and does not reflect a substantive policy favoring plaintiffs over defendants. *See Paine Webber*, 579 A.2d at 551 (court held that Connecticut’s “offer of judgment” rule, which “provides an economic incentive for parties to settle disputes before trial,” was “procedural rule, punitive in nature, and enacted to promote fair and reasonable pretrial compromises of litigation,” and that it therefore applied to action in Connecticut state court even though New York law governed substantive issues in dispute). In view of the many and varied social policies underlying statutory prejudgment interest rates, arbitrators reasonably may conclude that a statutory prejudgment interest rate binding on courts may or may not be appropriate in a particular case but should not dictate the determination of interest in arbitration.

of the award appears anomalous in the sense that it involved the reversal of a substantive ruling, not the correction of a mere computational error.⁵⁷ The court’s interpretation of G.O.L. Section 5-501(1) as establishing a legal rate of interest of six percent under New York law would appear to support the application of this rate to pre-award interest in arbitration irrespective of whether or not the parties specifically so agreed in their contract.

Three factors militate against the application of the six percent rate established by G.O.L. Section 5-501(1) to pre-award interest in arbitration, absent party agreement that this rate will apply. First, G.O.L. Section 5-501(1) provides that the rate set by that section applies to a “loan or forbearance,” a phrase that does not encompass damages owed by a breaching party.⁵⁸ Accordingly, the text of the statute provides no basis for arbitrators to award interest at the six percent rate, absent party agreement to the contrary.

Second, the majority of courts to have addressed the issue have concluded that the six percent rate set forth in G.O.L. Section 5-501(1) is “superseded” by New York’s maximum interest rate of sixteen percent set by Section 14-a of the Banking Law.⁵⁹ The latter is a usury rate and does not reflect the NY Legislature’s calculation of what rate would make an injured party whole. Accordingly, it would not be appropriate, in the Committee’s view, for arbitrators to award interest at the sixteen percent rate set by Section 14-a, absent clear evidence of party intent that it apply in the circumstances.

Third, to the extent that the six percent rate mentioned in G.O.L. Section 5-501(1) retains any validity, the Committee is not aware of any precedent or other authority supporting the

⁵⁷ See, e.g., *Madison Realty Capital, L.P. v. Scarborough-St. James Corp.*, 25 N.Y.S.3d 83, 85 (1st Dep’t 2016) (“CPLR 7511(c)(1) only authorizes modification of computational errors . . . , not reversal of substantive rulings”).

⁵⁸ See, e.g., *Manfra, Tordella & Brookes*, 794 F.2d at 63.

⁵⁹ See, e.g., *La Barbera v. A.F.C. Enters.*, 401 F. Supp. 474, 479-80 (S.D.N.Y. 2005) (collecting cases); *Rachlin & Co. v. Tra-Mar, Inc.*, 308 N.Y.S.2d 153, 158 (1st Dep’t 1970).

award of interest in accordance with G.O.L. Section 5-501(1) in arbitration, absent party agreement that New York's "legal rate" is applicable. Arbitrators therefore should not presume, solely on the basis of the parties' choice of New York law as the law governing their contract, that parties intended for the six percent rate to apply to the award of interest.

b. International Arbitrators Should Align the Rate of Interest With the Currency of the Award

As already noted, many jurisdictions (including New York, in the case of a court judgment) have enacted statutory provisions specifying how interest shall be assessed on damages, including the rate at which it shall accrue.⁶⁰ For reasons set forth above, the Committee takes the view that neither the New York prejudgment interest provisions (C.P.L.R. §§ 5001, 5002 and 5004) nor G.O.L. Section 5-501(1) are binding in international arbitration. For purposes of this discussion, the Committee assumes that, under some circumstances, the statutory interest provisions of other jurisdictions may be deemed applicable, as a question of local law or public policy, in a particular international arbitration.

In accordance with the choice-of-law analysis discussed above, the law governing the parties' contract generally should determine whether the prevailing party may recover interest on damages and, if so, how much.⁶¹ An award of interest in accordance with these provisions may not be appropriate, however, if (a) the governing law specifies a legal rate of interest and (b) the arbitral tribunal assesses damages and issues its award in the currency of another jurisdiction. For example, a contract may provide for arbitration in New York, French governing law, and payment in U.S. dollars. If, as would be expected, the arbitral tribunal assesses damages and

⁶⁰ See, e.g., C. CIV. art. 1231-7 (Fr.) (interest on damages accrues at "legal rate"); Decree No. 2014-947 of August 20, 2014 Relating to the Legal Rate of Interest (amending Article L. 313-2 of the Monetary and Financial Code) (legal rate fixed by French Minister of Economy every six months).

⁶¹ See *supra* notes 26-30 and accompanying text.

issues its award in U.S. dollars, the grant of pre-award interest at the French legal rate may not make commercial sense because that rate reflects, *inter alia*, material changes in the value of the Euro over time.⁶² In fairly foreseeable circumstances, therefore, application of the French legal rate to an arbitral award in U.S. dollars could significantly undercompensate or overcompensate the prevailing party for the loss of use of its money.⁶³

Arbitral tribunals may wish to consider at least two factors as they seek to avoid anomalies in the interest rate used to calculate pre-award interest. First, arbitrators may consider whether, as a matter of statutory construction, the legal rate under the governing law does not apply to damages assessed in a foreign currency. As explained by Professor Pierre Mayer:

The arbitrator's sense of equity can suggest to him that the rule expressed in the applicable law only deals with domestic situations, which allows him to formulate himself the rule that is supposed to apply to international situations. This last device has been used to set aside provisions, which can be found in many national laws, which fix the rate of interest at a certain percentage, regardless of the place of payment and of the currency in which the debt was expressed; indeed, such provisions lead to absurd results when applied to international contracts.⁶⁴

In the event an arbitral tribunal should determine that the legal rate of interest under the governing law does not apply, the arbitrators may consider assessing interest at a rate appropriate to the currency of the award through the exercise of any discretion that they possess in determining damages under the governing substantive law or the arbitral law of the seat.

⁶² In the international context, particularly in the absence of an express provision in the parties' contract, an arbitral tribunal may have discretion in determining the currency in which the award is rendered. *See* UNIDROIT PRINCIPLES Art. 7.4.12 ("Damages are to be assessed either in the currency in which the monetary obligation was expressed or in the currency in which the harm was suffered, whichever is more appropriate.").

⁶³ The 2012 U.S. Model Bilateral Investment Treaty recognizes the importance of matching the interest rate to the currency of the award. Article 6(3) of the Model Treaty provides that if the fair market value of an expropriated investment is denominated in a freely usable currency, the arbitral tribunal shall grant pre-award and post-award interest "at a commercially reasonable rate for that currency[.]" *See also* 2012 U.S. Model Bilateral Investment Treaty, Art. 6(4) (specifying compensation payable if fair market value of expropriated investment is denominated in currency that is not freely usable).

⁶⁴ Pierre Mayer, *Reflections on the International Arbitrator's Duty to Apply the Law*, 17(3) ARB. INT'L 235, 244 (2001). *See also* Secomb, *supra* note 6, at 440.

Alternatively, international arbitrators reasonably may conclude that the choice-of-law approach, holding that interest should be determined in accordance with the same law that governs liability and damages, is subject to an exception in an international case if the value of the currency of the governing law changes at a materially different rate from the value of the currency of the award.⁶⁵ In such circumstances, the Committee believes that it would be appropriate for a tribunal to determine the entitlement to interest and the period during which interest accrues in accordance with the law governing the contract, while determining the interest rate, whether the interest is simple or compound, and (if it is compound) the compounding period in accordance with general principles of law.⁶⁶ Such general principles include the prevailing party's right to full compensation for the loss of use of money it was entitled to receive from the date when interest begins to accrue under the governing law until the date of the award.⁶⁷ An international arbitration tribunal possesses discretion under general principles of law to assess

⁶⁵ Section 10 of the Restatement (Second) Conflict of Laws expressly recognizes that “[t]here may . . . be factors in a particular international case which call for a result different from that which would be reached in an interstate case.” The Reporters Notes to Section 10 of the Restatement observe that “[s]ome questions can arise only in international conflicts, [such] as questions involving . . . the conversion of one currency into another.”

⁶⁶ This recommended choice-of-law rule is similar to the approach followed by the English courts, which determine liability to pay prejudgment interest in accordance with the law governing the merits, while determining the rate of interest in accordance with English law. See DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS (15th ed.) § 7R-082, Rule 20(2). English law authorizes the High Court to award prejudgment interest on a simple-interest basis “at such rate as the court thinks fit[.]” Senior Courts Act, 1981, § 35A(1). In the exercise of its discretion under English law, the High Court “will, *prima facie*, award the rate applicable to the currency in which the debt is expressed.” DICEY, MORRIS & COLLINS, *supra*, § 7R-082, Rule 20(3) (footnotes omitted). See also, e.g., *Miliangos v. George Frank (Textiles) Ltd.*, [1977] Q.B. 489, 497 (“while you look to the proper law of the contract to see whether there is a right to recover interest by way of damages, you look to the *lex fori* to decide how much”; court awarded damages in Swiss francs and held that claimant was entitled to prejudgment interest on a simple-interest basis “at a rate at which someone could reasonably have borrowed Swiss francs in Switzerland at simple interest”).

⁶⁷ See UNIDROIT PRINCIPLES Art. 7.4.10 (“Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues from the time of non-performance.”).

pre-award interest at a market rate appropriate to the currency of the award and on a compound basis.⁶⁸

Comment (e) to Section 823 of the Restatement (Third) of the Foreign Relations Law of the United States addresses the awarding of prejudgment interest by U.S. state and federal courts in international cases as follows:

The date for commencement of interest on an obligation or a judgment is determined by the law of the forum, including its rules on choice of law. When a statutory rate of interest is applicable in the forum, that rate must be applied, even if the judgment is given in foreign currency. If no statutory rate of interest is applicable, the court may, in appropriate cases, order interest to be based on the interest rate applicable at the principal financial center of the state issuing the currency in which the judgment is payable.⁶⁹

In accordance with the first sentence of this comment, read together with Comment (e) to Section 207 of the Restatement (Second) of Conflicts of Law, the law governing the merits of the parties' dispute should determine the date for commencement of prejudgment interest. The second sentence appears to provide that a U.S. court must apply the forum's statutory prejudgment interest rate, if any, in assessing prejudgment interest in an international case, "even if the judgment is given in foreign currency." This approach to the applicable interest rate can

⁶⁸ See, e.g., UNIDROIT PRINCIPLES Art. 7.4.9(2) (providing that interest on late payments shall be payable at "the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment"); ICC Award No. 8769, ICC International Court of Arbitration Bulletin 10(2) (1999), at 75 (awarding interest at "commercially reasonable interest rate" in accordance with Article 7.4.9(2) of UNIDROIT Principles). International investment tribunals, applying international law, often assess pre-award interest at a market rate appropriate to the currency of the award and on a compound basis. A recent survey of pre-award interest determinations in 63 investment awards rendered between January 2000 and March 2016 found that 18 of the 63 awards surveyed (approximately 30%) assessed pre-award interest at a rate based on LIBOR, most often with an uplift of two percentage points. See Tiago Duarte-Silva & Jorge Mattamouros, *Prejudgment interest – a mere afterthought?*, 11(5) GLOBAL ARB. REV. 30, 31 (2016). LIBOR is a benchmark rate that the leading banks in London charge each other for short-term loans. Sixteen of the awards surveyed (25%) assessed interest at a rate not linked to any benchmark, most often from four to six percent, while nine of the awards (14%) assessed interest at a rate based on U.S. Treasury yields. *Id.* at 31-32. In the majority of recent awards, international investment tribunals have assessed interest on a compound basis. See RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 298 (2012).

⁶⁹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 823 cmt. e (1987).

give rise to anomalies for at least two reasons.⁷⁰ First, if a statutory prejudgment interest rate is to be applied, the presumptively applicable interest rate in an international case generally is not the forum's statutory rate, but the statutory rate under the governing substantive law.⁷¹ Second, a court or arbitral tribunal should consider the impact, if any, of the currency in which damages are to be awarded. If the value of the currency of the governing substantive law changes at a materially different rate than the value of the currency of the award, it may be inappropriate, as a general matter, for a court or arbitral tribunal to grant one of the parties a windfall by applying a statutory prejudgment interest rate that has no relevance to the loss incurred as a result of delay in recovery of compensation.⁷²

4. Law of the Arbitral Seat

The next step in the Committee's suggested approach is for arbitrators to look to the law of the arbitral seat governing the arbitral process.⁷³

⁷⁰ To the Committee's knowledge, no U.S. court has ever cited or applied the second sentence of Comment (e) to Section 823 of the Restatement (Third) of the Foreign Relations Law of the United States. *See, e.g., Amoco Cadiz*, 954 F.2d at 1333 ("Rules for prejudgment interest . . . usually come from the law defining the elements of damages. . . . One would think, therefore, that prejudgment interest on the French plaintiffs' claims depends on French law[.]").

⁷¹ *See* RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 207 cmt. e (1971).

⁷² In an article published in 1985, Professor Ronald Brand proposed that Section 823 of the draft Restatement (Third) of the Foreign Relations Law of the United States then under consideration be revised to include the following provision:

In giving judgment on a foreign currency obligation, a court may award both pre-judgment and post-judgment interest at such rate or rates as may be appropriate, taking into consideration the statutory rate of interest, if any, otherwise applicable and the rate of interest generally available in the market on investments made in terms of the currency in which judgment is made.

Ronald A. Brand, *Restructuring the U.S. Approach to Judgments on Foreign Currency Liabilities: Building on the English Experience*, 11(1) YALE J. INT'L L. 139, 184 (1985). As Professor Brand explained, this provision was "directed at the problem of matching the interest rate to the currency of judgment. Without such a rule, it is possible that a court would render judgment in one currency and apply the interest rate relevant to another currency[.]" *Id.* at 189. Professor Brand's proposal was not adopted.

⁷³ The choice of a seat almost invariably leads to the application of its arbitration law, and so parties should expect that their selection of a seat will affect numerous aspects of the arbitral process, potentially including the standards applicable to the awarding of interest. *See, e.g., BORN, supra* note 6, at 2052 ("[T]he law of the arbitral seat can directly govern a number of distinct legal issues affecting any international arbitration, many of which can be highly important."). An arbitral tribunal, in considering an award of interest, may decide, in the face of evidence

As discussed in subsection (a) below, the law of the arbitral seat, when the seat is New York, accords with New York substantive law relating to the award of interest by international arbitrators. If, in a particular case, the law of the arbitral seat conflicts with the applicable substantive law relating to the award of interest by international arbitrators, the tribunal will need to determine how to reconcile the conflict. No such conflict exists when New York is the arbitral seat and New York substantive law governs the dispute. This Committee does not express a view as to how such conflicts might be addressed in arbitrations seated in other jurisdictions.

a. International Arbitrators' Broad Remedial Powers Under Federal Arbitral Law

The Federal Arbitration Act and C.P.L.R. Article 75, New York's arbitration statute, are silent with respect to the award of interest. It is well-settled, however, as a matter of federal and New York arbitral law that, "[w]here an arbitration clause is broad . . . arbitrators have the discretion to order remedies they determine appropriate, so long as they do not exceed the power granted to them by the contract itself."⁷⁴

In the Committee's view, the broad remedial powers of international arbitrators under federal arbitral law include at least the same discretionary power to award interest that the New

in a specific case that the contracting parties carefully considered the arbitration law of the seat, that the arbitration law of the seat be given greater weight in that case than the law governing the merits. However, contracting parties frequently select the seat of arbitration primarily or exclusively for reasons of logistical convenience and without regard to its arbitration law. Under the latter, more typical scenario in commercial cases, principles of party autonomy and respect for the intent of the parties arguably weigh in favor of giving the arbitration law of the seat lower priority than the law governing the merits of the parties' dispute. Following the same logic, when parties neglect to designate the seat and, as a consequence, the seat is designated for the parties, arbitrators reasonably may decide not to give weight to the law of the seat as reflective in any way of party intent as to interest awards.

⁷⁴ *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 262 (2d Cir. 2003) (federal law). See also, e.g., *Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 902 (2d Cir. 2015) ("Like federal law, New York law gives arbitrators substantial power to fashion remedies that they believe will do justice between the parties and under New York law, arbitrators have power to fashion relief that a court might not properly grant.") (internal quotation marks, ellipsis and citation omitted); *Bd. of Educ. of Norwood-Norfolk Cent. Sch. Dist. v. Hess*, 49 N.Y.2d 145, 152 (1979) ("[T]o achieve what the arbitration tribunal believes to be a just result, it may shape its remedies with a flexibility at least as unrestrained as that employed by a chancellor in equity."); *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 308 (1984) (arbitrator "may do justice as he sees it"); *Benedict P. Morelli & Assocs., P.C. v. Shainwald*, 854 N.Y.S2d 133, 134 (1st Dep't 2008) ("Arbitrators are free to shape a remedy with unrestrained flexibility in order to achieve a just result.").

York courts possess in equitable actions. In equitable actions, the New York courts enjoy discretion under C.P.L.R. Section 5001(a) to determine whether to award any interest and, if so, how much.⁷⁵ As explained by the Appellate Division in *Rosenblum v. Aetna Casualty & Surety Co.*, 439 N.Y.S.2d 482 (3d Dep’t 1981),

[I]t is . . . well settled that the inclusion of interest in recoveries in actions of an equitable nature is left to the sound discretion of the court (see CPLR 5001, subd [a]) and that arbitrators are empowered to fashion awards to achieve just results and may shape remedies with a flexibility at least as unrestrained as that employed by a chancellor in equity.

Id. at 483 (internal quotation marks, ellipsis and citation omitted). Although the underlying claim in *Rosenblum* was equitable, the Appellate Division’s conclusion that a tribunal’s broad remedial powers under New York law include the discretionary power to award interest applies equally regardless of whether the claim in the arbitration is characterized as legal or equitable.⁷⁶ An international arbitral tribunal seated in New York has discretion, therefore, to award such interest as it considers appropriate.

b. International Arbitrators’ Power to Award Interest Under Other National Arbitration Laws

The arbitration statutes of England and several predominantly British Commonwealth jurisdictions expressly grant to arbitral tribunals discretion to award such interest as they

⁷⁵ N.Y.C.P.L.R. § 5001(a) (“ . . . in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court’s discretion”). By contrast, in actions of a legal nature, courts generally have no discretion under New York law with regard to prejudgment interest determinations. *See, e.g., United Bank*, 542 F.2d at 878 (“This Court has repeatedly held that since CPLR § 5001 is obviously phrased in mandatory terms, New York law does not permit the trial court to exercise any discretion with regard to prejudgment interest determinations.”).

⁷⁶ *See Levin & Glasser*, 896 N.Y.S.2d at 312 (tribunal’s “broad authority to resolve disputes” includes power to award interest; nature of underlying claim in arbitration not specified); *West Side Lofts*, 751 N.Y.S.2d at 476 (arbitrator did not exceed his powers by granting pre-award interest; nature of underlying claim in arbitration not specified); *Grobman v. Chernoff*, No. 024250/98, 2008 N.Y. Misc. LEXIS 10792, at *3 (Sup. Ct. Nassau County 2008) (“an arbitrator’s power includes pre-award interest as part of a decision”; sole issue in arbitration was amount of damages owed for personal injuries).

consider appropriate.⁷⁷ For example, Section 49(3) of the English Arbitration Act 1996 provides that “[t]he tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case . . . on the whole or part of any amount awarded by the tribunal[.]”

The House of Lords’ well-known decision in *Lesotho Highlands Development Authority v. Impregilo SpA*, [2005] UKHL 43, establishes that a tribunal seated in England has discretion to award interest under Section 49(3) of the English Arbitration Act even if the law governing the merits specifies how interest shall be calculated on damages. The dispute in that case arose under a contract governed by the law of Lesotho and providing for arbitration in London. The law of Lesotho included statutory interest provisions, but the tribunal disregarded those provisions in exercising its discretion to award interest under Section 49(3) of the Arbitration Act. The Court of Appeal held that the tribunal had exceeded its powers, reasoning that “there is no room for any discretionary procedural power” under Section 49(3) where the law governing the merits confers a substantive right to interest.⁷⁸ The House of Lords reversed on the ground, *inter alia*, that Section 49 of the Arbitration Act allows an arbitral tribunal to award interest either by exercising its discretionary power under Section 49(3) or by applying the law governing the merits pursuant to Section 49(6).⁷⁹

⁷⁷ See, e.g., ENGLISH ARBITRATION ACT 1996 § 49; SINGAPORE INTERNATIONAL ARBITRATION ACT 2012 §§ 12(5)(b), 20; HONG KONG ARBITRATION ORDINANCE, Art. 34D; BERMUDA INTERNATIONAL CONCILIATION AND ARBITRATION ACT 1993 § 31; BRITISH COLUMBIA INTERNATIONAL COMMERCIAL ARBITRATION ACT § 31(7); AUSTRALIAN INTERNATIONAL ARBITRATION ACT 1974 §§ 25-26; INDIAN ARBITRATION AND CONCILIATION ACT 1996 § 31(7)(a); IRISH ARBITRATION ACT 2010 § 18. Several U.S. states that enacted arbitration statutes based on the UNCITRAL Model Law on International Commercial Arbitration added a section providing that unless otherwise agreed by the parties, the arbitral tribunal “may award interest.” See CALIFORNIA CIV. PROC. CODE § 1297.317 (2017); 710 ILLINOIS COMP. STAT. 30/25-20(g) (2017); OREGON REV. STAT. § 36.514(6) (2017); TEXAS CIV. PRAC. & REM. CODE § 172.144 (2017). These U.S. state statutes do not address the standard that the tribunal should apply in awarding interest.

⁷⁸ *Lesotho Highlands Development Authority v SPA*, [2003] EWCA Civ 1159, at [48]-[49].

⁷⁹ *Lesotho Highlands Development Authority v. Impregilo SpA*, [2005] UKHL 43, at [38]-[39].

5. General Guidelines for the Exercise of Discretion in Awarding Interest

Federal case law with respect to the awarding of prejudgment interest by the federal district courts in federal question and admiralty cases may provide useful guidance for international arbitrators in the exercise of any discretion they possess with respect to the awarding of pre-award interest in arbitration, whether by virtue of the applicable arbitration rules, the applicable substantive law (or rules of law), or the applicable arbitration law. The federal district courts have broad discretion as to the awarding of prejudgment interest in such cases.⁸⁰ Each Circuit has developed somewhat different guidelines for the exercise of this discretion. The Seventh Circuit Court of Appeals has set forth perhaps the clearest and most comprehensive set of guidelines. *See In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1331-35 (7th Cir. 1992). In a *per curiam* opinion, Chief Judge Bauer and Judges Easterbrook and Fairchild set forth the following guidelines:

- A district court should award prejudgment interest at the market rate, because interest at this rate “puts both parties in the position they would have occupied had compensation been paid promptly.” *Id.* at 1331.
- The market rate is “the minimum appropriate rate for prejudgment interest, because the involuntary creditor [*i.e.*, the prevailing party] might have charged more to make a loan.” *Id.*
- “Any market rate reflects three things: the social return on investment (that is, the amount necessary to bid money away from other productive uses), the expected change in the value of money during the term of the loan (*i.e.*, anticipated inflation), and the risk of nonpayment. The best estimate of these three variables is the amount the defendant must pay for money, which reflects variables specific to that entity.” *Id.* at 1332.
- A district court need not try to determine the actual rate that the defendant must pay to borrow money. *Id.* If the court chooses not to engage in such “refined rate-setting,” it should award prejudgment interest at the U.S. prime rate, which is “the rate banks charge for short-term unsecured loans to credit-worthy

⁸⁰ See, e.g., *Wickham Contracting Co. v. Local Union No. 3, Int’l Bhd. of Elec. Workers, AFL-CIO*, 955 F.2d 831, 833-34 (2d Cir. 1992) (federal question case); *Indep. Bulk Transp., Inc. v. Vessel “Morania Abaco”*, 676 F.2d 23, 25 (2d Cir. 1982) (admiralty case).

customers.” *Id.*⁸¹ While the prime rate “may miss the mark for any particular party, . . . it is a market-based estimate.” *Id.*

- The relevant market rate is the rate in effect during the prejudgment period, “not the going rate at the end of the case.” *Id.* If the market rate fluctuated during the prejudgment period, the district court should calculate interest at the different rates in effect during this period. *Id.* at 1333. Alternatively, it may use an average rate during the period. *Id.* at 1335.
- The “norm” in federal litigation is to award prejudgment interest on a compound basis because (1) the defendant would have had to pay interest on unpaid interest if it had borrowed the amount of the damages and (2) the plaintiff could have earned interest on interest if it had invested or loaned that amount. *Id.* at 1331-32.

The Seventh Circuit’s guidelines are broadly similar to those developed by the other federal courts of appeals. For example, the Second Circuit held, in *Mentor Insurance Company (U.K.) Ltd. v. Norges Brannkasse*, 996 F.2d 506 (2d Cir. 1993), that the district court may award prejudgment interest at a rate that “reflects the cost of borrowing money, if measured for example by the average prime rate or adjusted prime rate[.]” *Id.* at 520.⁸² Judge Jacobs, writing for the panel, concluded that “[t]he award of compound interest . . . was within the district court’s broad discretion.” *Id.* Unlike the Seventh Circuit in *Amoco Cadiz*, the Second Circuit in *Mentor Insurance* held that (a) the district court may award interest at a short-term, risk-free rate, rather than the market rate, and (b) “a prevailing party is not entitled to a calculation of prejudgment interest at the interest rates at which it actually borrowed money during the period in question since consideration of the precise credit circumstances of the victim would inject a needless variable into these cases.” *Id.* (internal quotation marks and citation omitted).

⁸¹ As of the date of this report (June 2017), the U.S. prime rate is 4.25%. If the tribunal assesses damages and issues its award in a currency other than the U.S. dollar, the Committee considers that it would generally be appropriate for it to use a market rate appropriate to the currency of the award. See subsection II.A.3.b *supra*.

⁸² See also, e.g., *Cont’l Transfert Technique Ltd. v. Fed. Gov’t of Nigeria*, 603 Fed. Appx. 1, 5 (D.C. Cir. 2015) (“This court has repeatedly concluded that the use of the prime rate in the award of prejudgment interest reflects an appropriate exercise of the district court’s discretion.”).

An arbitral tribunal may find guidance in judicial opinions that set forth guidelines intended to ensure that the prevailing party is fully compensated for its loss. Arbitral tribunals generally differ from most trial courts in being able to bring to bear whatever resources the parties consider appropriate in order to take into account the particular circumstances of the parties including, in appropriate cases, engaging in a “refined rate-setting” exercise. *See Amoco Cadiz*, 954 F.2d at 1332. In other cases they may choose to award interest at an appropriate market rate or at a risk-free rate. *See Mentor Ins.*, 996 F.2d at 520.

Economists differ as to how pre-award (or prejudgment) interest should be calculated in order to compensate the prevailing party for the loss of use of money it was entitled to receive from the date its claim arose until the date of the award.⁸³ For example, some economists espouse the “coerced loan” theory, which holds that pre-award interest should be calculated at the rate that the losing party would have paid a voluntary creditor because the losing party, by not immediately compensating the prevailing party for its harm, in effect forced the prevailing party to make a loan to the losing party equal in value to the prevailing party’s harm.⁸⁴ Other economists argue that pre-award interest should be calculated at a rate equal to the prevailing party’s opportunity cost of capital.⁸⁵ Several other approaches for determining the pre-award

⁸³ See Aaron Dolgoff & Tiago Duarte-Silva, *Prejudgment Interest: An Economic Review of Alternative Approaches*, 33(1) J. INT’L ARB. 99 (2016).

⁸⁴ See, e.g., Michael S. Knoll & Jeffrey M. Colon, *The Calculation of Prejudgment Interest* (2005), in PENN LAW: LEGAL SCHOLARSHIP REPOSITORY.

⁸⁵ See, e.g., Manuel A. Abdala et al., *Invalid Round Trips in Setting Pre-Judgment Interest in International Arbitration*, 5(1) WORLD ARB. & MEDIATION REV. 1 (2011). In a number of industries and economic sectors, commercial enterprises have an opportunity cost of capital equal to or in excess of nine percent per annum. In those circumstances, at least, adoption of an “opportunity cost of capital” approach to calculating pre-award interest would tend to support the award of interest at New York’s nine percent statutory prejudgment interest rate as an appropriate estimate of the prevailing party’s opportunity cost of capital. On the other hand, a number of economists criticize the opportunity cost of capital approach to calculating pre-award interest on the ground, *inter alia*, that the prevailing party does not actually put any investment at risk; rather, the only risk that the prevailing party assumes is the risk that the losing party will not satisfy the award, and this risk may be compensated by requiring the losing party to pay interest at the rate that it would have paid a voluntary creditor. See, e.g., Dolgoff & Duarte-Silva, *supra* note 83 at 101 (“[T]here is an inconsistency introduced by applying *ex ante* cost of capital rates

interest rate also exist.⁸⁶ It will generally be up to the parties in the arbitration to argue to the arbitral tribunal what rate is appropriate in the particular circumstances of their dispute.

The Seventh Circuit awarded the plaintiffs in the *Amoco Cadiz* case prejudgment interest at the average U.S. prime rate compounded annually, although it did not address the appropriate compounding period in its decision.⁸⁷ It would not be inappropriate for arbitrators, in exercising their discretion, to award compound interest and to base the compounding period on factors specific to the parties and their industry.

Finally, the Committee believes that it is generally appropriate for pre-award interest to begin to accrue from the date of the non-performing party's breach, except that interest upon damages incurred thereafter should generally begin to accrue from the date the damages were incurred. Subject to any countervailing equitable considerations, the awarding of interest until the date of the award generally appears to be necessary to provide full compensation to the prevailing party for the loss of use of its money.⁸⁸

to an *ex post* calculation of compensation. The opportunity cost of capital is also inappropriate because the claimant has not actually put any investments at risk to earn such a return.”); Don Harris et al., *A Subject of Interest: Pre-award Interest Rates in International Arbitration* (2015), at <http://www.brattle.com> (“Pre-award interest at the claimant’s cost of capital would compensate the claimants for a favourable outcome to the alternative investment, while ignoring the chances that they could have lost. Moreover, if the alternative project was really so fantastic, then the claimant should have been able to find sources of funding for it other than the amounts owed by respondent.”); Knoll & Colon, *supra* note 84 at 9 (“Given th[e] assumption [that the plaintiff had access to the capital markets], the defendant’s actions cannot plausibly be said to have prevented the plaintiff from foregoing any attractive investment opportunities and thus to have missed out on the resulting return.”).

⁸⁶ See Dolgoff & Duarte-Silva, *supra* note 83.

⁸⁷ See *Amoco Cadiz*, 954 F.2d at 1331-32; *Cement Div., Nat’l Gypsum Co. v. City of Milwaukee*, 950 F. Supp. 904, 910-11 (E.D. Wis. 1996).

⁸⁸ This pre-award period coincides with the periods specified in C.P.L.R. Section 5001(b) and UNIDROIT Principles Article 7.4.10. See N.Y.C.P.L.R. § 5001(b) (“Interest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date.”); UNIDROIT PRINCIPLES Art. 7.4.10 (“Unless otherwise agreed, interest on damages for non-performance of non-monetary obligations accrues from the time of non-performance.”).

B. Post-Award, Prejudgment Interest

Parties sometimes request not only that arbitrators include pre-award interest as part of the total compensation due under the award, but also that the arbitral tribunal order the losing party to pay interest on the total amount of the award from the date the award is issued until the date it is paid. The Committee is also aware that there have been instances in which the ICC International Court of Arbitration, following its review of a tribunal's draft award under Article 33 of the ICC Rules, has asked the tribunal to modify its award to address the granting of post-award interest, even if the prevailing party did not request such interest in its pleadings.

Increasingly, the practice is for arbitral tribunals to order the award-debtor to pay post-award interest if it does not satisfy the award within a specified time period. In U.S. courts, post-award interest ordered by an arbitral tribunal generally accrues from the date of the award (or the date on which payment is due under the award) until the date of a U.S. federal or state court judgment enforcing the award, even if the award provides that such interest shall accrue until the date the award is paid. Under the so-called merger doctrine, when an award is enforced through a U.S. federal or state court judgment, the debt created by the award merges with the judgment, such that the award debt is extinguished and, in the jurisdiction that rendered the judgment, only the judgment debt survives.⁸⁹ Accordingly, "post-award" interest ordered by an arbitral tribunal comprises only post-award, prejudgment interest; post-judgment interest is separately determined in accordance with the law of the enforcement forum. In cases potentially involving enforcement proceedings in a forum that has not adopted a merger doctrine analogous to the

⁸⁹ See, e.g., *Marine Mgmt, Inc. v. Seco Mgmt, Inc.*, 574 N.Y.S.2d 207, 208 (2d Dep't 1991), *aff'd*, 80 N.Y.2d 886 (1992); *Westinghouse Credit Corp. v. D'Urso*, 371 F.3d 96, 102 (2d Cir. 2004); *Tricon Energy Ltd. v. Vinmar Int'l, Ltd.*, 718 F.3d 448, 457 (5th Cir. 2013); *Fid. Fed. Bank, FSB v. Durga Ma Corp.*, 387 F.3d 1021, 1024 (9th Cir. 2004); *Newmont U.S.A. Ltd. v. Ins. Co. of N. Am.*, 615 F.3d 1268, 1275-77 (10th Cir. 2010); *Parsons & Whittemore Ala. Mach. & Servs. Corp. v. Yeargin Constr. Co.*, 744 F.2d 1482, 1484 (11th Cir. 1984); *Bayer CropScience AG v. Dow Agrosciences LLC*, No. 2016-1530, 2017 U.S. App. LEXIS, at *30 (Fed. Cir. Mar. 1, 2017).

doctrine prevailing in the United States, there may be good practical reasons for the arbitral tribunal to award interest until the date the award is paid.

In the Committee's view, it is generally appropriate for an arbitral tribunal to follow the same step-by-step methodology to identify the standards governing the award of post-award, prejudgment interest that an arbitral tribunal follows to determine the standards for pre-award interest. The fundamental guiding principles remain the same: respect for the intent of the parties and the compensatory purpose of interest. Not surprisingly, all of the arbitration rules that address the awarding of interest grant the arbitral tribunal discretion to award such pre-award and post-award interest as it considers appropriate.⁹⁰

Accordingly, an arbitral tribunal, in exercising discretion with respect to post-award, prejudgment interest, may follow the guidelines set forth in subsection II.A.5 above for pre-award interest. Notwithstanding the arguably secondary purpose to encourage an award-debtor to satisfy an award promptly, the awarding of post-award, prejudgment interest at a rate higher than the rate of pre-award interest may be deemed an unenforceable penalty in some jurisdictions.⁹¹

C. Post-Judgment Interest

As noted above, "post-award" interest ordered by an arbitral tribunal only accrues until the date of a U.S. federal or state court judgment enforcing the award, because the debt created

⁹⁰ See, e.g., ICDR International Arbitration Rules, Art. 31(4); LCIA Arbitration Rules, Art. 26.4; SIAC Arbitration Rules, Rule 32.9. One circumstance in which the governing standards for pre-award interest and post-award, prejudgment interest would differ is where the parties' contract contains a clause specifically addressing the assessment of interest on any damages "until the date of award," rather than "until the date of payment."

⁹¹ See *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063, 1068-69 (N.D. Ga. 1980) (declining to enforce that portion of award assessing post-award interest at rates higher than rate of pre-award interest on ground that post-award rates were penal rather than compensatory). The Indian Arbitration and Conciliation Act (as amended in 2015) provides that, unless otherwise ordered by the arbitral tribunal, post-award interest shall accrue at a rate two percent higher than the Indian legal rate in effect on the date of the award. See INDIAN ARBITRATION AND CONCILIATION ACT 1996 § 31(7)(b).

by the award is deemed to merge into the judgment under the merger doctrine prevailing in the United States.⁹² Interest on the judgment, or “post-judgment interest,” is separately determined in accordance with the law of the enforcement forum. For U.S. federal court judgments, 28 U.S.C. Section 1961 specifies that interest shall be calculated from the date of entry of the judgment, “at a rate equal to the weekly average 1-year constant maturity Treasury yield . . . for the calendar week preceding the date of the judgment,” and that it shall be compounded annually.⁹³

It may be possible, under some circumstances, for parties to override the general merger rule and to specify a post-judgment interest rate, if the parties use “clear, unambiguous, and unequivocal” language indicating their intent that interest will accrue at this rate after the entry of a judgment.⁹⁴ Contractual language stating that interest will accrue at a particular rate “until the principal is paid,” or other similar language, has been held not to meet this high standard.⁹⁵

Where the parties have agreed to a broad arbitration clause, the question whether they have sufficiently contracted for their own post-judgment rate is a determination reserved for the arbitral tribunal.⁹⁶ Nevertheless, an award ordering that interest shall accrue at a particular rate “until the award is paid,” or other similar language, does not override the general rule on merger.⁹⁷ Rather, the arbitral tribunal must use words that make crystal clear its intent to award

⁹² See, e.g., *Marine Mgmt.*, 574 N.Y.S.2d at 208; *Westinghouse*, 371 F.3d at 102; *Tricon*, 718 F.3d at 457; *Fid. Fed. Bank*, 387 F.3d at 1024.

⁹³ See 28 U.S.C. § 1961(a), (b). See also N.Y.C.P.L.R. §§ 5003, 5004 (providing for 9% interest upon New York State court judgments).

⁹⁴ *Marine Mgmt.*, 574 N.Y.S.2d at 209; *Westinghouse*, 371 F.3d at 102; *Tricon*, 718 F.3d at 457; *Fid. Fed. Bank*, 387 F.3d at 1024.

⁹⁵ *Marine Mgmt.*, 574 N.Y.S.2d at 208-09; *Tricon*, 718 F.3d at 459.

⁹⁶ *Tricon*, 718 F.3d at 457; *Newmont*, 615 F.3d at 1276-77.

⁹⁷ *Tricon*, 718 F.3d at 459-60; *Fid. Fed. Bank*, 387 F.3d at 1022, 1024.

post-judgment interest.⁹⁸ The Committee is aware of only one case in which an arbitral tribunal's award was interpreted as awarding post-judgment interest.⁹⁹

International Commercial Disputes Committee
Richard L. Mattiaccio, Chair

June 2017

⁹⁸ *Tricon*, 718 F.3d at 459-60.

⁹⁹ *See Newmont*, 615 F.3d at 1273, 1276-77 (tribunal's award "provided for pre- and post-judgment interest at rate of 1.5% per month").

APPENDIX A

Arbitrators' Pre-Award and Post-Award Interest Determinations in International Commercial Arbitrations Governed by New York Substantive Law

<u>Key: Arbitral Institutions and Relevant Rules</u>	
Arbitral Institution	Relevant Rules on Interest
<u>ICC</u> : (International Chamber of Commerce)	The ICC Arbitration Rules are silent with regard to interest.
<u>ICDR</u> : International Centre for Dispute Resolution	The ICDR International Arbitration Rules provide, at Article 31(4), that a tribunal “may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law(s).”
<u>IUSCT</u> : Iran- U.S. Claims Tribunal	The IUSCT Arbitration Rules, which are adapted from the 1976 UNCITRAL Arbitration Rules, are silent regarding interest.
<u>LCIA</u> : London Court of International Arbitration	The LCIA Rules provide, at Article 26.4, that “the arbitral tribunal may order that simple or compound interest shall be paid by any party on any sum awarded at such rates as the arbitral tribunal decides to be appropriate (without being bound by rates of interest practised by any state court or other legal authority).”

No.	Case	Case Details	Rate Applied	Approach to Interest
<u>Awards Granting Interest at a Market Rate</u>				
Some arbitral tribunals granted pre-award interest and/or post-award interest at a market rate, rather than at New York’s statutory prejudgment interest rate. The law governing the merits in all of these arbitrations was New York law. Some of the arbitrations were seated in jurisdictions other than New York. Awards declining to apply the New York statutory prejudgment interest rate tend to contain the most thorough and searching analysis with respect to the awarding of interest.				
1	<i>Veolia Propreté v. Valores Ecologicos S.A. de C.V.</i> , ¶¶ 259–60, 279(a)-(c)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York 	5%	The tribunal considered that a grant of pre-award interest was appropriate, and acknowledged that the CPLR rate was 9%. Nonetheless, the tribunal granted simple pre-award interest at a

A-1

No.	Case	Case Details	Rate Applied	Approach to Interest
	(available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Law</u>: New York - <u>Year</u>: 2007 		<p>rate of 5%, describing this rate as “market based.”</p> <p>The tribunal undertook a comparatively lengthy analysis of the applicability of the CPLR to pre-award interest. It concluded that while there was no doubt that New York law governed the contract at issue, “[t]his agreement by the parties does not extend to their joint agreement as to the applicability of Section 5004 of the Civil Practice Law and Rules (CPLR) of the State of New York.”</p> <p>The tribunal found that the CPLR was meant to govern “the civil procedure in the courts of New York” and <i>not</i> arbitration proceedings taking place in New York, other than as provided for under CPLR Article 75. Accordingly, the tribunal did not feel “compelled to apply the CPLR interest rate of 9%”.</p> <p>The tribunal considered that since the 9% interest rate under the CPLR had been fixed by statute over 20 years prior, it is a rate that “inevitably bears no relation to existing market rates.”</p> <p>For post-award interest, the tribunal granted interest at a 5% rate, <i>or</i> the applicable rate in the jurisdiction where enforcement of the award was sought.</p>
2	<p><i>Grove Skanska v. Lockheed International</i> A.G., ICC Case No. 3903</p> <p>(excerpted in David J. Branson & Richard E. Wallace, <i>Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach</i>, 28 Va. J. Int’l L. 919 (1987))</p>	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: Geneva - <u>Law</u>: New York - <u>Year</u>: 1981 	Unspecified “realistic rate”	<p>The contract at issue in this case provided that a party’s failure to make payments on time would carry the penalty of interest, but did not specify any particular interest rate. The contract had an unusual governing law clause which explicitly provided that “the law of the State of New York, U.S.A. (procedural and substantive) shall govern the interpretation of the Agreement.”</p> <p>The prevailing party contended that interest should be computed at market rates (LIBOR +1%). LIBOR had been as high as 20% during the pre-award period. The losing party argued that interest should be set at the New York statutory prejudgment rate, which at that time was 6%.</p> <p>The tribunal first noted that, under New York case law, the question of interest is deemed substantive. However, the tribunal declined to apply the CPLR interest provisions on the ground that</p>

No.	Case	Case Details	Rate Applied	Approach to Interest
				<p>they only pertained to court actions and not to international arbitrations. The tribunal noted the “truly international flavor” of the dispute and stated that “in international commercial arbitrations it is generally accepted that arbitrators are entitled and indeed expected to award a realistic rate of interest.”</p> <p>The tribunal performed its own analysis of the CPLR, noting that the separate section dealing with arbitration (Article 75) does not cross-reference the CPLR prejudgment interest provisions, whereas it does explicitly refer to other portions of the CPLR such as the prescription rules found in Article 2. The tribunal stated that “[w]e approach §§ 5001 and 5004 on the footing that the rate of interest laid down may have the characteristic of a rule of practice to be applied in certain circumstances but not necessarily of universal application to all tribunals charged with the duty of deciding issues in accordance with the law of the State of New York.”</p> <p>The arbitrators conceded that if there was some indication that New York law was intended to limit interest rates in all contexts, it would control. Absent some clear indicia of such an intent, however, the tribunal did not believe that New York law had such a broad application.</p> <p>Ultimately, the tribunal granted interest at what it called a “realistic rate,” but did not give an indication of what it considered this to be. Instead, the tribunal expressed the hope and expectation that the parties would be able to agree on a mutually-acceptable, appropriate rate.</p>
3	<p><i>Daum Global Holdings Corp. v. Ybrant Digital Ltd.</i>, ¶¶ 56–61 (available via Westlaw Arbitration Materials)</p>	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: Singapore - <u>Law</u>: New York - <u>Year</u>: 2013 	Unspecified	<p>In this case, the tribunal found that although New York law governed the merits of the parties’ dispute, interest was governed by Singapore law, as the <i>lex arbitri</i>. Section 20(1) of the Singapore Arbitration Act 2012 expressly grants to arbitral tribunals the authority to “award simple or compound interest from such date, at such rate and with such rest as the arbitral tribunal considers appropriate. . .”</p> <p>The tribunal further explained that CPLR Article 50 is “concerned</p>

No.	Case	Case Details	Rate Applied	Approach to Interest
				<p>with New York court proceedings.”</p> <p>The tribunal noted that it had wide discretion as to the awarding of interest, but it held that it had insufficient information to make a suitable award of interest at the time. Instead, it reserved the question for a later award.</p>
4	<p><i>NTT Docomo, Inc. v. Ultra D.O.O.</i>, ¶ 85 (available via Westlaw Arbitration Materials)</p>	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2010 	<p>U.S. Prime (3.25% - 4.25%)</p>	<p>The tribunal first noted that Docomo was entitled to pre-award and post-award interest at the New York statutory prejudgment interest rate pursuant to CPLR § 5001. However, it chose not to grant interest at this rate.</p> <p>Rather, the tribunal applied the U.S. Prime rate for pre-award interest, to run as of three separate dates for separate breaches. Similarly, the tribunal granted simple post-award interest at the Prime rate, to run until the award was paid or reduced to judgment.</p> <p>The tribunal did not provide a detailed explanation as to why it chose to apply the Prime rate over the New York statutory prejudgment interest rate. However, one factor that was likely relevant is that Docomo only claimed interest at the Prime rate, and Ultra made no submission in response.</p>
5	<p>ICC Case No. 10888 (excerpt available via ICC Dispute Resolution Library)</p>	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: Paris - <u>Law</u>: New York - <u>Year</u>: 2002 	<p>U.S. Risk-Free</p>	<p>The tribunal had previously granted pre-award interest at a risk-free interest rate computed by an expert. Said interest was to run from the date of breach to the date of the award.</p> <p>Claimant applied for correction of the award, asserting that the tribunal should have awarded interest at the 9% New York statutory prejudgment interest rate.</p> <p>The tribunal rejected the application, noting that an international arbitral tribunal acting under the ICC Rules and seated in Paris was not bound to apply a rule on interest that was intended for the courts of New York State.</p> <p>The tribunal expressed concern that employing the New York rate would hinder the enforceability of its award, and instead chose the</p>

No.	Case	Case Details	Rate Applied	Approach to Interest
				“U.S. risk-free prejudgment interest rate,” which it viewed as more reflective of the economic reality.
6	<i>Al Maya Trading Establishment v. Global Export Marketing Co., Ltd.</i> , ¶ 88 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2016 	U.S. Prime (3.25%)	<p>The tribunal acknowledged that New York law prescribes 9%. However, it found that “in an international arbitration such as this, where the parties have not specifically agreed to any particular interest rate and no evidence was presented as to actual borrowing costs, we believe that the better course is to apply a commercial rate in the relevant currency.”</p> <p>Notably, the tribunal cited to the <i>Grove Skanska</i> case in support of its proposition that “CPLR Article 50 . . . concerns court judgments.”</p> <p>The tribunal thus granted pre-award interest at the U.S. Prime Rate.</p>
7	<i>Butzel Long v. Valtech, S.A.</i> , ¶¶ 7.1–7.7 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: London - <u>Lex Arbitri</u>: England - <u>Law</u>: France, New York - <u>Year</u>: 2010 	5%	<p>The sole arbitrator concluded that interest was governed by the English Arbitration Act as the <i>lex arbitri</i>. Under Section 49 of that Act, an arbitral tribunal has broad discretion to fix the rate of interest.</p> <p>The sole arbitrator granted pre-award interest at 5%, in accordance with English court practice. While “this rate may be in excess of the interest rate at which Valtech could borrow from a bank,” it was “designed to encourage Valtech to resist the temptation to delay payment to Chesapeake of the sums due it, in effect using Chesapeake as its de facto banker.” For post-award interest, the Arbitrator similarly applied a rate of 5% both for damages and costs, with a three-week grace period for the latter. This interest was to be compounded quarterly.</p>
8	<i>PepsiCo, Inc. v. Iran</i> (available at Yearbook of Commercial Arbitration, Vol. XII, Page 253 (1987))	<ul style="list-style-type: none"> - <u>Institution</u>: IUSCT - <u>Seat</u>: The Hague - <u>Law</u>: New York - <u>Year</u>: 1986 	10%	<p>In this case, the tribunal applied LIBOR +3% for damages relating to most of the contractual breaches found. For one breach, the tribunal applied a 10% rate, deeming this “reasonable.”</p> <p>Notably, neither party argued for the application of the New York statutory prejudgment interest rate, even though New York law</p>

No.	Case	Case Details	Rate Applied	Approach to Interest
				governed the underlying contract.
<p align="center"><u>Awards Granting Interest at the Contractual Rate</u></p> <p>Usually, contractual interest rates apply, by their terms, only to the late payment of money owed under the contract. However, tribunals have often applied such contractual rates to the award of damages.</p>				
9	<i>Sullivan & Cromwell, LLP v. Justice</i> , ¶¶ 128–32 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: AAA - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2016 	8%	<p>The parties' contract (an attorney-client fee agreement) provided that the client could elect to make certain payments due under the contract over a period of 10 calendar quarters at an annual interest rate of 8%. The tribunal held that this provision was not directly applicable to the amount due by the client and considered the contract ambiguous as to whether the parties intended the 8% contractual rate or the 9% statutory rate to apply to this amount.</p> <p>The tribunal rejected the law firm's request for 9% pre-award interest, noting that "[u]nder New York law, where a contract provides that interest will be paid at a specific rate until the principal has been paid, the contract rate governs, not the statutory rate, and interest is due until payment of the principal is made or until the contract is merged into a judgment." The tribunal further noted that "[a]mbiguous provisions in attorney-client fee agreements are to be construed in a manner most favorable to the client."</p>
10	<i>PDV Sweeny, Inc. v. ConocoPhillips Co.</i> , ICC Case No. 16982, Final Award of 18 August 2014, ¶¶ 31–32 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York - <u>Law</u>: New York, Venezuela - <u>Year</u>: 2014 	Default Rate (4.875%)	<p>The relevant contract in this case was unusual, in that it provided for an interest rate that was specifically to be applied to damages. It read, in relevant part: "[Seller Damages] shall bear interest at the Default Rate pursuant to Section 4.2 from such Damages Due Date until the date of payment."</p> <p>The tribunal had previously rendered a Partial Award in which it awarded respondent Seller Damages under the contract. The parties had agreed that pre-award interest should be granted at the Default Rate (4.875%), and that it should run from the date when Seller Damages became due until the date of the Partial Award.</p> <p>Respondents sought the 9% statutory prejudgment interest rate for</p>

No.	Case	Case Details	Rate Applied	Approach to Interest
				post-award interest, arguing that the contract did not specify a rate for post-award interest. The tribunal held that this provision was tantamount to a post-award interest provision, given that it specified that interest was to run “until the date of payment.” The tribunal thus awarded post-award interest at the Default Rate of 4.875%, reasoning that applying the New York statutory prejudgment interest rate would be contrary to the parties’ agreement.
11	<i>Travis Coal Restructured Holdings v. Essar Global Fund, Ltd.</i> , ¶¶ 711–23 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2014 	10%	<p>The contract in this case provided for a “pre-default” interest rate of 8% on the principal balance due, and a 10% “default” rate once the claimant had made a demand for payment. The contract further provided that any amount to be paid by respondent “shall bear interest at the Default Rate or the maximum rate permitted by applicable Requirements of Law, whichever is less” This contract was more in line with the norm, in that it provided that the contractual rates applied to late payments and not to damages.</p> <p>The tribunal construed the term “Requirements of Law” as addressing only those laws that set upper limits on interest, such as usury statutes. To hold otherwise, the tribunal reasoned, would be to needlessly abridge the parties’ freedom to contractually agree on an interest rate of their choice.</p> <p>The tribunal further concluded that the interest rates specified under the contract were not prohibited by New York’s anti-usury laws. As such, the tribunal granted simple pre-award interest at 8% up until the “default date,” and 10% interest thereafter.</p> <p>The tribunal also granted simple post-award interest at 10%.</p>
12	<i>CIMC Raffles Offshore Ltd. v. Schahin Holdings, S.A.</i> , ¶ 81(1)(a)-(c) (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York (?) - <u>Year</u>: 2012 	LIBOR +2%	<p>The contract included an interest rate of LIBOR +2%.</p> <p>The tribunal granted pre-award interest at the contractual rate. However, the tribunal granted post-award interest at the statutory 9% rate, which was to run beginning 30 days after the rendering of the award.</p> <p>The tribunal did not explain why it decided to apply different rates</p>

No.	Case	Case Details	Rate Applied	Approach to Interest
				to pre-award and post-award interest.
13	<i>Thales Alenia Space France v. Globalstar, Inc.</i> , ¶¶ 124, 126. (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2012 	EURIBOR + 400 basis points	<p>The contract stipulated an interest rate of EURIBOR + 400 basis points for late payments.</p> <p>The tribunal granted pre-award interest at the contractual EURIBOR rate. For post-award interest, the tribunal awarded 5% simple interest to run on unpaid amounts beginning 30 days from the issuance of the award until payment in full. The tribunal noted that this 5% rate corresponded closely to the rate that the parties agreed to in the contract (EURIBOR +400 basis points).</p>
14	<i>Amaprop Ltd. v. Indiabulls Financial Services Ltd.</i> , ¶¶ 155–56 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York, India - <u>Year</u>: 2011 	12%	<p>The agreement between the parties provided that the respondent would pay 12% interest per annum on all amounts borrowed.</p> <p>The tribunal, invoking the contract as well as equitable considerations and arbitral practice, awarded pre-award and post-award interest at the 12% contractual rate.</p>
15	<i>Agrera Investments, Ltd. v. Palant</i> , ¶ 68 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2011 	12%	<p>The contract provided for a 12% interest rate on payments for purchase of shares, pursuant to a contractual stock purchase option.</p> <p>The tribunal applied the contractual rate, in light of the fact that claimant sought damages for breach of the very contractual provision that provided for the 12% interest rate.</p>
16	<i>Westminster Securities Corp. v. Petrocom Energy Ltd.</i> (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2010 	12%	The tribunal granted pre-award interest on damages as well as on the fees and costs awarded. The tribunal did not specify the interest rate it was applying, although claimant had requested interest at the contractual rate applicable to late payments (12%).
17	<i>KWV Int'l (Pty) Ltd. v. Peter Andrew LLC</i> , pp. 12–13	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR 	7%	One of the contracts at issue provided for an interest rate of 7% on overdue payments; the other was silent on interest.

No.	Case	Case Details	Rate Applied	Approach to Interest
	(available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2008 		Despite the fact that “[b]oth parties have requested pre and post award interest at the New York statutory rate of 9% per annum,” the sole arbitrator concluded that the contractual interest provision reflected what the parties had deemed an appropriate rate of interest for their business arrangement and accordingly awarded interest at the 7% contractual interest rate, to run from the date of breach until the date of payment.

No.	Case	Case Details	Approach to Interest
<u>Awards Granting Interest at the New York Statutory Prejudgment Interest Rate (Reasoned Decisions)</u>			
In arbitrations where the contract between the parties was silent on the issue of interest, arbitral tribunals have often granted pre-award and/or post-award interest at the 9% New York statutory prejudgment interest rate. Those tribunals that have issued (often perfunctory) reasoned decisions on this issue have generally relied on the parties’ choice of New York law as the law governing the contract.			
18	<i>Organizacion Ideal, S. de R.L. de C.V. v. FHR Mexico Management Company, S.A. de C.V.</i> , ¶¶ 484–500 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: AAA - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2017 	<p>The sole arbitrator granted pre-award interest at the 9% statutory rate. In this case, the parties apparently agreed that CPLR §§ 5001 and 5004 governed the grant of interest.</p> <p>The dispute related solely to whether the grant of pre-award interest on an award of lost profits would constitute double recovery and a windfall for the award creditor. The sole arbitrator considered that New York law did not bar the grant of prejudgment interest on lost profits.</p>
19	<i>Digitelcom Ltd. v. Tele2 Sverige AB</i> , ¶ 457 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2011 	<p>The tribunal granted post-award interest on costs, to run beginning 15 days from the rendering of the award.</p> <p>It applied the New York 9% statutory prejudgment interest rate, holding that it was appropriate given that New York law governed the contract and New York was the seat of arbitration.</p>
20	<i>Kailuan Int’l Co., Ltd v. Sino East Minerals Ltd.</i> , ¶¶ 136–37 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York 	The tribunal, citing the CPLR, granted pre-award interest at the statutory 9% rate, stating that “[w]e find this rate appropriate” because New York law governed the contract. The tribunal further granted post-award interest at 9%, to run beginning 30

No.	Case	Case Details	Approach to Interest
	Materials)	<ul style="list-style-type: none"> - <u>Law</u>: New York - <u>Year</u>: 2016 	days after the rendering of the award.
21	<i>Logic, S.P.A. v. L-3 Communications Corp.</i> , ¶ 111 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2015 	<p>This decision is notable in that the tribunal explicitly found that it was not bound to apply the New York statutory prejudgment interest rate. However, citing to CPLR §§ 5001 and 5004, it found the 9% rate “appropriate” because it was the rate applied to New York court judgments and therefore “may be used by arbitral tribunals for guidance.”</p> <p>The tribunal granted simple pre-award interest at 9%, running from the date of breach. It also granted 9% post-award interest until the date the award was paid.</p>
22	<i>Sexton v. Karam et al.</i> , ¶¶ 218–222 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2014 	<p>The tribunal did not grant pre-award interest, as it had rejected the claimant’s claims and there were no counterclaims. However, it did grant post-award interest on its award of costs and fees.</p> <p>The tribunal noted that Article 28(4) of the ICDR Rules allowed it to “award such . . . post-award interest . . . as it considers appropriate, taking into consideration the contract and applicable law.”</p> <p>The tribunal further indicated that the “New York CPLR does not set forth a post-award interest rate for international arbitrations seated in New York and does not mandate the application of its post-judgment interest rate to such arbitrations. Further, it is generally accepted in international arbitration that neither the statutory post-judgment interest rate at the seat of arbitration nor the statutory post-judgment interest rate of the law governing the contract mandatorily applies. Instead, arbitrators generally have wide discretion to determine the applicable interest rate, and the ICDR Rules reflect this principle.</p> <p>In exercise of its discretion, the tribunal nonetheless chose to apply the 9% CPLR rate “that would apply to a judgment rendered by a New York state court as of the date of this Final Award.”</p>
23	<i>Barracuda and Caratinga Leasing Co., B.V. v. Kellogg Brown & Root, LLC</i> , at Part K(A) (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: LCIA (UNCITRAL Rules) - <u>Seat</u>: New York 	<p>This arbitration, while administered by the LCIA, was conducted pursuant to the 1976 UNCITRAL Arbitration Rules, which are silent as to the award of interest.</p> <p>The tribunal declined to grant any pre-award interest, noting that the claimant did not request such interest and that the claimant had not incurred additional replacement</p>

No.	Case	Case Details	Approach to Interest
	Materials)	<ul style="list-style-type: none"> - <u>Law</u>: New York - <u>Year</u>: 2011 	<p>costs that would warrant the grant of pre-award interest.</p> <p>With respect to post-award interest, the tribunal granted the New York statutory prejudgment interest rate because New York law was the “law applicable to the arbitration” and the contract. This post-award interest was applied both to damages and to the costs awarded by the tribunal.</p>
24	<i>Aconcagua Investing Ltd. v. Ingaseosas International Co.</i> , ¶¶ 165–66 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: Miami - <u>Law</u>: New York - <u>Year</u>: 2008 	<p>The sole arbitrator granted pre- and post-award interest at the 9% statutory prejudgment interest rate, reasoning that “no interest rate was stipulated” in the contract.</p> <p>The sole arbitrator determined that pre-award statutory interest would run from the date of breach as determined by the arbitrator. Post-award interest would begin accruing if payment of the amount awarded was not made within 30 days.</p>
<u>Awards Granting Interest at the New York Statutory Prejudgment Interest Rate (Unreasoned Decisions)</u>			
Many awards that have granted interest at the 9% statutory prejudgment interest rate have done so without any analysis.			
25	<i>Life Insurance Fund Elite Trust v. Avon Capital, LLC</i> (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: AAA - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2016 	<p>The sole arbitrator granted 9% pre-award interest pursuant to CPLR §§ 5001 and 5004. The sole arbitrator did not provide any reason for this award other than that the claimant was “entitled” to statutory interest.</p>
26	<i>Moses & Singer LLP v. Cleveland Heart, Inc.</i> , ¶¶ 1–7 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: AAA - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2015 	<p>The sole arbitrator granted 9% interest pursuant to CPLR § 5004 to each of seven sums due under seven separate invoices.</p>
27	<i>Travelers v. Idas Celik Enerji Tersane ve Ulasim Sanayi A.S.</i> (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York 	<p>For pre-award interest, the tribunal simply awarded a lump sum amount. For post-award interest, the tribunal granted interest at the New York statutory prejudgment interest rate to run on any amounts unpaid within 30 days of issuance of the arbitral award.</p>

No.	Case	Case Details	Approach to Interest
		- <u>Year</u> : 2015	
28	<i>Hard Way, LLC v. Roc Fashions, LLC</i> , p. 2 (available via Westlaw Arbitration Materials)	- <u>Institution</u> : ICDR - <u>Seat</u> : New York - <u>Law</u> : New York - <u>Year</u> : 2014	The tribunal granted a fixed figure for pre-award interest (\$68,219.18 interest through June 18, 2014 plus \$4.28 per day through date of award). For post-award interest, the tribunal granted 9% statutory interest, to run beginning 30 days after the rendering of the award.
29	<i>Caldera Resources, Inc. v. Global Gold Mining, LLC</i> , ICDR Case No. 50 2010 00674, p. 40 (available via Westlaw Arbitration Materials)	- <u>Institution</u> : ICDR - <u>Seat</u> : New York - <u>Law</u> : New York (?) - <u>Year</u> : 2014	The tribunal neither granted nor discussed pre-award interest. It granted post-award interest at New York's statutory prejudgment interest rate of 9% on most categories of damages awarded, running from the date of award.
30	<i>Garcia v. Ridge C.C.</i> , ¶¶ 66, 82 (available via Westlaw Arbitration Materials)	- <u>Institution</u> : ICC - <u>Seat</u> : New York - <u>Law</u> : New York - <u>Year</u> : 2014	The tribunal granted 9% simple pre-award and post-award interest. The pre-award interest was to run from the date of breach. The tribunal opted to grant simple interest despite a contractual provision that allowed it discretion to grant compound interest.
31	<i>Schulte, Roth & Zabel, LLP v. China North Docl East Petroleum Holdings Ltd.</i> , p. 8 (available via Westlaw Arbitration Materials)	- <u>Institution</u> : ICDR - <u>Seat</u> : New York - <u>Law</u> : New York (?) - <u>Year</u> : 2014	The sole arbitrator granted pre-award interest at the 9% statutory prejudgment interest rate, to run from date of breach. There was no discussion of post-award interest.
32	<i>GlobeOp Financial Svcs. LLC v. Titan Capital Group</i> , p. 51 (available via Westlaw Arbitration Materials)	- <u>Institution</u> : ICDR - <u>Seat</u> : New York - <u>Law</u> : New York - <u>Year</u> : 2014	The sole arbitrator referenced the contractual choice of New York law and noted that “under New York law, interest is normally allowed and awarded as a matter of course.” He granted pre-award interest at 9%. He also granted post-award interest at the statutory prejudgment interest rate.

No.	Case	Case Details	Approach to Interest
33	<i>CE Int'l Resources Hldgs, LLC v. S.A. Minerals Ltd. Partnership</i> , ¶ 75 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2013 	The sole arbitrator granted 9% statutory interest, to run from the approximate date of breach. This interest was to run until award-debtor received payment in full.
34	<i>Toshiba Corp. v. Nat'l Film Laboratories, Inc.</i> (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2012 	The sole arbitrator granted post-award interest at the statutory prejudgment interest rate on attorney's fees and costs, to begin running immediately after the rendering of the award. There was no mention of pre-award interest.
35	<i>Colt Int'l Ltd. v. Altpower, Inc.</i> (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2012 	The sole arbitrator granted pre-award interest at the statutory prejudgment interest rate, to run from a date fixed after the commencement of the arbitration. There was no mention of post-award interest.
36	<i>Oakley Fertilizer, Inc. v. Hagrpota For Trading & Distribution, Ltd.</i> , ¶ 136 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2011 	The tribunal granted simple 9% statutory interest, running from the date of breach. It made no express finding with respect to post-award interest.
37	<i>Amri Rensselaer, Inc. v. Borregaard Industries Ltd.</i> , ¶ 3 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2010 	<p>The sole arbitrator cited to the CPLR, and granted pre-award interest at the statutory prejudgment interest rate. The interest was to run from the date on which claimant received notice of the termination of the contract at issue.</p> <p>The sole arbitrator also granted post-award statutory interest at 9%, to run until date of payment.</p>
38	<i>A.G.k. SARL v. A.M. Todd Co.</i> , ¶ 17 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR 	The tribunal granted pre-award interest at the 9% statutory prejudgment interest rate. The interest was to run from the date the arbitration commenced, given the extreme

No.	Case	Case Details	Approach to Interest
	Materials)	<ul style="list-style-type: none"> - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2010 	<p>longevity of the dispute.</p> <p>The tribunal also granted post-award interest at the 9% statutory prejudgment interest rate, to run until payment in full.</p>
39	<i>Lizton Trading, Ltd. v. ATM Lenders, LLC</i> , ¶¶ 190–91, 194 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: LCIA - <u>Seat</u>: London - <u>Law</u>: New York - <u>Year</u>: 2008 	<p>With respect to pre-award interest, the tribunal stated that it would exercise “its discretion to apply the New York rate of interest of 9% to the principal sums awarded.” This was to be a simple interest rate, running from the date of breach.</p> <p>Similarly, for post-award interest, the tribunal granted simple interest at New York’s statutory prejudgment interest rate. This was uncontested.</p> <p>The tribunal awarded interest at a rate of LIBOR +2% on the costs of the arbitration if not paid within 14 days.</p>
40	<i>Navneet Publications India Ltd. v. American Scholar, Inc.</i> , ¶¶ 5.2-5.3 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: Unclear - <u>Year</u>: 2008 	<p>The sole arbitrator granted the claimant 9% pre-award interest running from the date of breach, and 9% post-award interest on any unpaid amounts to begin running 30 days from the date the award was rendered.</p>
41	<i>Colonial Oil Industries, Inc. v. Masefield America, Inc.</i> , ¶ 5.3 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2007 	<p>The tribunal granted both pre-award and post-award interest at the 9% statutory prejudgment interest rate.</p>
42	<i>Lubiam Modo per l’Uomo SPA v. Chesapeake Int’l Ltd.</i> , ¶ 19 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICDR - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2007 	<p>The tribunal granted pre-award interest “at the legal rate of interest permitted under the law of New York.” The interest was to run until the date of payment.</p>
43	<i>Esso Exploration and Prod. Chad Inc. v.</i>	<ul style="list-style-type: none"> - <u>Institution</u>: ICC 	<p>In this case, the applicability of the 9% statutory prejudgment interest rate was uncontested. The sole arbitrator granted pre-award interest, to run from “an</p>

No.	Case	Case Details	Approach to Interest
	<i>Taylor's Int'l Svcs. Ltd.</i> , ¶¶ 58, 60 (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2006 	appropriate midpoint of the various dates on which Esso Chad incurred the losses suffered by it.” Post-award interest at the 9% rate was granted on both damages and the costs and fees awarded by the tribunal. It was to run starting 1 month and 1 week after the rendering of the award.
44	<i>Capital India Power Mauritius I v. Mahashtra Power Dev't Corp. Ltd.</i> , ICC Award No. 12913/MS, pp. 34–36 (available via italaw.com)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2005 	The tribunal granted 9% simple pre-award interest, to run from the date of the destruction of claimant's equity in an investment project in breach of a Shareholders Agreement. The tribunal invoked its discretion to decline to grant pre-award interest on arbitration costs. The tribunal also granted 9% simple post-award interest.
45	<i>Chemical Overseas Hldgs, Inc. v. Uruguay</i> , ¶¶ 64–65, 68(a) and 68(h) (available via Westlaw Arbitration Materials)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: New York - <u>Law</u>: New York - <u>Year</u>: 2004 	Invoking the CPLR, the tribunal held that claimants were entitled to simple 9% interest “from the earliest ascertainable date the cause of action existed.” The tribunal also granted simple post-award interest at the statutory 9% rate.
46	<i>ICC Case No. 9839</i> , ¶ 63 (excerpt available in 2004 Y.B. Com. Arb. 66)	<ul style="list-style-type: none"> - <u>Institution</u>: ICC - <u>Seat</u>: Unclear - <u>Law</u>: New York - <u>Year</u>: 1999 	The tribunal held that, under CPLR § 5001, the petitioner was owed 9% interest from the earliest possible date its cause of action existed. This 9% interest was to run until petitioner received full payment of the sum awarded.
47	<i>White Westinghouse Int'l Co. v. Bank Sepah</i> , IUSCT Case No. 14 (7-14-3), (summarized in 1983 Y.B. Com. Arb. 320)	<ul style="list-style-type: none"> - <u>Institution</u>: IUSCT - <u>Seat</u>: The Hague - <u>Law</u>: Unclear - <u>Year</u>: 1982 	In this case, a check issued by the respondent to claimant remained unpaid due to a presidential order of 14 November 1979, freezing respondent's U.S. assets. A consent judgment was filed in the New York Court Clerk's office on 28 February 1980. Before the Iran-U.S. Claims Tribunal, the claimant sought the principal amount of this judgment plus interest running from 14 November 1979. For its part, the respondent claimed that no interest should be payable on the principal amount because its funds in the U.S. were frozen. The tribunal noted evidence that respondent's U.S. funds had yielded interest during the period in question, and therefore respondent could not be exempted from paying New York statutory interest.

No.	Case	Case Details	Approach to Interest
			<p>The tribunal applied §§ 5003 and 5004 of the CPLR in its analysis. The application of § 5003, which deals with post-judgment interest, was a product of the unusual circumstances of this case, <i>i.e.</i> that the tribunal was dealing with an award that followed a New York state court judgment.</p> <p>The tribunal granted pre-award interest at 6% up to and including 24 June 1981. After that date, pre-award interest was raised to 9% to match the increase in the CPLR rate. This interest was to run from the date of the consent judgment.</p> <p>No post-award interest was granted.</p>

APPENDIX B

New York Federal and State Court Decisions Reviewing Arbitrators' Awards of Interest

No.	Case Citation	Approach to Interest
	<u>Federal Court Decisions Reviewing Arbitrators' Interest Awards</u>	
	Federal courts have consistently held that the question of whether to grant pre-award interest is for the arbitrators to determine and that courts are powerless to award such interest if the arbitrators have not done so. By contrast, federal courts have discretion to grant post-award, prejudgment interest if the arbitral tribunal has not granted such interest in its award. Where arbitral tribunals have granted post-award interest, federal courts will confirm the award of interest for the post-award, prejudgment period. There appears to be no difference between the federal courts' approach to domestic and international arbitral awards.	
1	<i>Waterside Ocean Navigation Co. v. International Navigation Ltd.</i> , 737 F.2d 150 (2d Cir. 1984)	<p>In this New York Convention case, the lower court had confirmed the tribunal's award without granting post-award, prejudgment interest, stating that it did not have jurisdiction to "go beyond confirmation" of the award.</p> <p>On appeal, the Second Circuit held that whether to grant post-award, prejudgment interest in cases arising under federal law has, in absence of statutory directive, been placed in the "sound discretion" of the district courts. The court noted that there is a presumption in favor of the award of prejudgment interest, and that the facts did not indicate that award of prejudgment interest would be inappropriate in this case.</p> <p>The case was thus remanded to the district court for computation of post-award, prejudgment interest at a "appropriate rate."</p>
2	<i>Manios v. Zachariou</i> , No. 14CV4331-LTS-DCF, 2015 U.S. Dist. LEXIS 42537 (S.D.N.Y. 2015)	<p>In this proceeding to vacate an international arbitral award under Chapter 2 of the Federal Arbitration Act ("FAA"), the award-creditor argued that the arbitrators had manifestly disregarded the law by granting pre-award interest on a distribution of assets in an estate settlement case. The award-creditor contended that the terms of CPLR § 5001 only allow for interest upon "a sum awarded."</p> <p>The court rejected the award-creditor's "manifest disregard" claim, holding that where parties agree to submit a dispute to AAA arbitration (such as in the instant case), the AAA Commercial Rules are incorporated into the underlying agreement. Because the AAA Rules grant arbitrators the authority to award interest at such rate and from such date as they may deem appropriate, the tribunal did not manifestly exceed its authority by granting pre-award interest in this case.</p> <p>Accordingly, the award-debtor was not entitled to vacatur of the arbitral tribunal's award under the FAA.</p>
3	<i>Sayigh v. Pier 59 Studios</i> , No. 11-CV-1453-RA, 2015 U.S. Dist. LEXIS 27139, at *37 (S.D.N.Y.	In this proceeding to modify or vacate an arbitral award, the award-creditor argued that the arbitrator manifestly disregarded New York law by not granting her pre-award interest.

No.	Case Citation	Approach to Interest
	Mar. 5, 2015)	<p>The court rejected this argument, first noting that CPLR § 5001 (providing that interest shall be recovered on a sum awarded for breach of contract) was inapplicable, as the underlying dispute concerned an alleged act of employment discrimination.</p> <p>The court further held that, “where an arbitrator could have awarded pre-award prejudgment interest but did not, the court may not do so when entering judgment on an arbitration award.”</p> <p>The court, applying CPLR § 5002, granted “post-award prejudgment interest at an annual rate of 9%” as well as post-judgment interest at the rate provided for in 28 U.S.C. § 1961(a).</p>
4	<p><i>Local Union No. 1 of the United Assn. of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. v. Bass Plumbing & Heating Corp.</i>, 2014 U.S. Dist. LEXIS 183085 (E.D.N.Y. Oct. 28, 2014)</p>	<p>In this proceeding to confirm a domestic arbitral award, the arbitral tribunal had not granted post-award, prejudgment interest. Petitioner sought, along with confirmation of its award, to obtain interest from the date of the award.</p> <p>Magistrate judge Viktor Pohorelsky found that where an award is silent as to prejudgment interest, a court is not entitled to award such interest. He therefore recommended that Petitioner’s request for interest be denied. This recommendation was adopted, and a judgment was entered in <i>Local Union No. 1 of the United Assn. of Journeymen & Apprentices of the Plumbing & Pipe Fitting Indus. v. Bass Plumbing & Heating Corp.</i>, 2015 U.S. Dist. LEXIS 37932 (E.D.N.Y. Mar. 25, 2015).</p> <p>This judgment is at odds with the weight of New York federal case law, which provides that courts have discretion to grant post-award, prejudgment interest where the arbitral award is silent as to such interest. The outcome of this case appears to have resulted from the Magistrate Judge’s misreading of certain precedents (<i>see Shamah v. Schweiger</i> and <i>Moran v. Arcano</i>, below) which had referred to pre-award interest as “prejudgment” interest.</p>
5	<p><i>PremiereTrade Forex, LLC v. FXDirectDealer, LLC</i>, No. 12 CIV. 7006 PAC, 2013 WL 2111286 (S.D.N.Y. May 16, 2013)</p>	<p>In this proceeding to confirm a domestic arbitral award, the tribunal in the underlying arbitration had granted post-award interest at the New York statutory prejudgment interest rate of 9%, to begin running 30 days after the award.</p> <p>During the confirmation proceeding, the award-creditor sought a separate, additional award of prejudgment interest at 9% per annum, on top of the arbitrators’ award of post-award interest.</p> <p>The court denied the award-creditor’s request for duplicative post-award, prejudgment interest, noting that “confirmation of the award will include post-award interest at a rate of 9% specified in the arbitrators’ opinion”. The court further noted that, to the extent the award-creditor’s request for prejudgment interest referred to pre-award interest, “the Court will not grant interest that the arbitrators in this action explicitly denied.”</p>

No.	Case Citation	Approach to Interest
6	<i>Ganfer & Shore, LLP v. Witham</i> , 2011 U.S. Dist. LEXIS 2622 (S.D.N.Y. 2011)	<p>In this proceeding to confirm a domestic arbitral award, the court held that where an arbitral tribunal does not grant pre-award interest, a court cannot award such interest on a motion to confirm the arbitration award.</p> <p>By contrast, the court held that it was required to grant post-award, prejudgment interest “absent circumstances warranting the contrary” and that post-judgment interest was similarly “mandatory.”</p>
7	<i>Finger Lakes Bottling Co. v. Coors Brewing Co.</i> , 748 F.Supp.2d 286, 292-93 (S.D.N.Y. 2010)	<p>In this proceeding to confirm a domestic arbitral award, the court first noted that, where arbitrators have authority to grant pre-award interest, courts cannot grant such interest in post-award proceedings.</p> <p>However, in this case the issue of interest was beyond the scope of the parties’ narrowly-worded and limited arbitration agreement. New York law governed the granting of pre-award interest, because this was a diversity case and New York law governed the arbitration agreement.</p> <p>The award-creditor was not entitled to interest at the 9% statutory prejudgment interest rate because it did not assert a claim for breach of contract. Rather, because the proceeding was one of an equitable nature, the court had discretion to grant pre-award interest under CPLR § 5001. The court ultimately granted interest at the treasury bill rate, reasoning that the New York statutory prejudgment interest rate was not in line with actual market conditions.</p>
8	<i>Petrie v. Clark Moving & Storage, Inc.</i> , No. 09-CV-06495, 2010 U.S. Dist. LEXIS 48460 (W.D.N.Y. 2010)	<p>In this proceeding to confirm a domestic arbitral award, the award-creditor requested that the court grant pre-award interest at the 9% rate specified in CPLR § 5004.</p> <p>The court rejected the award-creditor’s claim, noting that arbitrators may provide for pre-award interest as part of their award, but if the award is silent on pre-award interest courts may not grant it.</p> <p>Because the “court is not entitled to award an amount relating to such prejudgment interest . . . the parties must determine the applicable interest rate and calculate the amount due.”</p>
9	<i>Coastal Caisson Corp. v. E.E. Cruz/NAB/Frontier-Kemper</i> , 2007 U.S. Dist. LEXIS 58114 (S.D.N.Y. Aug. 10, 2007)	<p>In this proceeding to confirm a domestic arbitral award, the award-creditor moved to modify the award to add prejudgment interest. The award-creditor sought 9% prejudgment interest pursuant to the CPLR, from the date the contract balance was due.</p> <p>The arbitral tribunal had held that “[a]lthough prejudgment interest may be required by the CPLR, we find that we have discretion under the applicable rules of the American Arbitration Association not to award pre-award interest Given the vast uncertainties concerning the amounts due and the reasons for those uncertainties . . . we think it is highly inappropriate to award interest and we decline to do so.”</p> <p>In denying the award-creditor’s motion to modify the award, the court noted that “the arbitrators did not</p>

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		<p>disregard law in exercising their discretion to deny [award-creditor] prejudgment interest.” The court noted that the parties had selected the American Arbitration Association Construction Industry Rules and New York law to govern their dispute. The former, at Rule 44(d), grant arbitrators discretion to award such interest as they may deem appropriate. The latter, at CPLR § 5001, provides that “interest may be required by law.”</p> <p>Ultimately, the court concluded that “[g]iven the tension between Rule 44(d) and Section 5001, it is appropriate to refrain from vacating an arbitral award and to defer to the arbitrators’ judgment.</p> <p>This case was partially reversed on unrelated grounds in <i>E.E. Cruz v. Coastal Caisson Corp.</i>, 346 Fed. Appx. 717 (2d Cir. 2009).</p>
10	<p><i>P.M.I. Trading Ltd. v. Farstad Oil, Inc.</i>, 2001 U.S. Dist. LEXIS 227 (S.D.N.Y. 2001)</p>	<p>In this New York Convention case, the court, citing <i>Waterside Ocean Nav.</i>, held that, absent persuasive evidence to the contrary, post-award, prejudgment interest is available for judgments rendered under the New York Convention and is presumed to be appropriate.</p> <p>The court held that “[t]he mere fact that arbitrators chose not to award post-award, prejudgment interest does not control this analysis.”</p> <p>It granted post-award, prejudgment interest, as well as post-judgment interest, at the federal post-judgment rate specified by 28 U.S.C. § 1961(a).</p>
11	<p><i>Shamah v. Schweiger</i>, 21 F.Supp.2d 208 (E.D.N.Y. 1998)</p>	<p>In this proceeding to confirm a domestic arbitral award, the award-creditor moved to modify the amount of the award to include pre-award interest at the New York statutory prejudgment interest rate of 9%. It asserted that the tribunal’s grant of 6% interest was a “material miscalculation” that necessitated modification.</p> <p>The court denied the motion, noting that courts “have rejected motions to vacate or modify arbitration awards which have failed to provide prejudgment interest.” The court also cited <i>Moran v. Arcano</i> for the proposition that arbitrators may grant pre-award interest, but when their award is silent with regard to such interest, courts may not grant it in the arbitrators’ stead.</p> <p>The court considered that, in awarding 6% interest, the tribunal could have been using the federal post-judgment interest rate. Accordingly, there was no evidence that the pre-award interest component of the arbitral award was miscalculated. The court denied the award-creditor’s request for modification.</p>
12	<p><i>Nicoletti v. E.F. Hutton & Co.</i>, 761 F.Supp. 312 (S.D.N.Y. 1991)</p>	<p>The award-creditor moved to modify a domestic arbitral award on the ground that the tribunal had manifestly disregarded the law in failing to grant him pre-award interest under CPLR § 5001.</p> <p>The court denied the motion, noting that the award-creditor had cited to no case in which an arbitration</p>

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		award was vacated or modified for failure to award prejudgment interest. Although the award-creditor's claim sounded in contract, the arbitrators may have determined that his entitlement was equitable rather than contractual, and that interest was therefore discretionary under CPLR § 5001(a).
13	<i>Jamaica Commodity Trading Co. v. Connell Rice & Sugar Co.</i> , No. 87 CIV. 6369 (JMC), 1991 WL 123962 (S.D.N.Y. July 3, 1991)	<p>In this New York Convention enforcement proceeding, the arbitral tribunal had granted post-award, prejudgment interest “in the amount of 10% per year from the date of the award until the award is fully paid or reduced to judgment.”</p> <p>In addition to confirming the principal amount of the award, the court expressly noted that it was confirming the arbitrators’ award of prejudgment interest pursuant to <i>Waterside Ocean Nav.</i></p>
14	<i>Moran v. Arcano</i> , 1990 U.S. Dist. LEXIS 9349 (S.D.N.Y. 1990)	<p>In this proceeding to confirm a domestic arbitral award, the award-creditor claimed pre-award and post-award, prejudgment interest. The court held that whether interest is taxed on a claim prior to the entry of an arbitration award (<i>i.e.</i>, pre-award interest) is within the discretion of the arbitrators (although neither of the two cases that it cited in support of this proposition so held).</p> <p>The court held that if the award is silent as to pre-award interest, a court is not entitled to grant it. By contrast, it held that “the award of post-award prejudgment interest is a matter left with the district court.”</p>
15	<i>Brandeis Intsel, Ltd. v. Calabrian Chemicals Corp.</i> , 656 F.Supp. 160 (S.D.N.Y. 1987)	<p>In this proceeding to confirm an international arbitral award under the New York Convention, the award-debtor cross-moved for vacatur, <i>inter alia</i> on the ground that the tribunal’s award of 11.5% pre-award interest was penal and therefore contrary to U.S. public policy.</p> <p>The court denied the cross-motion, holding that the award-debtor had not shown that the arbitrators’ chosen rate of 11.25% per annum was penal as a matter of English law, which governed the parties’ contract. Moreover, the award-debtor had not pointed to any other expression of accepted public policy which would weigh against confirming the arbitrators’ award of interest. 28 U.S.C. § 1961(a), which refers to post-judgment interest, was inapposite.</p>
16	<i>UCO Terminals, Inc. v. Apex Oil Co.</i> , 583 F. Supp. 1213 (S.D.N.Y. 1984)	<p>In this proceeding to confirm a domestic arbitral award, the award-debtor cross-moved to vacate the award, in part on the ground that the tribunal’s calculation of post-award interest was incorrect and unauthorized. The tribunal had granted post-award interest at a rate of 12%, to run beginning 30 days after the award was rendered.</p> <p>The court rejected the award-debtor’s argument that this grant of interest was unauthorized, noting that “[p]ost-award interest is an entirely rational arrangement established by the arbitrators to compensate [award creditor] for its loss. . . . Absent some express limitation on such an award, the Court can discern</p>

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		<p>no disregard of applicable law or of the [underlying contract] here.”</p> <p>The court further rejected the award-debtor’s argument that the annual rate of 12% established in the arbitral award should be set aside, as there was no indication that the tribunal disregarded the law in granting such a rate of interest.</p>
17	<p><i>A/S Siljestad v. Hideca Trading, Inc.</i>, 541 F. Supp. 58 (S.D.N.Y. 1981)</p>	<p>In this confirmation proceeding, the award-debtor moved to vacate the arbitral tribunal’s grant of pre-award interest at 14%, as said interest was omitted from the arbitral award itself and was only later added as an “Appendix B.” The award-debtor argued that this amounted to an impermissible reconsideration of the tribunal’s ruling.</p> <p>The court rejected the award-debtor’s claim, holding that the tribunal had not considered the issue of interest in its initial award, and therefore retained discretion to subsequently add pre-award interest in the form of Appendix B.</p> <p>The grant of interest was thus confirmed. The court, applying federal maritime law, granted post-award, prejudgment interest, also at 14%.</p>
18	<p><i>United States use of Groisser & Schlager Iron Works, Inc. v. Walsh</i>, 240 F. Supp. 1019 (N.D.N.Y. 1965)</p>	<p>In this case, the award-debtor moved to vacate a prior judgment confirming an arbitral award. The prior judgment had granted pre-award interest to the award-creditor notwithstanding that (a) the tribunal had not granted pre-award interest, and (b) the issue of interest had not been placed before the arbitral tribunal.</p> <p>The court held that, under CPLR §§ 5001, 5002 and 5003, the award-creditor was entitled to interest as a matter of right. The court noted that while the issue of interest was not submitted to the tribunal in the demand for arbitration, the parties specifically agreed in their arbitration agreement to arbitrate their dispute “as to balance due, together with appropriate interest.” Further, the award-creditor had demanded interest in the complaint it submitted to the district court.</p> <p>Thus, even though the arbitral tribunal had not granted pre-award interest, the court rejected the award-debtor’s argument that the court’s grant of pre-award interest was improper and merited vacatur or modification of the prior judgment.</p> <p>N.B. This case appears at odds with the weight of subsequent case law, which unambiguously holds that courts may not grant pre-award interest if the arbitrators have not done so.</p>
<p><u>New York State Court Decisions Reviewing Arbitrators’ Interest Awards</u></p> <p>New York state case law mirrors federal case law with regard to the review of arbitrators’ awards of interest.</p>		

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19	<i>Dermigny v. Harper</i> , 6 N.Y.S.3d 561 (2d Dep’t 2015)	<p>In this appeal, the award-creditor sought to reinstate a vacated lower court judgment that had confirmed an arbitral award and granted pre-award interest. The lower court had vacated its own judgment on the ground that the award-creditor had misrepresented to the clerk of the court that he was entitled to pre-award interest.</p> <p>The Appellate Division noted that, because the arbitration award did not include a provision granting pre-award interest to the award-creditor, the court was without power to grant such pre-award interest. Post-award, prejudgment interest and post-judgment interest were granted pursuant to CPLR 5002 and 5003, respectively.</p>
20	<i>Esrey v. Ernst & Young, LLP</i> , 133 A.D.3d 539 (1st Dep’t 2015)	<p>In this case, the award-creditors appealed from a lower court ruling denying a motion to vacate an arbitral award on the ground that the tribunal had manifestly disregarded the law by granting prejudgment interest at a rate lower than the CPLR rate.</p> <p>The First Department affirmed the trial court’s ruling, noting that (a) the parties’ agreement limited the prevailing party’s damages to the actual damages suffered and (b) the tribunal had found that the award-creditors were “fully compensated” by reduced prejudgment interest.</p>
21	<i>Peters v. Collazo Florentino & Keil LLP</i> , 117 A.D.3d 432 (1st Dep’t 2014)	<p>In this case involving a domestic arbitral award, the award-creditor appealed from a decision confirming an arbitral award which granted prejudgment interest at a rate of 2% per annum.</p> <p>The First Department, reviewing the award under CPLR Article 75, denied the appeal and held that (a) the award-creditor failed to timely move to modify the award to raise the prejudgment interest rate to 9%, and (b) in any event, the arbitrator properly set the prejudgment interest rate at 2%.</p> <p>It is not entirely clear why the court felt that the 2% rate was proper. The court cited to CPLR § 5001(a), suggesting that it may have viewed the dispute as one of an equitable nature rather than for breach of contract. CPLR § 5001(a) provides that “in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be <i>in the court’s discretion</i>.”</p>
22	<i>Kingdon Capital Mgt., LLC v. Kaufman</i> , 110 A.D.3d 648 (1st Dep’t 2013)	<p>In this case involving a domestic arbitral award, the award-debtor appealed from the lower court’s judgment granting the award-creditor the sum and prejudgment interest rate set by the award.</p> <p>The First Department unanimously affirmed the lower court judgment, noting that there was no basis for modifying the rate of prejudgment interest awarded.</p>
23	<i>Levin & Glasser, P.C. v. Kenmore Property, LLC</i> ,	<p>In this case involving a domestic arbitral award, the award-debtor appealed from the lower court’s</p>

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	896 N.Y.S.2d 311 (1st Dep't 2010)	<p>judgment granting the award-creditor pre-award interest pursuant to CPLR § 5001.</p> <p>The Appellate Division vacated the lower court's judgment, holding that the lower court had erred in granting pre-award interest. It reasoned that, in contract disputes before an arbitral tribunal, the question of whether interest from the date of breach of contract should be allowed in the arbitral award is a mixed question of law and fact that is for the arbitrator to determine.</p> <p>Because the award-creditor could have sought pre-award interest from the arbitral tribunal, it was now barred from seeking such interest from the court.</p>
24	<i>Grobman v. Chernoff</i> , 881 N.Y.S.2d 458 (2d Dep't 2009)	<p>The award-creditor appealed from a lower court order that disallowed pre-award interest. The circumstances of this case were unusual, in that the arbitration was focused solely on the issue of damages after the award-debtor's liability had been determined in a prior jury trial.</p> <p>The Appellate Division observed that in a personal injury action in which the trial is bifurcated, interest on damages runs from the date liability is determined. Therefore, the court held that the award-creditor was entitled to "pre-award" interest, <i>i.e.</i> interest running from the date of the jury verdict that preceded the arbitration.</p> <p>Thus, the Appellate Division granted the award-creditor interest on her personal injury award from the date the award-debtor's liability was determined, notwithstanding the tribunal's silence with regard to pre-award interest. This decision was affirmed by the Court of Appeals in <i>Grobman v Chernoff</i>, 15 N.Y.3d 525 (2010).</p>
25	<i>West Side Lofts, Ltd. v. Sentry Contr., Inc.</i> , 300 A.D.2d 130 (1st Dep't 2002)	<p>In this case involving a domestic arbitral award, the award-debtor appealed from a lower court ruling confirming an arbitral award, including pre-award interest.</p> <p>The First Department affirmed the lower court's judgment. It held that, [g]iven a broad arbitration clause and the absence of a contractual provision specifically prohibiting preaward interest, the award of preaward interest cannot be successfully challenged as beyond the arbitrator's power simply because the parties' contract contains no provision therefor and petitioner made no such demand in the arbitration."</p>
26	<i>Rothermel v. Fidelity & Guarantee Ins. Underwriters Inc.</i> , 721 N.Y.S.2d 565 (3d Dep't 2001)	<p>In this case involving a domestic arbitral award, the award-creditor appealed from a lower court ruling denying his request for pre-award interest. The arbitral tribunal had also refused to grant pre-award interest.</p> <p>The Appellate Division affirmed the lower court's ruling, holding that the question as to whether pre-award interest is to be awarded is for the arbitrator to determine and, if the arbitrator does not award any pre-award interest, the court is powerless to do so.</p>

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		<p>The court added that even if the arbitrator had committed an error of fact or law in denying the award-creditor pre-award interest, the lower court would have lacked the authority to correct such an error.</p>
27	<p><i>Excelsior 57th Corp. v. Kern</i>, 283 A.D.2d 209 (1st Dep’t 2001)</p>	<p>The award-creditor appealed from a lower court judgment vacating so much of an arbitration award as granted pre-award interest.</p> <p>The Appellate Division affirmed the lower court, holding that the arbitrators exceeded their authority in awarding pre-award interest on the back rent they found due, because (a) the parties’ narrow arbitration clause only covered specifically-mentioned issues of fact and (b) the parties did not agree to submit the issue of interest to the arbitrators. The court also declined to use “judicial discretion” to award interest under CPLR 5001, criticizing the award-debtor’s conduct in the underlying arbitration.</p>
28	<p><i>State Farm Mut. Auto. Ins. Co. v. Cordes</i>, 662 N.Y.S.2d 140 (2d Dep’t 1997)</p>	<p>In this appeal, the Second Department reversed a lower court order that granted pre-award interest, in spite of the arbitral tribunal’s failure to do so.</p> <p>The Second Department noted simply that “[t]he court lacked the power to award pre-arbitration award interest.”</p>
29	<p><i>Aetna Casualty and Surety Co. v. Rosen</i>, 650 N.Y.S.2d 29 (2d Dep’t 1996)</p>	<p>In this appeal from a lower court judgment confirming an arbitral award, the Appellate Division modified the lower court’s ruling so as to omit the court’s award of pre-award interest.</p> <p>The Appellate Division explained that the lower court was powerless to grant pre-award interest (as presumably the tribunal had not provided for such interest). Rather, upon confirmation of an arbitrator’s award, interest should be calculated from the date of the award.</p>
30	<p><i>Sedlis v. Gertler</i>, 554 N.Y.S.2d 615 (1st Dep’t 1990)</p>	<p>In this appeal from a lower court judgment confirming a domestic arbitral award, the tribunal had granted pre-award interest and post-award interest at a rate of 12%. The award-creditor requested that the court vacate the award or modify the interest the interest portion of the award.</p> <p>The parties’ contract provided that late payments would bear interest at the rate specified or at the “legal rate” at the award-creditor’s place of business, which was New York.</p> <p>The First Department held that, as no interest rate was specified in the parties’ contract, prejudgment interest should be calculated at the rate of 6% per annum set by General Obligations Law § 5-501(1).</p> <p>In modifying the award, the First Department relied on CPLR § 7511(c)(1), which provides that the court shall modify an arbitral award if “there was a miscalculation of figures . . . in the award.” This appears to have been in error, given that CPLR § 7511(c)(1) only authorizes modification of computational errors and not reversal of substantive rulings. The arbitrators’ award of interest involved a decision on a substantive</p>

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		issue, and not a mere miscalculation.
31	<i>Gruberg v. Cortrell Group, Inc.</i> , 143 A.D.2d 39 (1st Dep’t 1988)	<p>In this case involving a domestic arbitral award, the award-creditor appealed from a lower court judgment that had denied pre-award interest.</p> <p>The Appellate Division upheld the lower court’s decision to deny pre-award interest, but modified the date from which post-award interest was to run to correct a computational error by the arbitrator.</p> <p>The Appellate Division noted that in a contract dispute brought before an arbitrator, the question of whether interest from the date of breach of contract should be allowed is a mixed question of law and fact for the arbitrator to determine. Further, in a motion under CPLR § 7510 to confirm an arbitral award, the arbitrator’s award is deemed conclusive as to all matters of law and fact, unless some ground for modification or vacatur exists under CPLR § 7511.</p> <p>In this case, since the tribunal’s award was silent as to pre-award interest, the lower court did not have the authority to grant such interest.</p>
32	<i>Rosenblum v. Aetna Casualty & Surety Co.</i> , 439 N.Y.S.2d 482 (3d Dep’t 1981)	<p>The award-creditor appealed from a lower court judgment confirming an arbitral award that omitted pre-award interest. The award-creditor had moved under CPLR § 7511 to modify the award to include pre-award interest, but this motion was denied.</p> <p>The Appellate Division considered it “well settled” that arbitrators are empowered to fashion awards to achieve just results and “may shape remedies with a flexibility at least as unrestrained as that employed by a chancellor in equity.” Accordingly, the award should not be disturbed.</p>
33	<i>Penco Fabrics, Inc. v. Bogopulsky, Inc.</i> , 146 N.Y.S.2d 514 (1st Dep’t 1955)	<p>In this proceeding involving a domestic arbitral award, the Appellate Division held that the question of whether interest is to be allowed from the date of breach was for the arbitrators to determine. The court was powerless to award interest from the date of breach. The mere fact that the award was silent on interest did not mean that the arbitrators did not consider this question.</p> <p>Additionally, the court noted that provisions of law applicable to judicial actions and proceedings do not necessarily apply to arbitrations. Parties who submit their disputes to arbitration forego these provisions and leave all questions of law and fact to the arbitrators. The right to interest involves questions of law and fact that were within the arbitrators’ purview.</p>
34	<i>Taborsky v. Bayes</i> , No. 09-9562, 2016 N.Y. Misc. LEXIS 592 (Sup. Ct. Suffolk Co. Feb. 23, 2016)	<p>In this proceeding to confirm an arbitral award pursuant to CPLR Article 75, the award-creditor moved to modify the award to add pre-award interest, pursuant to CPLR § 5001.</p> <p>Citing <i>Dermigny and Rothmel</i>, the court noted that the arbitration award “did not include a provision</p>

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		granting the [award-creditor] pre-arbitration award interest; consequently, the court is without power to award such interest.”
35	<i>Chamois v. Countrywide Home Loans, Inc.</i> , 863 N.Y.S.2d 897 (Sup. Ct., Orange Co., 2008)	<p>In this proceeding to confirm a domestic arbitral award in a labor dispute, the award-creditors claimed that they were entitled to pre-award interest on their back pay award as a matter of law, despite the fact that the tribunal had not granted such interest.</p> <p>The court, applying the review standards contained within CPLR Article 75 and the Federal Arbitration Act, concluded that “judicial review of arbitration awards is extremely limited.”</p> <p>In particular, the court noted that arbitrators may provide for pre-award interest as part of their award, and that courts have rejected motions to vacate or modify arbitration awards which have failed to provide pre-award interest. It also noted that where an award is silent on pre-award interest, a court may not grant it.</p> <p>Thus, because pre-award interest was not mentioned in the arbitral award, the award-creditors’ request was denied.</p>
36	<i>DeMartini v. Bertram Garden Apartments</i> , 138 N.Y.S.2d 659 (Sup. Ct. Queens Co. 1955)	<p>In this case involving a domestic arbitration, the arbitral tribunal had rendered an award, a judgment had been entered thereon, and the award-debtor had made payment in full. Nevertheless, the award-creditor contended that he was still entitled to continue a proceeding to enforce a mechanic’s lien for pre-award interest on the arbitral award. The arbitrator’s award had not provided for pre-award interest.</p> <p>The court noted that “interest was an incident of the award and arose out of the contract between the parties” because all matters arising out of that contract were within the scope of the parties’ arbitration agreement. It followed that the arbitral award and the judgment entered thereon stood as a bar to enforcement of the mechanic’s lien.</p> <p>The court thus granted summary judgment dismissing the award-creditor’s attempt to enforce the mechanic’s lien.</p>

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