AWARDS OF INTEREST IN INTERNATIONAL ARBITRATION: ACHIEVING COHERENCE THROUGH PURPOSE

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Abstract

Awards of interest by international arbitral tribunals are often criticised for their lack of consistency. Rather than propose another model to achieve uniformity, this article submits that the flexibility of tribunals to award interest as damages and interest on damages (both pre and post-award) should be preserved, provided tribunals are guided by a purposive approach to their award. Using English law and public international law as a framework for analysis, this article considers the issues that typically confront an arbitral tribunal determining whether and how interest can be awarded, through the lens of the purposes of an award of interest.

I. Introduction

In 1996, Professor John Gotanda described how the law of interest in international arbitration had been "*left behind in the march towards uniformity*",[1] resulting in inconsistent arbitral awards. Twenty-odd years later, not much has changed. Claims for interest in international arbitration – whether commercial, investor-State or inter-State – may have increased in their complexity, but the resulting awards of interest by tribunals, and their reasons for doing so, remain far from uniform.[2]

In this context, commentators claim *ad nauseam* that the case-by-case approach taken by tribunals to awards of interest is undesirable for reasons of efficiency and predictability,[3] particularly in circumstances where interest can constitute as much as sixty percent of the monetary value of an award.[4] Yet there is no empirical evidence that pre- or post-award interest has any impact on the efficiency of dispute resolution: parties rarely seem incentivised (pre-award) to hasten the resolution of their dispute by the spectre of compounding interest on a damages award.[5] Nor is the law on interest definitively settled: indeed, until recently English law and public international

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The views expressed here are the personal views of the authors and do not reflect those of their law firm.

1 John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 AM. J. INT'L L. 40, 40 (1996). For an earlier analysis making the same point, *see* David J. Branson & Richard E. Wallace, *Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach*, 28 VA. J. INT'L L. 919 (1988).

2 SERGEY RIPINSKY & KEVIN WILLIAMS, DAMAGES IN INTERNATIONAL INVESTMENT LAW 361 (2008); IRMGARD MARBOE, CALCULATION OF COMPENSATION AND DAMAGES IN INTERNATIONAL INVESTMENT LAW 403-405 (2nd ed., 2017).

3 *See* Inna Unchkunova & Olga Temnikov, *A Procrustean Bed: Pre- and Post-Award Interest in ICSID Arbitration,* 29(3) ICSID REV. 648 (2015); Christina .L. Beharry, *Prejudgment Interest Rates in International Investment Arbitration*, 8 J. INT'L DISP. SETTLEMENT 56, 72 (2017); John Y. Gotanda & Thierry Senechal, *Interest as Damages*, 47 COLUM. J. TRANSNAT'L L. 491 (2009); Mark Beeley & Richard E. Walck, *Approaches to the Award of Interest by Arbitration Tribunals*, J. DAMAGES INT'L ARB. 1 (2014); Natasha Affolder, *Awarding Compound Interest in International Arbitration*, 12 AM. REV. OF INT'L ARBITRATION 45, 46 (2001).

4 Mark Smith & Romans Vikis, *Whose Money is it and Does it Really Matter*, 10(4) TRANSNAT'L DISP. MGMT. 1, 2 (2013); *See also*, the examples given in Gotanda & Senechal, *supra* note 3, at 492 n. 2.

5 *But see* DEPARTMENTAL ADVISORY COMMITTEE ON ARBITRATION LAW, 1996 REPORT ON THE ARBITRATION BILL 311 (1996).

law were equally confused as to whether compound interest could be claimed. Similarly, while most civil law systems now recognise the possibility of awarding compound interest, few have historically considered it to be the norm.[6] And under international law, there is still no consensus on how pre- and post-award interest should be calculated, with persuasive arguments for every conceivable interest rate being available.[7]

This article submits that there is, or should be, no real inconsistency or lack of coherence in awards of interest, provided arbitral tribunals adopt a purposive approach.[8] If awards of interest are reasoned and made in accordance with their underlying purpose, there is no need to fetter the discretion and flexibility of tribunals. From the perspective of an enforcing court, the use of a purposive approach by a tribunal may also assist in overcoming any issues of enforceability, particularly where a large amount of interest has been awarded as a result of a high rate, the use of compounding, or a long interest period.

For background, part II of this article describes the main types of interest that can be awarded, and their various purposes. Using English law and public international law as the primary framework for analysis, part III then considers the legal and economic issues facing a tribunal evaluating a claim for interest, and examines how those issues can be resolved using a purposive approach.[9]

II. The Varying Purposes of an Award of Interest

Except in legal systems where interest is prohibited,[10] most legal systems recognise three main forms of interest: (i) interest as damages[11] (ii) pre-award interest on damages and (iii) post-award interest.[12] Other types of interest may also be available, but are not considered for the purposes of this article.[13] In a claim for interest, it is critical at the outset to identify the type of interest sought. Each of these forms of interest will require a different analysis and serve a distinct function. Indeed, much of the confusion surrounding awards of interest in international

6 Sempra Metals Ltd. v. Inland Revenue Commissioners [2008] 1 AC 561 (HL), 587 ¶ 37 (Eng.); *see infra* pt. III.F.

7 *See infra* pt. III.E.

8 A similar approach is advocated by Professor Marboe: *see* MARBOE, *supra* note 2, ¶ 6.03.

9 For a comprehensive review of the treatment of interest in most major legal systems, *see* John Gotanda, *Damages in Private International Law, in* 326 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 193-237 (2007). *See also,* MARBOE, *supra* note 2, ¶¶ 6.24-6.27.

10 Gotanda, *supra* note 9, at 233-237. Although interest will usually be prohibited in jurisdictions where the Islamic faith is practised (or where Sharia law applies), in these jurisdictions some exceptions do exist. For example, Iran secured exemptions to the general prohibition in Sharia law on interest in order to allow claims for interest to be made before the Iran-US Claims Tribunal: *see* Gotanda, *supra* note 1, at 49. *See also,* I.F.I. Shihata, *Some Observations on the Question of Riba and the Challenges Facing "Islamic Banking",* TRANSNAT'L DISP. MGMT. (2003).

11 Gotanda & Senechal, *supra* note 3, at 514.

12 *Cf.* the comparison provided by Caroline Kleiner, *Les intérêts de somme d'argent en droit international privé*, REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 639, ¶ 37 (2009), suggesting that the distinction between pre- and post-award interest in English law is tracked in Swiss law as a distinction between 'compensatory' and 'moratory' interest; in Germany, through the distinction between interest for delay and procedural or judicial interest; and in French law in an uncertain way, given the confusion between the concepts of compensatory interest ("*intérêts compensatoires*" or "*intérêts rémunératoires*"), moratory or default interest ("*intérêts moratoires*") and judicial interest.

13 These include interest awarded as restitution, equitable interest, statutory interest as of right (for example, in the context of an insolvency), interest on costs, and enhanced interest where a party refuses a reasonable settlement offer. *See also,* Pauline Ridge, *Pre-Judgment Compound Interest*, 126 L. Q. REV. 279, 291-300 (2010).

arbitration stems from a blurring of the (often unclear) distinction between the available forms of interest, particularly 'interest as damages' and 'pre-award interest on damages'.[14]

Under English law, interest as damages will compensate a claimant for direct or consequential loss caused by a respondent's wrongful conduct.[15] For example, interest as damages can compensate for any interest paid by a claimant as a result of having to borrow additional funds,[16] the loss of interest that would have been earned on funds,[17] or the time value cost arising from the non-delivery of goods.[18] Similarly, under international law, interest as damages can arise as part of a claim for damages following the late payment of a debt,[19] consequential loss caused by an international wrong, or as a direct form of loss where the interest claimed is part of the sunk costs of an investor.[20]

By comparison to interest as damages, pre-award interest on damages only compensates for the loss of use of the principal sum of damages.[21] In this sense, interest on damages is a form of secondary or consequential loss based on a claimant having been deprived of the use of the principal sum of damages for a period of time leading up to an award. Compared to interest as damages, this form of interest compensates for a narrower category of loss, and is based on an assumption that if the principal sum had been paid at the date it was owed, the claimant would

14 *See, e.g.,* MARBOE, *supra* note 2, ¶ 6.03.

15 JAMES EDELMAN ET AL., MCGREGOR ON DAMAGES ¶¶ 19-005-19-029 (20th ed. 2017).

16 A similar principle is reflected in the 2016 UNIDROIT Principles of International Commercial Contracts, for example, in the context of describing damages for consequential loss (that is, any gain of which a party has been deprived as a consequence of non-performance): UNIDROIT Principles of International Commercial Contracts 2016, *available at* https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016 [*hereinafter* "2016 UNIDROIT Principles"]. The illustration given for the principle that "[d]amages cover loss suffered, including loss of profit" is one in which a creditor has not been paid by a debtor under the terms of their contract, and must borrow money from its bank at a high rate of interest. In such a case, the 2016 UNIDROIT Principles require the debtor to compensate the creditor for the interest due to its bank: 2016 UNIDROIT Principles 272, art. 7.4.2.

17 *See, e.g.,* Hartle v. Laceys [1999] 1 Lloyd's Rep. 315 (Eng.); Equitas Ltd., Additional Underwriting Agencies (No. 9) Ltd. v. Walsham Brothers & Co. Ltd. [2013] EWHC 3264 (Eng.) [*hereinafter* "Equitas v. Walsham"].

18 EDELMAN ET AL., *supra* note 15, ¶¶ 19-012-19-013.

19 *See, e.g.,* Russian Claim for Interest on Indemnities (Russ. v. Turk.), 11 R.I.A.A. 421 (Perm. Ct. Arb. 1912).

20 In an investor-state context, *see* Siemens AG v. The Argentine Republic, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007), ¶ 365 where approximately AR$33 million in interest on investments and "non-productive expenses" was claimed as part of the investment made by the claimant. The tribunal considered it appropriate to treat as accrued certain interest on third-party loans made to the investment vehicle at the actual rate (ranging between nine to fourteen percent). Inter-company loans, which formed the bulk of the company's capital, were assessed on an actual cost of funds basis: ¶¶ 368-370. For an inter-State claim where interest was part of the principal sum claimed, *see* the interest claimed by the Netherlands in The Rhine Chlorides Arbitration concerning the Auditing of Accounts (Neth./Fr.), Case No. 2000-2004, Award (Mar. 12, 2004), ¶ 139, *available at* https://pcacases.com/web/sendAttach/78.

21 If interest *on* damages is being claimed, then the measure to be used is one of compensation, not unjust enrichment: *cf.* MARBOE, *supra* note 2, ¶¶ 6.10-6.11, 6.28-6.34; Gotanda, *supra* note 9, at 264.

have achieved some benefit or avoided additional expense.[22] As a result of this purpose, the use of that principal sum by the party *paying* interest on damages should not be relevant.[23]

The first of the kinds of loss (loss of benefit) remedied by interest on damages is usually identified using the 'alternative investment theory' (or a concept equivalent to it), which assumes that if a claimant had the principal sum, they would have invested it.[24] Under this theory, the relevant loss is approximated without necessarily requiring strict proof of how the hypothetical alternative investment would have performed,[25] using an interest rate that provides a reasonable approximation of the claimant's loss.[26] This theory is reflected, for instance, in the 2016 UNIDROIT Principles of International Commercial Contracts ["**2016 UNIDROIT Principles**"] where the rationale given for pre-award interest on unliquidated sums is that in international trade *"it is not the practice for businesspersons to leave their money idle"*.[27] That being said, this assumption may not be appropriate for every kind of claimant.[28]

The second kind of loss compensated by interest on damages (additional expense) tends to be measured using an assumption about the costs incurred by a claimant as a result of borrowing funds to replace the principal sum.[29] Here again, assumptions may be made as to how much additional interest a claimant has had to pay on that borrowing, subject to proof to the contrary.[30]

It should be noted that the distinction between 'interest *as* damages' and 'pre-award interest *on* damages' will not always be clear-cut. A claimant may even have a choice as to whether it claims its lost interest 'as damages' or 'on damages'. But this is not a distinction without a difference. While both forms of interest compensate a claimant, a tribunal's jurisdiction to award either may derive from a different juridical basis.[31] Conflating these forms of interest can therefore lead to

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22 DAVID SUTTON ET AL., RUSSELL ON ARBITRATION, ¶ 6-120 (24th ed. 2015); Gotanda, *supra* note 1, at 41-42; RIPINSKY & WILLIAMS, *supra* note 2, at 362-3; Security Council, U.N. Comp. Comm'n Governing Council, Awards of Interest (Jan. 4 1993), U.N. Doc. S/AC.26/1992/16, ¶ 1; JAMES CRAWFORD, THE LAW OF STATE RESPONSIBILITY 533 (2013); Elihu Lauterpacht & Penelope Nevill, *Interest, in* THE LAW OF INTERNATIONAL RESPONSIBILITY 613 (James Crawford et al. eds., 2010); THE LAW COMMISSION, PRE-JUDGMENT INTEREST ON DEBTS AND DAMAGES, 2003-4, HC 295, ¶ 1.9 (UK) [*hereinafter* "LAW COMMISSION REPORT"].

23 Fiona Trust & Holding Corp. v. Privalov [2011] EWHC (Comm) 664, ¶ 13 (Eng.).

24 MARBOE, *supra* note 2, ¶ 6.09; RIPINSKY & WILLIAMS, *supra* note 2, at 363; *see, e.g.,* Sylvania Technical Systems, Inc. v. Iran, 8 Iran-U.S. Cl. Trib. Rep. 320-322 (1985).

25 Gotanda, *supra* note 9, at 191; John Gotanda, *Compound Interest in International Disputes*, 2 OXFORD UNIV. COMP. L. F. 1, 21 (2004); McCullough & Co. Inc. v. Ministry of Post, Telegraph and Telephone, 11 Iran-U.S. Cl. Trib. Rep. 3 (1986).

26 Gotanda, *supra* note 1, at 41-42.

27 2016 UNIDROIT Principles, *supra* note 16, art. 7.4.10.

28 For example, it may not be appropriate to assume that a nascent business would have invested all of the principal sum, given that it will likely have some debt financing it will have to service before it has freedom to invest the principal sum. In such cases, pre-award interest is better designed by reference to assumptions about the additional cost incurred by the delay in payment of the principal sum or a mixed analysis based on the cost incurred *and* benefits lost.

29 RIPINSKY & WILLIAMS, *supra* note 2, at 363; MARBOE, *supra* note 2, ¶ 6.09.

30 While these kinds of loss provide the primary purpose of pre-award interest, interest on damages may also serve the purpose of protecting the award against inflation: *see* J. Colon & M. S. Knoll, *Prejudgment Interest in International Arbitration* 4(6) TRANSN'L DISP. MGMT. 1 (2007). Some commentators have also suggested that interest on damages might encourage parties to resolve their disputes quickly, although without reference to any empirical evidence to support this claim: Gotanda, *supra* note 9, at 192; *see also* Eiser Infrastructure v. Kingdom of Spain*,* ICSID Case No. ARB/13/36, Award (May 4, 2017), ¶ 478.

31 *See infra* pt. III.B.i.

error in calculating the applicable interest rate, particularly if the parties' agreement or the applicable law provide that different interest rates apply to different kinds of interest.[32] And on a more practical level, while interest as damages will always be accrued to form part of the principal sum awarded by a tribunal, pre-award interest on damages will only ever be accrued at the date of the award.[33]

In contrast to interest as damages and pre-award interest, post-award interest is generally viewed as a procedural device. Although post-award interest continues to provide compensation for loss of use of a principal sum,[34] its primary purpose (at least under international law) is to incentivise an award debtor to satisfy an award promptly.[35] This purpose justifies a separation between pre and post-award interest, and can support post-award interest being calculated differently.[36]

III. Factors to be Considered by Tribunals when Awarding Interest

When presented with a claim for interest, a tribunal must consider a range of issues. It must first establish that it has jurisdiction to award interest, whether based on the parties' consent or the applicable law. It must then consider whether there are any factors making an award of interest inappropriate. Finally, it must determine how any interest award should be calculated. This requires a careful analysis of (i) the principal sum (or sums) on which interest should be applied, which will usually control the currency of the interest, (ii) the time period over which interest should be awarded, and whether any grace period should apply, (iii) the applicable rate of interest, (iv) whether simple or compound interest should be awarded, and (v) whether the award of interest makes sense from an economic or valuation standpoint.[37] The questions arising under each of these issues often straddle the boundaries between law, facts and economics, potentially requiring factual and expert evidence.

A. Agreement on Interest

The obvious starting point for any jurisdiction to award interest is the parties' arbitration agreement, or any other agreement relevant to the tribunal's determination of the dispute, such as the parties' contract or any applicable treaty.[38] Subject to the applicable law[39] and public

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32 *See infra* pt. III.B.

33 Of course, these kinds of interest may be accrued at the same date (for example, if loss is valued at the date of the award) but, in general, this will not be the case.

34 The 'compensatory principle' plays a much greater role for post-judgment interest on English judgments: Novoship (UK) Ltd. v Mikhaylyuk, Novoship (UK) Ltd v. Nikitin [2014] EWCA (Civ) 908, ¶¶ 134-136 (Eng.). In an Indian law context, *see* Hyder Consulting (UK) Ltd. v. State of Orissa, (2013) 2 SCC 719.

35 Gotanda, *supra* note 1, at 44; MARBOE, *supra* note 2, ¶ 6.03; Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicar.), Judgment, 2018 I.C.J. (Feb. 2, 2018), ¶¶ 154-155 [*hereinafter* "Costa Rica v. Nicar., International Court of Justice"].

36 MARBOE, *supra* note 2, ¶ 6.262. *But see,* Beeley & Walck, *supra* note 3, at 15-16; T.W. Walde & B Sabahi, *Compensation, Damages and Valuation in International Investment Law,* 6(4) TRANSNAT'L DISP. MGMT. 48 (2007).

37 For similar guidance, *see* CHARTERED INSTITUTE OF ARBITRATORS: INTERNATIONAL ARBITRATION PRACTICE GUIDELINE: DRAFTING ARBITRAL AWARDS PART II – INTEREST (2018), *available at* http://www.ciarb.org/docs/default-source/ciarbdocuments/guidance-and-ethics/practice-guidelines-protocols-and-rules/international-arbitration-guidelines-2015/drafting-arbitral-awards-part-ii-interest-8-june-2016.pdf?sfvrsn=14 .

38 Gotanda, *supra* note 9, at 189, 246-247.

39 *See, e.g.,* 2016 UNIDROIT Principles, *supra* note 16, art. 7.4.13; Arbitration and Conciliation Act, No. 26 of 1996 (India), § 49(1) [*hereinafter* "Indian Arbitration Act"].

policy,[40] an agreement on whether, at what rate, and on what sums interest accrues will usually be determinative for payments falling within the scope of the interest provision (for example, an interest on late payments provision would not necessarily be determinative for claims of a different nature).

In an English law context, the inclusion of a term expressly dealing with the powers of a tribunal to award pre or post-award interest is relatively rare.[41] Where provisions on interest are included, however, they may appear in many forms, ranging from general to more detailed provisions requiring interest to be awarded at a particular rate for a particular time, on a simple or compound basis.[42]

The inclusion of interest provisions in international treaties (particularly bilateral investment treaties) is more commonplace, but these tend to be light on detail. For example, Article 28(6) of the Energy Charter Treaty, 1994 provides that *"awards of arbitration … may include an award of interest"*. The United States Model BIT also provides that a tribunal may award *"monetary damages and any applicable interest"*.[43] Beyond these types of provisions, interest rates or criteria are almost invariably specified only for lawful expropriation.[44]

The procedural rules of some arbitral institutions also address interest. For example, the 2014 Rules of the London Court of International Arbitration provide that:[45]

> *"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*

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40 *See, e.g.,* the extreme award of interest overturned at the enforcement stage on grounds of public policy in Oberster Gerichtshof [OGH] [Supreme Court] Jan. 26, 2005, 3 Ob 221/04b, *reprinted in* 30 Y.B. COMMERCIAL ARB. 421 (2005) (Austria); *see also,* Steven H Reisberg & Kristin M Pauley, *An Arbitrator's Authority to Award Interest on an Award until "Date of Payment": Problems and Limitations,* 16(1*)* INT'L ARB. L. REV. 25 (2013).

41 As the House of Lords has previously observed: "[i]t is, nevertheless, still fair to assume that loss of interest is not within the parties' contemplation under many everyday contracts.": Sempra Metals Ltd. v. Inland Revenue Commissioners [2008] 1 AC 561 (HL), at 643. For example, the Loan Market Association standard forms for lending in developing markets (which allow for dispute resolution via arbitration) contain provisions on the payment of interest by a borrower, but no provision specifically regulating how interest should be awarded by a tribunal in the event of a dispute.

42 For example, in the Venezuelan law-governed agreements considered in the recent Conoco v. PDVSA award, the parties agreed that interest would be paid on yearly indemnifications under each agreement at 12-month and 3-month LIBOR (different rates applying to each agreement), but did not stipulate whether that interest was to be paid on a simple or compound basis. *See* Conoco Phillips Petrozuata B.V., et al. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/30, Final Award (Apr. 24, 2018), ¶ 999 [*hereinafter* Conoco v. PDVSA].

43 U.S. MODEL BILATERAL INVESTMENT TREATY arts. 34(1)(a), 34(2)(b) (2012), *available at* https://www.state.gov/documents/organization/188371.pdf; *See also,* Investment Agreement between the Government of Hong Kong Special Administrative Region of the People's Republic of China and the Government of the Republic of Chile, H.K.-Chile (Nov. 18, 2016), art. 32(1)(a), *available at* http://investmentpolicyhub.unctad.org/Download/TreatyFile/5413.

44 *See, e.g.,* Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No ARB/14/21, Award (Nov. 30, 2017), ¶ 712. In this context it is important to distinguish between provisions providing for the payment of interest in a lawful expropriation, as opposed to provisions providing for an award of interest in the context of a dispute submitted to a tribunal: Tenaris v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/26, Award (Jan. 29, 2016), ¶ 585; *Cf.* RIPINSKY & WILLIAMS, *supra* note 2, at 364-5, 366-7, nn. 20-30. *See also,* MARBOE, *supra* note 2, ¶¶ 6.13-6.17.

45 Arbitration Rules of the London Court of International Arbitration 2014, r. 26.4.

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."

A similar provision can be found in the 2016 Rules of the Singapore International Arbitration Centre,[46] the 2014 International Centre For Dispute Resolution's International Arbitration Rules,[47] and the 2014 World Intellectual Property Organization's Arbitration Rules.[48] Whether these procedural rules can confer jurisdiction to award interest may, however, depend on whether they are treated as part of the applicable substantive or procedural law.[49]

It is of course preferable for parties to agree – within the bounds of the applicable law – on how a tribunal should approach the issue of interest. A sophisticated provision would address: (i) the types of sums or obligations to which interest applies (and any currency or fixed exchange rate to be used), (ii) the time period during which interest will accrue, (iii) the rate of interest, and (iv) whether interest will be simple or compound. Such provisions create greater certainty for the parties as to the consequences of a breach and non-payment of an award debt. Yet agreements rarely contain this kind of detail, reflecting the general preference of parties to defer to the discretion of a tribunal, the applicable law or, more cynically, lawyers' general lack of interest in interest.[50]

B. The Power to Award Interest under the Applicable Law

Absent any agreement on interest, a tribunal must turn to the applicable law(s) as the source of its power to award interest. Which law is applicable will depend on whether the power to award the interest claimed is viewed as a matter of substance or a matter of procedure. In a claim for interest as damages, the law applicable to the power to award interest (and its quantum) should usually be the *lex causae*. For pre-award interest, the applicable law will often also be the *lex causae*, but it may alternatively (or concurrently) be the law of the parties' arbitration agreement or the law of the seat. And for post-award interest, the proper law will generally be the law of the seat or (if different) any other procedural law.[51] The law applicable to any enforcement jurisdictions

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46 Arbitration Rules of the Singapore International Arbitration Centre (6th ed., Aug. 1, 2016), r. 32.9. *See also,* the American Arbitration Association Commercial Arbitration, Rules and Mediation Procedures (2016), r. R-47D.

47 International Centre For Dispute Resolution, International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) (Jun. 1, 2014), art. 31(4).

48 World Intellectual Property Organization, Arbitration Rules (2014), art. 62(b). *Cf.* the 2013 UNCITRAL Rules, 2017 ICC Rules and the 2017 Stockholm Chamber of Commerce Rules are all silent on interest.

49 *See infra* pt. III.B.

50 In its 2004 report on 'Pre-judgment interest on debts and damages', the Law Commission of England and Wales concluded that their review suggested "by and large, lawyers pay scant regard to interest": LAW COMMISSION REPORT, *supra* note 22, ¶ 1.14.

51 For a statement of the approach under English law, *see* DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS ¶¶ 7-083-7-116 (15th ed. Supp. 2017). In this respect, an analogy can be drawn with the approach to damages under English common law, which provided that "the law relating to damages was partly procedural and partly substantive", with heads of damage being governed by the *lex causae* and quantification being viewed as an issue of procedure for the *lex fori*: *id.*, ¶ 7-044. Regarding international law it is debateable whether a similar division exists, *but see* Dr. Horst Reineccius, et al. v. Bank for International Settlements, 23 R.I.A.A. 252 (Perm. Ct. Arb. 2003), ¶ 91 [*hereinafter* "Bank for International Settlements Arbitration"] where the tribunal considered itself empowered to award interest under international law but applied Swiss law to calculate that interest, on the basis that Switzerland was the *siège* of the Bank for International Settlements, and the Swiss franc was the most relevant currency. And *see* CRAWFORD, *supra* note 22, at 533 stating that post-judgment interest is a matter of procedure for the relevant court or tribunal. Gotanda has also posited that there are at least six possible laws applicable to an award of interest: Gotanda, *supra* note 1, at 51-52.

may also be relevant, as the tribunal will have a duty to ensure the enforceability of its award.[52] Even where parties have expressly agreed on a tribunal's power to award interest, the applicable law therefore still plays a decisive role in determining the parameters of any interest to be awarded. For illustration, the rules governing interest under English law and international law are described below.

i.English law

Under English law, an arbitral tribunal can award interest *as* damages and *on* damages under the common law and on a statutory basis.

For interest as damages, the lodestar is the decision of the House of Lords in *Sempra Metals Ltd* v. *Inland Revenue Commissioners* ["**Sempra Metals v. IRC**"],[53] which made it possible to claim interest as damages as an ordinary form of consequential loss.[54] In a claim for interest as damages for a tortious wrong (breach of a statutory duty),[55] the House of Lords held that "*interest losses caused by a breach of contract or by a tortious wrong should be held in principle recoverable, but subject to proof of loss, remoteness of damage rules, obligations to mitigate damage and any other relevant rules relating to the recovery of alleged losses.*"[56] Lord Nicholls also embraced the notion that interest could be awarded as damages for the loss of opportunity to invest a sum of promised money, the cost of having to borrow money, or loss in "*some other form*".[57] Even more significantly, *Sempra Metals* v. *IRC* made it possible for interest as damages to be compounded, subject to appropriate proof.[58] A limitation on interest as damages, however, is that it is subject to a stricter standard of proof than pre-award interest on damages, which a tribunal is more readily prepared to approximate.[59]

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52 *See* N BLACKABY ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, ¶ 9.81 (6th ed., 2015). In such cases, parties ought to alert the tribunal of the risks of an award being held unenforceable.

53 Sempra Metals v. Inland Revenue Commissioners [2008] 1 AC 561 (HL) (Eng.).

54 This decision echoed a shift in doctrine that had occurred in Australia some twenty years earlier: *see* Hungerfords v. Walker (1989) 84 ALR 119 (Aust.), holding that interest on a compound basis at a rate of 20 percent was payable due to a breach of contract that resulted in the overpayment of tax. Prior to Sempra Metals v. Inland Revenue Commissioners [2008] 1 AC 561 (HL) 561, interest as damages was recoverable only in relation to obligations to pay money where the loss was foreseeable because of special circumstances brought to the knowledge of a respondent. This narrow situation did not affect rules of equity or admiralty, both of which allowed pre-judgment interest to be awarded. A similar rule applied in relation to negligence in the performance of a service, but not for negligence resulting in a breach of contract, for which interest appears to have not been awarded: Hartle v. Laceys [1999] 1 Lloyd's Rep. 315 (Eng.); EDELMAN, *supra* note 15, ¶¶ 19-017; *see also,* the cases referred to in EDELMAN ET AL., *supra* note 15, ¶¶ 19-018. (The one exception to this rule was awards of damages in consequence of a failure to pay a bill of exchange or promissory note. In such a case, interest was always recoverable at common law, and was later sanctioned by statute: Bills of Exchange Act 1882, § 57.) This limitation on the recovery of interest was often criticised, widely seen as "illogical", and reflected the strange situation that interest would be irrecoverable even where it was "obviously foreseeable" as being caused by the relevant wrongful act: EDELMAN ET AL., *supra* note 15, ¶ 19-009, n. 32. *See also* LAW COMMISSION REPORT, *supra* note 22; Sempra Metals v. Inland Revenue Commissioners [2008] 1 AC 561 (HL), ¶ 100.

55 Sempra also advanced a claim for restitution for unjust enrichment, alleging they had made tax payments under mistake. This claim was preferred by Sempra, but is not considered here.

56 Sempra Metals v. Inland Revenue Commissioners, [2008] 1 AC 561 (HL), ¶ 100.

57 *Id.* ¶ 95.

58 EDELMAN ET AL., *supra* note 15, ¶¶ 19-067. No consideration is given here to awards of interest in equity (claims for restitution), on which *see* EDELMAN, *supra* note 15, ¶ 19-068; Clef Aquitaine S.a.r.L. v. Laporte Materials (Barrow) Ltd. [1999] EWCA (Civ) 1547 (Eng.).

59 *See* the cases in which parties have unsuccessfully relied on Sempra Metals v. Inland Revenue Commissioners [2008] 1 AC 561 (HL), to obtain compound interest, due to insufficient proof: Cassa di Risparmio della Repubblica Di San Marino SpA v. Barclays Bank Ltd. [2011] EWHC 484; JSC BTA Bank v. Ablyazov & Ors. [2013] EWHC 867; Mortgage Express v. Countrywide Surveyors Ltd. [2016] EWHC 1830.

The 2013 judgment of the English High Court in *Equitas Limited* v. *Walsham Brothers & Co. Ltd.*[60] illustrates how interest as damages should be approached post-*Sempra Metals* v. *IRC*. In a dispute concerning whether sums of money obtained by the defendant (a reinsurance broker) from a third party (reinsurers) should have been remitted to the claimants (the reinsured), the claimants sought compensation for investment income they would have earned if they had received the money they were owed.[61] Relying on *Sempra Metals* v. *IRC*, the court considered that a claimant kept out of money could be assumed to have suffered a loss as a matter of "*commercial reality and everyday experience*".[62] Consequently, specific evidence of that loss would usually not be required – the real issue was how to quantify it. In commercial cases where the loss is understood as either the cost of borrowing or what a claimant would have done with the money, the court stated that the measure of the claimant's loss would be the cost of borrowing to replace the money of which the claimant had been deprived. This measure could apply regardless of whether it reflected what the claimant actually did. And to avoid a protracted investigation into what the claimant might have done, a 'conventional' compound interest rate representing a commercial borrowing rate would be presumed to be appropriate, subject to contrary proof.[63] Applying these principles, the court used two approaches to calculate the claimants' loss of interest. For an earlier period in which there was only general evidence that some investment income was lost, a commercial borrowing rate (the 'conventional approach') was applied.[64] For a later period in which there was specific evidence of investment returns that were made on similar sums, interest was calculated on the basis of those returns.[65]

For pre-award interest on damages, the power of English arbitral tribunals is usually found in two sources: (i) a common law power and (ii) the power in Section 49 of the Arbitration Act, 1996 ["**Arbitration Act**"].[66] Despite the distinction between these powers, as a matter of English law they can exist concurrently – the existence of one does not cancel out the other.[67]

The common law power of an arbitral tribunal to award pre-award interest on damages is derived from the parties' arbitration agreement, which implicitly confers on a tribunal the powers

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60 Equitas v. Walsham [2013] EWHC 3264 (Eng.).

61 A claim for restitution was also advanced. During the relevant period for lost investment income, LIBOR had ranged between 5.4% to six percent (in September 1996) to the 2013 range of under one percent rates. The claimants also sought interest pursuant to § 35A of the Senior Courts Act 1981: *Id.* ¶¶ 190-191.

62 Equitas Ltd v. Walsham [2013] EWHC 3264 ¶ 123(ii) (Eng.).

63 Equitas Ltd v. Walsham [2013] EWHC 3264 ¶ 123(ii)-(v) (Eng.). Mr Justice Males' judgment rationalised the use of these general presumptions on the basis that the kind of loss compensated by interest will necessarily be hard to prove, and whatever evidence is offered may be "somewhat hypothetical" and therefore of little assistance, even after extensive disclosure.

64 *Id.* In respect of the latter period, Mr Justice Males noted that this claim might have been refused if the defendant had argued that the claimants had not attempted to mitigate the harm caused, for example, by borrowing funds to replace the money lost. No such case was, however, advanced: *Id.* ¶ 128.

65 Equitas v. Walsham [2013] EWHC 3264 ¶ 133 (Eng.).

66 *See also,* the Late Payment of Commercial Debts (Interest) Act 1988 (U.K.), which provides for simple interest to be paid at the Base Rate plus a margin of eight percent for the late payment of certain debts. That Act is expressed not to apply to most international contracts where there is no close connection to England & Wales (and a choice of English law will generally not be sufficient to provide that connection): Bulk Ship Union SA v. Clipper Bulk Shipping Ltd. [2012] EWHC (Comm) 2595 (Eng.).

67 Arbitration Act 1996 c. 23, § 49(6) (England & Wales); Lesotho Development v. Impregilo SpA [2006] 1 AC 221 (HL), 238G.

of a court to make an order for pre-judgment interest.[68] Because this power is modelled on an English court's power to award interest, regard must therefore be had to Section 35A of the Senior Courts Act, 1981 ["**Senior Courts Act**"] (and the case law in relation to that provision),[69] which is limited to an award of simple interest in proceedings "*for the recovery of a debt or damages*".[70]

In determining how pre-award interest should be calculated, Section 35A confers a 'fivefold discretion' on a court to determine whether interest should be paid, the rate of interest, on what principal it should be applied, the period for interest, and whether different rates for different periods should apply.[71] In *Carrasco* v. *Johnson,*[72] the English Court of Appeal has recently provided guidance on how this 'fivefold discretion' should be exercised. Noting that interest on damages under Section 35A is awarded to compensate claimants for being kept out of money which ought to have been paid to them,[73] the court observed that statutory interest is approached in a '*broad-brush*' way by reference to a claimant's general attributes, not any special position they may have been in. Consequently, for commercial claimants, the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed, presuming that they will have borrowed less.[74] By comparison, individual claimants who have suffered personal injury will usually be awarded interest at '*the investment rate*' which is based on the rate available to money placed in the court's 'special account' (an account administered by the UK Court Funds Office for individuals lacking capacity) in order to mimic the borrowing rate for an individual.[75] Where a claimant does not clearly fall into either of these categories, a '*fair rate*' will be used, which "*may often fall somewhere between the two*".[76]

The power to award interest on damages under Section 49 of the Arbitration Act shares some features with Section 35A of the Senior Courts Act, but significantly improves upon it by

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68 Chandris v. Isbrandtsen-Moller Co. Inc. [1951] 1 KB 240, at 261, 263 (Eng.) *citing* Ram Dutt Ramkissendass v. E.D. Sassoon & Co. (1928) 56 IA 128 (appeal taken from India). In the latter case, the Privy Council (hearing an appeal from the High Court of Calcutta) held that in commercial arbitrations it was an implied term of the parties' contract that the arbitrator should decide the dispute "*according to the existing law of contract, and that every defence which would have been open in a court of law can be equally proposed for the arbitrator's decision unless the parties have agreed (which is not suggested here) to exclude that defence.*" The Court of Appeal in Chandris v. Isbrandtsen-Moller Co. Inc. extended that proposition to the statutory discretion to award interest, noting that there were well-known exceptions to prevent the rule being extended further, such as the right to grant an injunction: Chandris v. Isbrandtsen-Moller Co. Inc. [1951] 1 KB 240, at 262 (Eng.); *Cf.* SUTTON, *supra* note 22, at 334 n. 114 (albeit in the context of claims for contribution).

69 *Id.* at 262-264; *see also,* Housing Trust v. YP Seaton & Associates Co. Ltd. (Jam.) [2015] UKPC 43, at ¶ 29 (appeal taken from Jam.).

70 Pursuant to the Senior Courts Act 1981, c. 54, § 35A (4) (U.K.), interest on a debt can only be ordered under Section 35A where there is no contractual provision for interest.

71 Senior Courts Act 1981, c. 54, § 35A (U.K.).

72 Carrasco v. Johnson [2018] EWCA (Civ) 87 (Eng.).

73 *Id.* at ¶ 17(1); Fiona Trust & Holding Corp. v. Privalov [2011] EWHC (Comm) 664, ¶ 13 (Eng.).

74 This could be displaced, for example, by a highly leveraged borrower or a small business, who will typically pay interest on its financing at a higher rate than a large commercial entity: Jaura v. Ahmed [2002] EWCA (Civ.) 210 (Eng.). It is also irrelevant whether the claimant was cash rich, and so might not have needed to borrow the principal sum: SABIC UK Petrochemicals Ltd. v. Punj Lloyd Ltd. [2013] EWHC 3202, ¶ 10 (Eng.).

75 *See infra* pt. III.D.

76 Carrasco v. Johnson [2018] EWCA (Civ) 87, ¶ 17.

allowing compound interest, and conferring a jurisdiction for post-award interest (which did not exist for tribunals under the common law).[77] As set out in the relevant part:

> "*(3) The 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—*
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> *(a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award;*
> *(b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment.*
>
> *(4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case, on the outstanding amount of any award (including any award of interest under subsection (3) and any award as to costs).*".[78]

This jurisdiction to award interest, and especially compound interest, was included in the Arbitration Act following requests from practitioners.[79] It was well ahead of its time, at least by reference to the decision in *Sempra Metals* v. *IRC*.[80] A similar discretion can be found in the arbitration laws of India, Hong Kong and Singapore.[81]

Although the Arbitration Act is silent on the purposes of an award of interest under Section 49, it can safely be assumed (on settled principles of statutory interpretation) that this power should generally be exercised in accordance with the functions of pre-award and post-award interest at common law. Indeed, English courts have taken the view that the jurisdiction to award interest under Section 49 should normally be exercised where a claimant has been kept out of their money for a period, unless there is a good reason not to.[82] It is worth noting that in its report on the Bill preceding the Arbitration Act, the Departmental Advisory Committee on Arbitration Law considered that the absence of a power equivalent to Section 49 had caused injustice and had added "*to the delays (and thus the expense) of arbitrations*" since a tribunal's award of interest

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77 Timber Shipping Co. S.A. v. London & Overseas Freighters Ltd. [1972] AC 1 (HL) at 23 (Eng.). Tribunals seated in England and Wales were only given a power to award post-award interest in 1934, pursuant to § 11 of the Arbitration Act 1934 (Eng.).

78 Arbitration Act 1996 (England & Wales), §§ 49(3), 49(4).

79 DEPARTMENTAL ADVISORY COMMITTEE ON ARBITRATION LAW, 1996 REPORT ON THE ARBITRATION BILL, at 311 (Feb. 1996). *See also* EDELMAN ET AL., *supra* note 15, ¶ 15-020.

80 The UNCITRAL Model Law on International Commercial Arbitration 1985 contained no provision on interest, but the UNCITRAL Model Law as amended in 2006 contains a broad provision on interest: UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, art. 31 (2006), http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf, providing that an "*arbitral tribunal may award interest on such basis and on such terms as the tribunal considers appropriate and fair in the circumstances, also having regard to the currency in which the award was made, commencing not earlier than the date on which the cause of action arose and ending not later than the date of payment.*"

81 Indian Arbitration Act, *supra* note 39, § 31(7); Hong Kong Arbitration Ordinance, (2014) Cap. 609, §§ 79-80 (H.K.); International Arbitration Act c.143A, §§ 12(5), 20 (Sing.).

82 SUTTON ET AL., *supra* note 22, ¶ 6-124; CNH Global NV v. PGN Logistics Ltd. [2009] EWHC 977.

would likely be less than the interest an award debtor could earn by simply holding onto the principal sum.[83]

As already noted, Section 49 does not necessarily affect any other power of the tribunal to award interest.[84] The House of Lords has also taken the view that the section applies concurrently with any existing jurisdiction of the tribunal to award interest, pursuant to the parties' agreement or the applicable law.[85] This means that even if parties have agreed to apply a foreign law providing a separate jurisdiction to make an award of interest, that agreement will not oust the power under Section 49 unless the parties have some specific written agreement on interest.[86] Instead, the jurisdiction to award interest under the parties' chosen law and Section 49 may co-exist, enabling a claimant to rely on whichever right of interest appears to be more advantageous.

ii.International law

International tribunals have long considered that, subject to any applicable treaty, their power to award interest is inherent.[87] Indeed, a party's entitlement to interest is often described as "*generally fair and reasonable*"[88] or a general rule of international law,[89] drawn from the role played by interest in ensuring full reparation.

Early cases addressing interest under international law generally arose in the context of sovereign debt claims or claims before mixed claims commissions established to address diplomatic protection issues arising out of insurrectional movements.[90] The tribunals or commissions in these cases embraced compensatory rationales for awarding interest (amounting in some cases to significant sums).

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83 DEPARTMENTAL ADVISORY COMMITTEE ON ARBITRATION LAW, 1996 REPORT ON THE ARBITRATION BILL 311 (Feb. 1996).

84 Arbitration Act 1996 (England & Wales), § 49(6).

85 Lesotho Development v. Impregilo SpA [2006] 1 AC 221 (HL), 238G.

86 Even if the applicable *lex causae* purports to exclude the ability of a tribunal to award interest under Section 49, interest granted under that section will only result in a "mere error of law", and not an act in excess of the tribunal's power under the arbitration agreement within the meaning of section 68(2)(b) of the Arbitration Act 1996 (England & Wales) (i.e. a ground for challenging the award): Lesotho Development v. Impregilo SpA [2006] 1 AC 221 (HL), 238G, 239A. The jurisdiction to award interest under Section 49 is not mandatory, and parties can oust or modify it by a written agreement: Arbitration Act 1996 (England & Wales), § 49(1).

87 Gaetano Arangio-Ruiz (Special Rapporteur at the International Law Commission), *Second Rep. on State Responsibility*, U.N. Doc. A/CN.4/425 (June 9, 1989), *reprinted in* [1989] 2(1) Y.B. INT'L COMM. 23-30 [*hereinafter* "Arangio-Ruiz ILC Report"]; RIPINSKY & WILLIAMS, *supra* note 2, at 363-4; MARBOE, *supra* note 2, ¶¶ 6.04-6.05. The approach to awards of interest by human rights bodies and regional courts, such as the European Court of Justice, is not considered here, but is addressed in Penelope Nevill, *Awards of Interest by International Courts and* Tribunals, 78(1) BRIT. Y.B. INT'L L. 256 (2008).

88 M/V Saiga (No 2) (St. Vincent v. Guinea), Case No. 2, Judgment, 1999 ITLOS Rep. 10, (Jul. 1, 1999) ¶ 173.

89 Bank for International Settlements Arbitration, Final Award, 23 R.I.A.A. 252, (Sept. 19, 2003), ¶ 90. *See also,* Teinver S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Award (Jul. 21, 2017) ¶ 1121 ; Caratube International Oil Co. LLP v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Award (Sep. 27, 2017), ¶ 1214; Eiser Infrastructure v. Kingdom of Spain, ICSID Case No. ARB/13/36, Award (May 4, 2017), ¶ 478; Koch Minerals S.a.r.L. v. Bolivarian Republic of Venezuela*,* ICSID Case No. ARB/11/19, Award (Oct. 30, 2017), ¶ 11.10; UAB E Energija (Lithuania) v. Republic of Latvia, ICSID Case No. ARB/12/33, Award (2017)*,* ¶ 1150.

90 *See also,* the Alabama Claims, in which the tribunal considered it "just and reasonable" to allow interest "at a reasonable rate": Alabama Claims (U.S. v. Gr. Brit.), 29 R.I.A.A. 133 (Treaty of Washington Tribunal, 1872).

For example, in 1912 the tribunal in the *Russian Claim for Interest on Indemnities* was asked to consider Russia's claim against Turkey for interest as damages.[91] Russia claimed approximately 20 million francs of compound interest at rates between nine to twelve percent on war indemnities paid by Turkey following the Russo-Turkish War between 1877 and 1878.[92] Russia's loss was said to arise from Turkey's delay in payment. Although the tribunal ultimately held that Russia had waived its claim to interest, it still found that international law generally recognises a requirement for States to pay interest on a late payment of a debt, regardless of whether that interest is characterised using the civil law concepts of compensatory or moratory interest (a distinction rejected by the tribunal for the purposes of international law). This responsibility arose from the requirement to provide compensation for the delay in payment.[93] In reaching this view, the tribunal also found that Turkey's status as a State debtor, and the political and financial consequences of having a responsibility to pay interest, did not excuse it from making payment.[94]

Similarly, in the *Del Rio Case* in 1903 the Mexico-Venezuela Mixed Claims Commission found Venezuela liable to Mexico on a portion of Colombian debt assigned to a Venezuelan subject under a loan made in 1827, with interest.[95] Calculating the interest required as compensation for the delay in payment, the Commission awarded interest at a rate of six percent for a period of 75 years (using 360 day-years), totalling £81,859.50 in simple interest on a claim for £17,955. The justification given for this significant award was simply that it was necessary to "*make reparation to Mexico for the damages and injuries resulting from delay in the fulfilment of its obligation*.".[96]

What emerges from these and other early awards is that tribunals considered not only that they were empowered to award interest, but also that in doing so they could take into account the general characteristics of the claimant and the ability of the sovereign to pay that interest, in determining the applicable rate.[97] The only doubt that might have been expressed was whether post-award interest could be ordered, given that it would carry on after the tribunal has ceased to exist. This doubt was, however, unfounded. The practice of tribunals bold enough to award post-award interest was sufficient for the International Law Commission's ["**ILC**"] Special

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91 Russian Claim for Interest on Indemnities (Russ. v. Turk.) 11 R.I.A.A. 421 (Perm. Ct. Arb. 1912) [*hereinafter* "Russian Claim for Interest on Indemnities"]. *See also,* Interest on Diplomatic Debt Case (Gr. Brit. v. Venez.), 9 R.I.A.A. 479 (British-Venezuelan Commission, 1903).

92 Russian Claim for Interest on Indemnities (Russ. v. Turk.) 11 R.I.A.A. 421 (Perm. Ct. Arb. 1912), 437.

93 *Id.* 441.

94 *Id.* 441-442.

95 Del Rio Case (Mex. v. Venez.), 10 R.I.A.A. 698 (Mixed Claims Commission Mexico-Venezuela, 1903) [*hereinafter* "Del Rio Case"]. Although this dispute was decided on the basis of "absolute equity", it remains of use in an analysis of international law: *see,* Arangio-Ruiz ILC Report, *supra* note 87, at 24.

96 Del Rio Case 10 R.I.A.A. 693, 703 (Mixed Claims Commission Mexico-Venezuela, 1903). *See also,* the 1904 award of the Italian-Colombian Mixed Commission in the Affaire Spadafora case, where interest was awarded at a rate of three percent for a period of 20 years on an indemnity payable for the confiscation of goods belonging to Italian nationals. The rationale given was the devaluation of the Colombian currency, and the fact that if the money owed had been paid when it was due, it would have earned interest: Affaire Spadafora (Colom./It.), 11 R.I.A.A. 1, at 9-10 (Apr. 9, 1904).

97 *See, e.g.,* Cervetti Case (Opinions of a general nature) (It./Venez.), 10 R.I.A.A. 497-498 (Italian-Venezuelan Commission, 1903).

Rapporteur, Arangio-Ruiz, to conclude that, under international law, post-award interest forms part of the inherent jurisdiction of a tribunal.[98]

Following these earlier awards, pre-award interest on damages has been recognised as forming part of the principle of full reparation, established by the Permanent Court of International Justice ["**PCIJ**"] in the *Factory at Chorzów* case,[99] even where the national legal systems of the States to the dispute may have imposed some kind of limitation on interest.[100] This reasoning was adopted (in the context of a claim for interest on damages) by the Iran-US Claims Tribunal in *Iran* v. *United States of America (Case A-19)*.[101] It has since been reflected in Article 38 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts ["**ILC's Articles on State Responsibility**"], which provides that:[102]

> "*1.Interest on any principal sum due under this chapter shall be payable when necessary in order to ensure full reparation. The interest rate and mode of calculation shall be set so as to achieve that result.*
>
> *2. Interest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled.*".

The ILC's accompanying commentary to these articles makes clear that interest is a part of reparation and not a separate remedy.[103] Article 38 leaves the specifics of an award of interest to the discretion of a tribunal, or any more specific rules in a treaty or other 'primary rules' of international responsibility.[104] The commentary also makes clear that Article 38 only addresses pre-award interest, since post-award interest will be a matter of the procedure of the relevant court or tribunal.[105]

While Article 38 clarifies the principles of international law applicable to awards of interest, it does not expressly deal with the distinction between interest as damages and interest on damages. Properly understood, however, interest *as* damages falls within the scope of Article 36 of the ILC's Articles on State Responsibility, as a primary form of compensation for damage caused by an internationally wrongful act. Pre-award interest *on* damages falls within the scope of

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98 Arangio-Ruiz ILC Report, *supra* note 87, at 28. *See also,* CHRISTINE GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW 31 (1987), *citing inter alia* the Cape Horn Pigeon Case (U.S. v. Russ.), 9 R.I.A.A. 51 (Nov. 29, 1902).

99 Factory at Chorzów (Ger. v. Pol.), Judgment, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13) at 47: "reparation must, as far as possible, wipe out all consequences of the illegal act and reestablish the situation which would, in all probability have existed if that act had not been committed". Note that the PCIJ contemplated an award of interest, but was ultimately not required to determine that issue. *See also,* Arangio-Ruiz ILC Report, *supra* note 87, at 23.

100 Nevill, *supra* note 87, at 261-2.

101 The Islamic Republic of Iran v. The United States of America, Iran-U.S. Cl. Trib. Rep. 16 (1987), ¶¶ 285, 290. For interest *on* damages, the Iran-U.S. Claims Tribunal suggested a "fair" or "reasonable" amount of interest should be awarded: McCullough & Co. Inc. v. Ministry of Post, Telegraph and Telephone, 11 Iran-U.S. Cl. Trib. Rep. 3 (1986), ¶¶ 98, 99.

102 Int'l Law Comm'n, Draft Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries on its Fifty-Third Session, U.N.Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. INT'L COMM'N 30, 107, U.N. Doc. A/CN.4/SER.A/2001/Add.1, art. 38 [*hereinafter* "ILC Articles on State Responsibility"].

103 *Id.*

104 MARBOE, *supra* note 2, ¶ 6.21; *See also,* McCullough & Co. Inc. v. Ministry of Post, Telegraph and Telephone, 11 Iran-U.S. Cl. Trib. Rep. 3 (1986), ¶¶ 99-100.

105 ILC Articles on State Responsibility, *supra* note 102, at 109, ¶ 12; *see* CRAWFORD, *supra* note 22, at 533.

Article 38, which regulates circumstances where interest should be payable '*on*' a principal sum due under the principles of reparation.[106]

Relying on Article 38, the International Court of Justice ["**ICJ**"] in its recent judgment on compensation in *Certain Activities carried out by Nicaragua in the Border Area* ["***Costa Rica* v. *Nicaragua***"],[107] affirmed the jurisdiction of international courts and tribunals to award pre-judgment (or pre-award) interest. It held (for the first time in the ICJ's history) that pre-judgment interest is awarded in the practice of international courts and tribunals "*if full reparation for injury caused by an internationally wrongful act so requires*".[108] While the ICJ rejected Costa Rica's claim for pre-judgment interest on compensation awarded for environmental damage caused by Nicaragua on the basis that the principal sum of compensation already took "*full account*" of the impairment or loss in the period prior to recovery,[109] pre-judgment interest was awarded (on a simple basis, at a rate of 4 percent) on the costs incurred by Costa Rica to prevent further harm from occurring.[110]

By comparison, post-award interest under international law has received less consideration. One of the earliest examples of such an award, the judgment of the PCIJ in *SS Wimbledon*, provides little reasoning: post-award interest at a rate of six percent[111] was granted based on passing references to fairness and the prevailing market conditions for public loans.[112] The PCIJ also observed that the rate of interest it had chosen was not intended to guard against the risk of default against its judgment, a possibility it believed it neither could nor should contemplate.[113] More recently, however, in its judgments in *Ahmadou Sadio Diallo* and *Costa Rica* v. *Nicaragua*, the ICJ has granted post-judgment interest, in both cases at a rate of six percent based on the need to stave off any delay in payment.[114]

C. Factors Suggesting Interest should not be Awarded

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106 ILC Articles on State Responsibility, *supra* note 102, at 107; CRAWFORD, *supra* note 22, at 533. Like English law, the kinds of loss compensated by pre-award interest on damages under international law tends to be assumed or approximated, subject to evidence to the contrary. On that basis, interest on damages under international law has been analogised to "the approximate equivalent" of interest under section 35A of the Senior Courts Act 1981, or the default interest allowed in many civil law systems: *see* Nevill, *supra* note 87, at 279 (*but see* MARBOE, *supra* note 2, ¶¶ 6.52-6.53); Gotanda & Senechal, *supra* note 3, at 495.

107 Costa Rica v. Nicar., International Court of Justice, Judgment, 2018 I.C.J. (Feb. 2, 2018), ¶¶ 154-155 . To the same effect, see the recent award on compensation in Arctic Sunrise Arbitration (Neth. v. Russ.), PCA Case No. 2014-02, Award on Compensation (Jul. 10, 2017).

108 Costa Rica v. Nicar., International Court of Justice, Judgment, 2018 I.C.J. (Feb. 2, 2018), ¶ 151.

109 *Id.* ¶ 153.

110 Costa Rica claimed compound interest at six percent per annum on damages for environmental damage caused by Nicaragua, and costs incurred to prevent further harm from occurring. In support of its claim, Costa Rica endorsed the view expressed in an investment tribunal award to argue that this rate was necessary to "restore the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place": Memorial on Compensation of Costa Rica, Costa Rica v. Nicar., International Court of Justice Judgment, 2018 I.C.J. (Apr. 3, 2017), ¶ 2.30 *citing* Metalcorp v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award (Aug. 30, 2011), ¶ 128.

111 Case of the S.S. Wimbledon (U.K. v. Ger.), Judgment, 1923 P.C.I.J. (ser. A) No. 1, (Aug. 17, 1923) at 32.

112 *Id.* at 32-33.

113 *Id.* at 32.

114 Costa Rica v. Nicar., International Court of Justice, Judgment, 2018 I.C.J. (Feb. 2, 2018), ¶¶ 154-155; Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2012 I.C.J. Rep. 324 (June. 19, 2012), ¶ 56. In the Ahmadou Sadio Diallo case, the ICJ also referred to "the prevailing rates on the international market", although it is unclear what rates were being referred to.

Interest as damages will ordinarily be subject to any limitations imposed by the applicable law governing the award of damages. These can include issues of proof, causation, remoteness and mitigation.[115]

In contrast, the award of interest on damages, which usually follows the award of the principal sum,[116] tends to be discretionary. Depending on the applicable law, there are at least five cases in which interest on damages will usually not be granted. These are: (i) where a claimant or respondent's conduct suggests interest should not be awarded, for example by reason of an intentional delay by a claimant to accrue the greatest possible amount of interest;[117] (ii) where the loss is valued at the date of the award, precluding any need for pre-award interest;[118] (iii) where a sum for loss of use of the principal sum is already included, and any award of interest will result in double recovery;[119] (iv) where for practical reasons, interest cannot be awarded (for example, as a result of a settlement fund running out of money);[120] and (v) where the principal sum is based on an approximation, rather than "*precise calculations resting upon clear evidence*".[121] Although this catalogue is by no means exhaustive, it may be observed that all of these factors are referable back to considerations of fairness and the purpose of an award of interest.

Indeed, an international tribunal may even have regard to the relative positions and conduct of the parties. The Eritrea-Ethiopia Claims Commission, charged with resolving claims for compensation arising out of the conflict between Eritrea and Ethiopia between 1998 and 2000, awarded damages for breaches of international humanitarian law and other violations of international law to both States. However, the Commission rejected the States' claims for interest on the damages claimed (notwithstanding its power to award this under the arbitration agreement), considering that interest was not appropriate because it would not materially alter the parties' positions (to whom similar sums had been awarded). It also noted that the principal

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[115] Gotanda & Senechal, *supra* note 3, at 517. Under international law, issues of mitigation can affect an award of damages (Gabcíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. Rep. 7, 55, ¶ 80), and may therefore also affect pre-award interest on damages: Naulilaa Arbitration (Port. v. Ger.), 2 R.I.A.A. 1035, 1074 (Jun. 30, 1930) (finding that Portugal's interest claim was affected by its failure to mitigate its own loss).

[116] *But see* Panchaud Frères v. Pagnan & Fratelli [1974] 1 Lloyd's Rep 394, 411 (Eng). *See also,* SUTTON ET AL, *supra* note 22, ¶ 6-124. The same conclusion is reached by Gotanda following a survey of national legal systems, general principles, and the practice of international tribunals: Gotanda, *supra* note 9, at 254.

[117] EDELMAN ET AL., *supra* note 15, ¶¶ 19-096-19-102; SUTTON ET AL., *supra* note 22, ¶ 6-125; Nevill, *supra* note 87, at 277-278. *See, e.g.,* the inordinate delay justifying a refusal of interest in Antclizo Shipping Corporation v. Food Corporation of India (The "Antclizo") (No.2) [1991] 2 Lloyd's Rep. 485, during which both members of the original tribunal died, and another tribunal was not appointed for another 14 years due to the claimant's unreasonable failure to prosecute the claim. *See, e.g.,* the payments made by the Netherlands to France in the final years of an agreement on measures to prevent chloride pollution of the Rhine, in circumstances where those payments were objectively intended only to attract the interest rate specified in the parties' treaty, not to assist in depollution, and were therefore "unreasonable". On these payments, no interest was payable: The Rhine Chlorides Arbitration concerning the Auditing of Accounts (Neth./Fr.), Case No. 2000-2004, Award (Mar. 12, 2004) ¶ 139, *available at* https://pcacases.com/web/sendAttach/78. *See also,* Eritrea's Damages Claims (Eri. v. Eth.), Final Award, 26 R.I.A.A. 505 (Aug. 17, 2009), ¶ 44 [*hereinafter* "Eritrea's Damage Claims"].

[118] *Cf.* SUTTON ET AL., *supra* note 22, ¶ 6-125.

[119] ILC Articles on State Responsibility, *supra* note 102, at ¶ 11 (Noting that this only applies to situations where lost profits are calculated to the current date. Where lost profits are discounted back to a past valuation date, interest is allowed.) *See, e.g.,* Costa Rica v. Nicar., International Court of Justice, 2018 I.C.J. (Feb. 2, 2018), ¶ 153.

[120] *Cf.* the categories cited by Nevill, *supra* note 87, at 277-278; Gotanda, *supra* note 9, at 252-253.

[121] Eritrea's Damages Claims, 26 R.I.A.A. 505 (Aug. 17, 2009), ¶ 44; Aside from these cases, other claimant conduct justifying a refusal to award interest includes unreasonableness, bad faith, duress and fraud: Gotanda, *supra* note 9, at 252.

sums were based on approximations and the length of time taken in the proceedings (nine years) was not the result of '*dilatory conduct*' from either party.[122] Such reasoning could be extended to disputes outside the inter-State context involving the offsetting of claims and counter-claims, where similar considerations may arise.

D. The Principal Sum Attracting Interest on Damages

Although the principal sum that accrues interest is usually the entirety of the damages awarded to a claimant, this should not be taken for granted. Recalling that the purpose of interest should inform its award, it may be appropriate to apply interest only to certain types of loss, or over certain periods depending on the nature or the timing of the relevant '*loss of use*' of the principal sum. Approaching an award of interest in this way ensures that the award achieves an appropriate level of compensation. Such analysis is inevitably fact-specific, but some general approaches can be drawn out by the decisions of courts and tribunals.

Where loss has been sustained on multiple occasions over a period of time, but not continuously, English law adopts a '*slices of loss*' approach, resulting in interest being calculated for each '*slice*' at a particular point in time.[123] Some international tribunals have adopted a similar approach. For instance, in *Vivendi* v. *Argentina* and *Siemens* v. *Argentina,*[124] interest was awarded on expenses incurred at the date of expropriation, and, separately, during periods subsequent to the expropriation.[125] Alternatively, and especially in cases where identifying slices of loss would be impractical, a '*rough and ready*'[126] method can be applied, with interest accruing on half the amount awarded for the entire period.[127]

It may also be appropriate to isolate the various principal sums and to only award interest in respect of some, but not all, of these. For example, in the *Yukos* v. *Russia* awards,[128] no pre-award interest was granted on the damages for the claimants' expropriated shares (which were valued at the date of the award), but pre-award interest was granted on the dividend streams from those shares.[129]

Differentiating between the various principal sums can also be important where the loss has been suffered in multiple currencies. Subject to the applicable law or any agreement, interest on damages should be awarded in the same currency as the principal sum.[130] Therefore, where the currency in which loss is likely to be felt is volatile, parties may wish to obtain a degree of

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122 Eritrea's Damages Claims, 26 R.I.A.A. 505 (Aug. 17, 2009), ¶ 44

123 EDELMAN ET AL., *supra* note 15, ¶¶ 19-085-19-086 (disapproving the use of this method in commercial cases), 19-090-19-091 (endorsing its use in personal injury cases).This can be especially important if any interest earned would have been subject to tax: *see also* EDELMAN ET AL., *supra* note 15, ¶¶ 19-135-19-140.

124 Compania de Aguas del Aconquija S.A. & Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, Operative Part (Aug. 20, 2007), ¶ (vi).

125 *Id*; Siemens AG v. Argentine Republic, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007), ¶¶ 397-398; *See also,* RIPINSKY & WILLIAMS, *supra* note 2, at 379.

126 EDELMAN ET AL., *supra* note 15, ¶ 19-086.

127 *Id.* ¶ 19-085; Blayney v. Clogau St Davids Gold Mines [2002] FSR 233 (Eng.).

128 Yukos Universal Ltd. (Isle of Man) v. Russian Federation, PCA Case No. AA 227, Final Award (Jul. 18, 2014).

129 *Id.* ¶ 1687; Hulley Enterprises Ltd. (Cyprus) v. Russian Federation, PCA Case No. AA 226, Final Award (Jul. 18, 2014), ¶ 1687.

130 Lesotho Development v. Impregilo SpA [2006] 1 AC 221 (HL), 238G; Bank for International Settlements Arbitration, Final Award 23 R.I.A.A. 252 (Sept. 19, 2003), ¶ 91.

certainty in the event of a dispute by pre-agreeing the currency for any award, or a fixed exchange rate to be used to calculate damages and interest.

In England, the treatment of interest on damages awarded for personal injury cases provides a useful source of reasoning by analogy to differentiate between different principal sums. In such cases, interest on damages will be calculated separately depending on whether the damages are (i) for pain and suffering and loss of amenities (known as '*general damages*'), (ii) for the actual loss suffered by a claimant up to the date of trial ('*special damages*'), or (iii) for loss of future earnings and loss of earning capacity.[131] The first category of damages (which does not compensate for financial loss) attracts a lower rate of interest[132] than the second category, which compensates for financial loss.[133] In contrast, damages for loss of future earnings and loss of earning capacity accrues no pre-judgment interest, on the basis that, as of the date of adjudication, a claimant has not been kept out of their money.[134] In the exercise of a tribunal's discretion to award interest, this approach clearly distinguishes between the different kinds of '*loss of use*' felt by a claimant in respect of each principal sum, particularly where damages are being awarded for a non-financial form of loss.

E. The Time Period

International tribunals are fond of delimiting the period on which interest runs by reference to the '*dies a quo*' (the start date for the accrual of interest) and the '*dies ad quem*' (end date). This period is influenced by several factors. These factors include the law applicable to a cause of action or form of loss, the conduct of the parties (including, for pre-award interest, any delay by a claimant in bringing their claim) and, for post-award interest, any undertaking that the respondent will pay within a short period after the award. A tribunal must also consider when a party's loss has accrued and any other factors that might suggest one date would be fairer than another. Here again, the guiding consideration is the purpose of interest: if that purpose is compensatory, choosing the wrong start date can lead to either over or under compensation, making the time period for interest an important tool in achieving the purpose of the award.

Under English law, the appropriate start date for interest can be the date the cause of action arose, the date of loss or even the date of a claim form being issued.[135] It is impossible to specify a '*one-size-fits-all*' approach, and tribunals are generally afforded a broad discretion, as reflected by Section 49(3) of the Arbitration Act, which provides that interest can be awarded "*from such dates … as [a tribunal] considers meets the justice of the case*".[136] That discretion is particularly key in more complex situations, where the time of accrual of a cause of action is unclear,[137] or where loss has arisen on multiple occasions. In the latter case, courts and tribunals have again used the '*slices of*

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131 CIVIL PROCEDURE: THE WHITE BOOK SERVICE 2018 (Sir Geoffrey Vos ed., 2018), ¶ 16AI.9 [*hereinafter* "WhiteBook 2018"] referring to Birkett v. Hayes [1982] 1 WLR 816 (Eng.).

132 *Id.* ¶ 16AI.9(7); *see also,* EDELMAN ET AL., *supra* note 15, ¶¶ 19-127-19-133. This rate is currently set at 0.5%, but in practice judges still award interest at eight percent, seemingly on the basis that this reflects the investment account rate as it was between 1993 to 1999, before it dropped to the current record low rate: Lance M Dodgson, *A Matter of Interest*, NEW L. J. 13 (Oct. 9, 2015).

133 WhiteBook 2018, *supra* note 131, ¶ 16AI.9(4).

134 WhiteBook 2018, *supra* note 131, ¶ 16AI.9(6) *citing* Clarke v. Rotax Aircraft Equipment Ltd. [1975] 1 WLR 1570, 1576 (Eng.).

135 EDELMAN ET AL., *supra* note 15, ¶¶ 19-076-19-086.

136 Arbitration Act 1996, § 49(3) (England & Wales),.

137 EDELMAN ET AL., *supra* note 15, ¶ 19-077.

loss' approach, referred to above, with the start date being determined by reference to when each slice of loss was incurred.[138] Delay by a claimant in bringing their claim may also justify the start date being a time after the claimant has suffered their loss, or the date the respondent becomes aware of the loss.[139]

International law approaches this issue in a broadly similar way, identifying the start date for an award of interest by reference to either the way in which a specific cause of action has harmed a claimant or the conduct of the parties.[140] This much is implicit in Article 38 of the ILC's Articles on State Responsibility, which leaves the start date and any consequential time period to the discretion of a tribunal, but provides that interest runs from the date when "*the principal sum should have been paid until the date the obligation to pay is fulfilled*" (emphasis added).[141] Overwhelmingly, however, the start dates usually used by tribunals are the date of breach of the international obligation or the date of loss (if later), or the date claimed by the claimant.[142] Tribunals considering an unlawful expropriation will, for example, generally calculate interest from the date of the taking.[143]

Nor is there (in principle) any limit on the period over which interest can run: for example, in the *Del Rio Case*, discussed above, this approach resulted in interest being granted over a period of seventy-five years.[144]

These approaches appear consistent with the general position under many other legal systems.[145] The 2016 UNIDROIT Principles, for example, indicate that interest is to be paid from the time of non-performance.[146] One nuance worth highlighting, however, is that in some civil law systems, certain kinds of interest will not run until a default notice is given to a debtor.[147]

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138 *Id.* ¶¶ 19-084-19-086.

139 *Id.* ¶ 19-081.

140 *See* PSEG Global v. Republic of Turkey, ICSID Case No. ARB/02/5, Award (Jan. 27, 2009), ¶ 351. As to whether the *dies a quo* should be approached differently for liquidated versus unliquidated sums, there appears to be no universal rule. Early cases did suggest the two should be treated differently (similar to the differences in the way interest is approached for personal injury versus debt claims in English law), but both Brownlie and Arangio-Ruiz preferred the date of damage as a starting point: Arangio-Ruiz ILC Report, *supra* note 87, at 28.

141 CRAWFORD, *supra* note 22, at 534: "Although it is true that this formulation has a certain degree of flexibility, in theory the decisive date is the date on which damage occurs, which could be later than the date of breach." *See, e.g.,* Antoine Goetz v. République du Burundi (II), ICSID Case No. ARB/01/2, Sentence (Jun. 21, 2012), ¶¶ 302-303 where the tribunal did not award interest for a three year period due to delay in the prosecution of the claim. Other dates have included the point in time the respondent knew it had an obligation to pay: *see* Arangio-Ruiz ILC Report, *supra* note 87, at 27. And in the recent Arctic Sunrise Award on Compensation, the tribunal used its award on merits as an "appropriate proxy", given the difficulty in identifying the dates on which the various losses occurred and in the absence of any date identified by the Netherlands: Arctic Sunrise Arbitration (Neth. v. Russ.), PCA Case No. 2014-02, Award on Compensation (Jul. 10, 2017), ¶ 127.

142 Nevill, *supra* note 87, at 285 n. 152; In the other direction, some have suggested that a tribunal may (in principle) award interest from the date of capital first being committed: Smith & Vikis, *supra* note 4.

143 RIPINSKY & WILLIAMS, *supra* note 2, at 375.

144 Del Rio Case, 10 R.I.A.A. 693, 703 (Mixed Claims Commission Mexico-Venezuela, 1903), ¶ 7.

145 Gotanda, *supra* note 9.

146 2016 UNIDROIT Principles, *supra* note 16, at 286.

147 This is the position under French law in relation to post-judgment interest, subject to any agreement between the parties (*see* CODE CIVIL [CIVIL CODE] arts. 1231-6, 1344-1 (Fr.)). *See also,* Gotanda, *supra* note 9, at 200 (referring to Italy and Switzerland).

As to post-award interest, arbitral tribunals generally have a broad discretion to determine the start date, including by delaying that date via a grace period designed to incentivise payment of the award within a short time frame after the award,[148] or for other reasons established by the award debtor as justifying a delay.[149] In most cases, however, post-award interest will accrue from the date of the award until the date of payment.[150]

It should be noted that in some awards under international law the distinction between pre-award and post-award interest has not been observed, with tribunals conflating pre-award and post-award interest and ordering interest on damages to run until the date of payment.[151] Whether viewed as an issue of the time period of interest, or as an issue in terms of the principal sum to which interest is applied, it is submitted that these forms of interest should be separated in order to differentiate between their different purposes,[152] and to guard against any risk of either pre- or post-award interest being held unenforceable – in which case, only some (but not all) of the award of interest will have to be severed from the award.

F. The Rate of Interest

One of the most difficult aspects of calculating any award of interest is determining the applicable rate when none is specified in the relevant legal instrument. It has been observed that awards in international arbitration have considered and applied rates of interest ranging from three to thirty-one percent.[153] There are various reasons for this apparent lack of uniformity, ranging from the applicable law, to the nature and purpose of the interest claimed, and the situation of the claimant.[154]

Under English law, the law applicable to the rate of interest for an award of interest as damages or pre-award interest on damages is not entirely settled. The authors of an authoritative textbook on English conflict of laws rules have 'tentatively submitted' that the applicable law for the rate of interest (in whatever form) is a matter of procedure and should be determined by the *lex fori*.[155] If that *lex fori* is English law, then the prima facie rule (at least for interest awarded under a tribunal's common law power) is that the rate should match the currency in which the award is given, in order to ensure an appropriate level of compensation.[156] Tribunals have a discretion, however, and another rate can be applied if, for example, a claimant can no longer borrow in the award currency.[157] Similarly, international law tribunals have typically approached the rate of

148 MARBOE, *supra* note 2, ¶¶ 6.274-6.281.

149 In England, this discretion arises under § 49(4) of the Arbitration Act (England & Wales).

150 Ripinsky & Williams suggest this period could run from 30 to 60 days: RIPINSKY & WILLIAMS, *supra* note 2, at 390. Nevill suggests that this grace period can range from 30 to 90 days. Other approaches include awards of post-award interest that increase in rate or compounding *after* a 'grace' period comprising a requirement to pay interest at a different (lower) rate: Nevill, *supra* note 87.

151 BLACKABY ET AL., *supra* note 52, ¶ 9.83.

152 *Cf.* Thomas Wälde, *Remedies and Compensation in International Investment Law*, 2(5) TRANSN'L DISP. MGMT. 88.

153 Gotanda, *supra* note 9, at 190. For a survey of the rates used by the Iran-U.S. Claims Tribunal, *see* MARBOE, *supra* note 2, ¶ 6.43 (noting that interest rates as high as 12 percent were used).

154 RIPINSKY & WILLIAMS, *supra* note 2, at 367.

155 DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS ¶¶ 7-098-104 (15th ed. Supp. 2017); Miliangos v. George Frank Textiles Ltd. (No. 2) [1977] QB 489 (Eng.).

156 *See* Judgments Act 1838, 1 and 2 Vict. c. 110, § 17; DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS ¶¶ 7-116 (15th ed. Supp. 2017); EDELMAN ET AL., *supra* note 15, ¶¶ 19-104-19-122

157 DICEY, MORRIS & COLLINS ON THE CONFLICT OF LAWS ¶¶ 7-116 (15th ed. Supp. 2017).

interest with one eye on ensuring '*full compensation*',[158] with some older awards using a rate of interest based on the law of the place with the closest connection to the obligation to pay compensation.[159] Despite these differences and discretion, it is clear that the purpose of the award of interest plays (or should play) a decisive role in selecting the appropriate rate of interest.

Under English law, where the purpose of interest as damages or pre-award interest on damages is to ensure that a claimant receives an appropriate amount of compensation for loss of use of the principal sum, interest is calculated by taking into account general assumptions about the loss that would have been suffered by the general class of borrower in which the claimant sits, or specific proof of loss.[160] In commercial cases, that award will typically be designed using what is known as the '*commercial rate*', based on the base rate or conventional rate of borrowing such as LIBOR plus a margin (between one to three percent),[161] or by considering only the "*general attributes of the successful party*".[162] The use of short term rates such as the LIBOR 3-month rate (which are typically lower than long-term rates) has been adopted by the courts on the basis that at the outset of a breach of contract (or other obligation) a claimant cannot know for how long it will be deprived of its money.[163] Alternatively, a claimant (or a respondent) may adduce evidence to prove that some other interest rate is appropriate,[164] and a higher or lower rate may be appropriate due to the circumstances of the parties, including any agreements between them referring to a relevant rate of interest.[165]

The recent judgment in *Kazakhstan Kagazy* v. *Zhunus*[166] provides an interesting illustration of the manner in which a commercial rate of interest appropriate to the specific circumstances of the claimant may be selected. In this case, the claimants' loss had been suffered in US dollars, and its evidence resulted in an award of pre-judgment interest at a rate created to approximate the cost of borrowing US dollars in Kazakhstan, between seven to fourteen percent. That rate was proven by expert evidence, having regard to the general class of borrower to which the claimants belonged. Because no historical data for US dollar loans in Kazakhstan was available, the applicable rate was calculated by the claimants' expert using a blended rate based on several fully convertible currency-denominated long-term loans taken out by non-banking entities. This

158 Arangio-Ruiz ILC Report, *supra* note 87, at 29.

159 *See* Interest on Diplomatic Debt Case (Gr. Brit. v. Venez.) 9 R.I.A.A. 481 (British-Venezuelan Commission, 1903); Bank for International Settlements 23 R.I.A.A. 252, (Sept. 19, 2003), ¶ 91.

160 Equitas v. Walsham [2013] EWHC 3264 ¶¶ 123(iv), 125 (Eng.); Kuwait Airways v. Kuwait Insurance [2000] 1 All ER (Comm) 973, 992.

161 Equitas v. Walsham [2013] EWHC 3264 ¶ 123(iv) (Eng.).

162 Kazakhstan Kagazy PLC & Ors. v. Baglan Abdullayevich Zhunus & Ors. [2018] EWHC 369 ¶ 31 (Eng.).

163 *Id.* However, from a compensatory perspective a 3-month interbank rate generally reflects a lower risk than a 12-month interbank rate, and so may not adequately compensate a claimant for the loss they have suffered after being deprived of a principal sum for an extended period of time.

164 *Id.*

165 *See* the twenty percent interest awarded in Batallion & Anor. v. Shone & Anor. [2015] EWHC 3177 ¶ 22 (Eng.), where pre-award interest was awarded under § 35A of the Senior Courts Act to provide compensation "for the sort of money that they would have earned if that capital had been placed in investments elsewhere", using the interest rate provided in the parties' settlement agreement.

166 Kazakhstan Kagazy PLC & Ors. v. Zhunus & Ors., [2018] EWHC 369 ¶ 31 (Eng.).

interest allegedly added up to a sum of no less than US$200 million, although that amount was reduced after the court's decision required the use of a shorter term rate.[167]

Under international law, a much wider variety of rates has been used in the name of full reparation, as illustrated by the practice of investment tribunals. Taking tribunal awards from 2017 as a sample, tribunals have used LIBOR plus two percent for three month borrowings,[168] the US six-month Treasury Bill rate,[169] an approximation of a respondent State's borrowing rate,[170] the investor's cost of debt,[171] a contractual rate of interest,[172] and rates that reflected the interest the claimant would have to pay on its own financing.[173] More generally, a survey of the rates used by investor-State and inter-State tribunals shows that they have applied rates pre-agreed between parties,[174] the claimant's borrowing rate,[175] the respondent's borrowing rate,[176] a risk-free rate (such as the rate on U.S. treasury bonds) or an interbank lending rate (such as LIBOR)[177] with or without a claimant-specific market-risk premium[178] or a market-standard

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167 *Id.* ¶¶ 22, 26-27. This decision may be exceptional – in U.S. Dollar cases in the English courts, the U.S. Prime Rate has generally been used: Mamidoil-Jetoil Greek Petroleum Co. SA v. Okta Crude Oil Refinery AD [2002] EWHC 2642 ¶ 16 (Eng.). English courts have also used the yield on index-linked government stock where damages are being assessed at the date of trial in a depreciated currency, in order to avoid overcompensation: Wright v. British Railways Board [1983] 2 AC 773 (HL) (Eng.).

168 Burlington v. Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (Feb. 7, 2017), ¶ 535; Caratube International Oil Co. LLP v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Award (Sep. 27, 2017), ¶ 1225, (although the specific borrowing period was not specified, this rate was justified on the basis that this would provide full compensation and was "in line with ICSID standard practice"); Koch Minerals S.a.r.L. v Bolivarian Republic of Venezuela*,* ICSID Case No. ARB/11/19, Award (Oct. 30, 2017), ¶ 11.12 (awarding US$ 6-month LIBOR plus two percent).

169 Teinver S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Award (Jul. 21, 2017), ¶ 1124 .

170 In Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No ARB/14/21, Award (Nov. 30, 2017), ¶ 714, this was five percent, as a "conservative rate" derived from Peru's weighted yield to maturity (presumably from its US$-denominated debt) at the date of expropriation and the coupon rate of the most recently issued bond per annum. In Eiser Infrastructure v. Kingdom of Spain*,* ICSID Case No. ARB/13/36, Award (May 4, 2017), ¶ 478 , this was 2.07%, based on Spain's borrowing rate.

171 Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan, ICSID Case No. ARB/13/1, Award (Aug. 22, 2017), ¶ 998.

172 *Id.*, ¶¶ 995-996.

173 UAB E Energija (Lith.) v. Republic of Latvia, ICSID Case No. ARB/12/33, Award (2017), ¶¶ 1148, 1150.

174 MARBOE, *supra* note 2, ¶¶ 6.69-6.77.

175 MARBOE, *supra* note 2, ¶¶ 6.78-6.80, 6.91-6.96.

176 Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No ARB/14/21, Award (Nov. 30, 2017), ¶ 714 (Tenaris v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/26, Award (Jan. 29, 2016), ¶¶ 586-587; Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award (Dec. 8, 2000), ¶ 128 n. 289 (confirmed in Wena Hotels v. Egypt, ICSID Case No. ARB/98/4, Decision on Application for Annulment (Feb., 5, 2002), ¶ 53; Marvin Feldman v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2005), ¶ 205; Quasar des Valores v. Russian Federation, SCC Case No. 24/2007, Award (Jul. 20, 2012), ¶ 226; *But see* MARBOE, *supra* note 2, ¶¶ 6.109-6.111. Some of these awards rationalise the use of the respondent State's borrowing rate on the "coerced loan" theory. Others rationalise it on the basis that the investor would have invested in that State. And some awards give no reason at all.

177 *See also,* 2016 UNIDROIT Principles, *supra* note 16, art. 7.4.9 (*Interest for failure to pay money*). In investment arbitration, the origin of the use of the risk-free rate might be Sylvania Technical Systems, Inc. v. Iran, 8 Iran-U.S. Cl. Trib. Rep. 320-321(1985), when that rate was 12 .12 percent: *see* MARBOE, *supra* note 2, ¶¶ 6.121-6.122.

178 As to the use of a country-risk premium on top of a risk-free rate, *see* MARBOE, *supra* note 2, ¶ 6.127; Gotanda & Senechal, *supra* note 3; Thierry Senechal, *Time Value of Money: a Case Study*, 4(6) TRANSNAT'L DISP. MGMT. 1, 13 (207); Beharry, *supra* note 3; Smith & Vikis, *supra* note 4. On Damodaran's definition of "cost of equity", a risk-free rate with a market-risk premium may result in a close approximation of a claimant's cost of equity: Aswath Damodaran, *The Cost of Capital: The Swiss Army Knife of Finance*, NYU SCH. BUS. (Apr. 2016), http://people.stern.nyu.edu/adamodar/pdfiles/papers/costofcapital.pdf. *See also,* Alpha Projektholding v. Ukraine, ICSID Case No. ARB/07/16, Award (Nov. 8, 2010), ¶ 514 (9.11% based on U.S. treasury bonds and a market-risk

margin,[179] a '*legal*' default rate set by national law,[180] and a fixed or '*fair*' interest rate, i.e., a rate not necessarily based on market standards).[181] And without much explanation from courts and tribunals as to why this is the case, fixed or '*fair*' rates tend to dominate in inter-State disputes.[182]

In all of these cases, tribunals have rejected other proposed rates for a number of reasons, including by reference to their goal: to compensate the claimant. Importantly, the other rates proposed by parties have not been rejected on the basis that they were impermissible as a matter of law. Rather, one rate has been preferred over another for a variety of reasons relating to evidence in support of using a particular rate,[183] or positive reasons why a rate would either over- or under-compensate a claimant.[184] For instance, some tribunals have rejected a rate based on a respondent's cost of borrowing because that rate was not '*commercial*', given that the respondent could not borrow at that rate, and the claimant would not lend to the respondent at that rate.[185]

In order to make sense of the wide range of interest rates used by international tribunals on damages, it is helpful to refer to the non-exhaustive list of factors referred to by the Iran-US Claims Tribunal in *McCullough & Company* v. *Ministry of Post, Telegraph and Telephone*.[186] On that list, the relevant factors include: (i) any pertinent contractual and treaty-based stipulations; (ii) the rules and principles of the law applicable to the parties' contract or any applicable treaty; (iii) the nature of the facts generating the damage; (iv) the nature or level of the compensation awarded, particularly if it extends to lost profit or includes a profit in the costs to be reimbursed; (v) the knowledge that the defaulting party could have had of the financial consequences of its default

premium) and Funnekotter v. Zimbabwe, ICSID Case No. ARB/05/6, Award (Apr. 22, 2009), ¶¶ 143-144 (awarding ten percent based on LIBOR plus a political risk premium on the basis that the claimants could not invest outside of Zimbabwe as compensation was not paid on time). For an example of an international commercial arbitration where a claimant's cost of equity was explicitly used to determine the applicable interest rate, *see* Conoco v. PDVSA, ICSID Case No. ARB/07/30, Final Award (Apr. 24, 2018), ¶ 295.

179 *See* MARBOE, *supra* note 2, ¶¶ 6.144-6.159.

180 *See* CME Czech Republic B.V. v. Czech Republic, Award (Mar. 14, 2003), 19 ICSID Rep. 264 (2006) (UNCITRAL ad hoc, 2003), ¶¶ 636-641. For a criticism of the use of legal rates based on national law, *see* MARBOE, *supra* note 2, ¶¶ 6.52-6.68.

181 *See* MARBOE, *supra* note 2, ¶¶ 6.160-6.172.

182 Nevill, *supra* note 87. During the nineteenth century and for most of the twentieth century, rates awarded generally varied between four and eight per cent: Lauterpacht & Nevill, *supra* note 22, at 621. *But see* the Del Rio Case, 10 R.I.A.A. 693, 703 (Mixed Claims Commission Mexico-Venezuela, 1903), where Mexico's agent justified interest at a rate of six percent for a period of 75 years on "the recitations contained in the contract for a loan between Mexico and Colombia, upon the laws which were at that time in force, upon similar cases between the two nations interested, and upon arrangements for the negotiation of loans made as well by Colombia as by Mexico under similar circumstances of time and place": at 702; and interest was awarded at this rate: at 703.

183 Teinver S.A. v. Argentine Republic, Teinver S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Award (Jul. 21, 2017), ¶ 1122.

184 Burlington v. Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (Feb. 7, 2017), ¶ 533 (rejecting the use of the claimant's weighted average cost of capital *citing* F. M. Fisher & R. C. Romaine, *Janis Joplin's Yearbook and the Theory of Damages*, 5(1) J. ACCT. AUDITING & FIN. 146 (1990) which rejects the alternative investment theory on the basis that pre-award interest should not compensate for risk). For an analysis in support of using the claimant's weighted average cost of capital, *see* John Y. Gotanda, *The Unpredictability Paradox: Punitive Damages and Interest in International Arbitration*, 7(1) TRANSNAT'L DISP. MGMT. 1 (2010).

185 Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017), ¶ 714 ; Koch Minerals S.a.r.L. v Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/19, Award (Oct. 30, 2017), ¶ 11.12.

186 McCullough & Co. Inc. v. Ministry of Post, Telegraph and Telephone, 11 Iran-U.S. Cl. Trib. Rep. 3 (1986).

for the other party; (vi) the rates in effect on the markets concerned; and (vii) the rates of inflation.[187]

One might also ask whether interest rates should be adjusted to take into account any unreasonable refusal to consider and/or accept a reasonable settlement offer (at least where the fact of that offer has been disclosed to the tribunal), or where an award debtor's conduct has been particularly egregious.[188] And in an inter-State context, there is some support in the awards of tribunals for the view that considerations of equity and the ability of a State debtor to pay will also be relevant to selecting the appropriate rate of interest.[189]

In this context, it remains important to distinguish between different forms of interest. As described above, interest as damages, pre-award interest and post-award interest can serve different purposes and compensate for different forms of loss. Consequently, there is no obvious reason why the same interest rate should be used across the board. Yet, recent investor-State awards have used the same or a similar rate for post-award interest and for pre-award interest,[190] without any detail as to why that rate has been chosen. As a reference point for post-award interest, English courts award post-judgment interest on a simple basis at a rate of eight percent,[191] far higher than the rate available under statutes usually available for pre-award interest, unless the relevant damages are denominated in a currency other than sterling (in which case the court is granted a broad discretion).[192] Although English law justifies the post-judgment rate by reference to its compensatory function,[193] this higher rate also reflects the function of post-award interest as an incentive for compliance with a judgment or award.

For post-award interest, tribunals should also give due consideration to the relative circumstances of the parties and overarching considerations of fairness. It may be arguable, for

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187 *Id.* at 99-100.

188 *See* OMV Petrom SA v. Glencore International AG [2017] 1 WLR 3465, where the English Court of Appeal considered the application of an enhanced interest rate (ten percent above the base rate) to mark the court's disapproval of the defendant's conduct in defending the claim and refusing to engage in settlement negotiations under the English framework for settlement offers in litigation under Part 36 of the Civil Procedure Rules.

189 Affaire Spadafora (Colom./It.), 11 R.I.A.A. 9-10 (Apr. 9, 1904) at 1, 10: the applicable rate was assessed at three percent, based on the wide variance in the rate of interest applicable to Colombia over the applicable period (twenty years), the inability of Colombia to pay, and considerations of equity.

190 Burlington v. Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award (Feb. 7, 2017), ¶ 586; Teinver S.A. v. Argentine Republic, ICSID Case No. ARB/09/1, Award (Jul. 21, 2017), ¶ 1124; Caratube International Oil Co. LLP v. Republic of Kazakhstan, ICSID Case No. ARB/13/13, Award (Sep. 27, 2017), ¶ 1216, 1225; Bear Creek Mining Corporation v. Republic of Peru, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017), ¶ 716 ; Koch Minerals S.a.r.L. v Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/19, Award (Oct. 30, 2017), ¶ 11.12.

191 Prior to 1993, the applicable rate was 15 percent: WhiteBook 2018, *supra* note 131, at 16AI.17.

192 Administration of Justice Act 1970 c. 31, § 44A (UK); Novoship (UK) Ltd. v Mikhaylyuk, Novoship (UK) Ltd v. Nikitin, [2014] EWCA (Civ) 908, ¶¶ 132-136 (Eng.). For the factors to be considered in arriving at an appropriate interest rate for an award in a foreign currency, *see* Braspetro Oil Services Co. v. FPSO (Construction) Inc. [2007] EWHC 1359. *See also,* Gold Reserve Inc. v. Bolivarian Republic of Venezuela [2016] EWHC 153 ¶ 108 where the court continued the tribunal's post-award interest rate as its post-judgment rate, in an effort to enforce the award at the same rate ordered by the tribunal. This approach had previously been recommended by the Singapore Law Reform Committee, *see* LAW REFORM COMMITTEE, REPORT OF THE LAW REFORM COMMITTEE ON PRE- AND POST-JUDGMENT INTEREST vii (Recommendation 15) (Aug. 2005) (Sing.).

193 Novoship (UK) Ltd. v Mikhaylyuk, Novoship (UK) Ltd v. Nikitin, [2014] EWCA (Civ) 908, ¶¶ 132-136 (Eng.); *See also* LAW REFORM COMMITTEE, REPORT OF THE LAW REFORM COMMITTEE ON PRE- AND POST-JUDGMENT INTEREST (Aug. 2005) (Sing.), ¶ 155.

example, that the interest rate should be high enough to provide a real incentive for the award debtor to pay (which would not be the case if the rate of interest used for post-award interest is less than the rate an award debtor would pay on financing).[194] On the other hand, if the post-award interest rate is far higher than the respondent's relevant borrowing rate, the claimant may be able to sell the award for more than its face value, potentially obtaining over-compensation.[195]

In the light of the above, it is clear that there is no universal approach to fixing the interest rate.[196] Tribunals can justifiably award interest at various different rates (including different rates for different 'slices of loss')[197] according to the purpose to be achieved by the interest, "*the particular facts of a case or the availability of evidence*"[198] and considerations of proportionality and fairness.[199] This might appear as an apology for the varying approaches taken by tribunals. However, absent any proof that general uniformity in interest rates would better serve the ability of a tribunal to award appropriate compensation, the flexibility of a tribunal to choose the appropriate interest rate should be valued, not dismissed. A reasonable exception to this approach might be taken in cases where a specific interest rate is standard across an industry: for example, in certain trade or financial arbitrations. But in such cases, it is open for parties to pre-agree the applicable rate and constrain a tribunal long before any arbitration is commenced.

With the compensatory (or even the restitutionary) purpose in mind, it should also be clear that the '*coerced loan*' or '*involuntary creditor*' theory, sometimes posited as a method to determine the applicable rate of interest, is less relevant as a measure of the appropriate rate to calculate interest as damages or pre-award interest on damages.[200] This theory posits that because a claimant will become an involuntary lender to a respondent during arbitral proceedings, the appropriate rate of interest is the rate at which the respondent could have borrowed the principal sum from the claimant.[201] Unless this rate reflects what the claimant would have done with the principal sum (for example, because it was a capital supplier),[202] it will not reflect the actual loss of use of the principal, or the benefit obtained by the respondent. This is not to suggest that the '*coerced loan*' theory cannot be used. Rather, as Marboe also states, the '*involuntary creditor*' theory will have more utility in the context of post-award interest.[203]

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194 Smith & Vikis, *supra* note 5; MARBOE, *supra* note 2, ¶ 6.39.

195 A Dolgoff & T Duarte-Silva, *Prejudgment interest: an economic review of alternative approaches*, 33 J. INT'L ARB. 99, at 114 (2016).

196 For more detailed analyses of interest rates used by international tribunals, including proposals for a single rate *see id.* 108-112; Unchkunova & Temnikov, *supra* note 3; M Cazier-Darmois & A Riviere, *Trois questions en materie d'interet*, 5(1) REVUE D'ARBITRAGE ET DE MEDIATION 109, at 111 (2018); *See* MARBOE, *supra* note 2, ¶¶ 6.42-6.172**;** RIPINSKY & WILLIAMS, *supra* note 2, at 366-373; Gotanda & Senechal, *supra* note 3, at 502-503. In the context of rates to be used for awards of interest as damages, *see* Gotanda & Senechal, *supra* note 3, at 522-531; T Hart, *Study of Damages in International Center for the Settlement of Investment Disputes Cases*, 11(3) TRANSN'L DISP. MGMT. 1, at 18 (2014).

197 M/V Saiga (No. 2) (St. Vincent v. Guinea), 1999 ITLOS Rep. 10, ¶ 173; Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Judgment, 2012 I.C.J. Rep. 324, ¶ 56; Arctic Sunrise Arbitration, (Neth. v. Russ.), PCA Case No. 2014-02, Award on Compensation (Jul. 10, 2017), ¶ 127.

198 J C Keir & R C Keir, *Opportunity Cost: A Measure of Prejudgment Interest*, 39(1) BUS. LAWYER 129, 148-149 (1983).

199 SUTTON ET AL., *supra* note 22, ¶¶ 6-120,

200 Unchkunova & Temnikov, *supra* note 3, at 656; Colon & Knoll, *supra* note 30, at 1.

201 *In re* Oil Spill by Amoco Cadiz, 699 F.2d 909 (7th Cir. 1983), VII.G.1 (U.S.).

202 As Dolgoff & Duarte-Silva argue, the use of a respondent's borrowing rate may also unsound from an economic standpoint: Dolgoff & Duarte-Silva, *supra* note 195, at 104-105.

203 MARBOE, *supra* note 2, ¶ 6.11.

G. Simple or Compound Interest

It is now near-universally agreed that when it comes to the choice between simple and compound interest, most national legal systems and international courts and tribunals have failed to keep pace with commercial practice.[204] The 2016 UNIDROIT Principles still take "*no stand on the question of compound interest*", on the basis that in some national legal systems "*compound interest is limited by rules of public policy aimed at protecting the non-performing party*".[205] Absent any restrictions in the applicable law,[206] the policy and economic arguments in favour of allowing tribunals to award compound interest are clear: an award of compound pre-award interest reflects the use of compound interest in modern commerce, ensures complete compensation and, for post-award interest, such an award adds to the incentive for respondents to settle early or pay damages quickly in order to avoid a growing amount of interest.[207] While simple interest may have the '*virtue of simplicity*' it can also have the certainty of '*error and injustice*'.[208] For these reasons, perhaps, the power to award compound interest is now expressly reflected in the procedural rules of some arbitral institutions.[209]

As a matter of English law, and post-*Sempra Metals* v. *IRC*, interest as damages can be awarded on a compound basis.[210] Beyond interest as damages, however, compound interest on damages will usually only be available to a tribunal applying English law if this forms part of the agreement of the parties,[211] or the law of the seat permits this – for example, via provisions equivalent to Section 49 of the Arbitration Act.[212] This is because the common law still does not recognise an inherent jurisdiction for courts or tribunals to award interest *on* damages on a compound basis.[213]

Similarly, under international law, compound interest was for a long-time prohibited,[214] despite persuasive arguments to the contrary.[215] The Iran-US Claims Tribunal even refused to uphold an

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204 For a review of the treatment of compound interest by national legal systems, *see* John Y. Gotanda, *Compound Interest in International Disputes*, 34 L. & POL'Y INT'L BUS. 400-430 (2003).

205 2016 UNIDROIT Principles, *supra* note 16, art. 7.4.10. As was observed by the House of Lords in Sempra Metals Ltd. v. Inland Revenue Commissioners, *supra* note 6 [2008] 1 AC 561 (HL), ¶ 37 (Eng.), the practice in the majority of EU states was to award "simple interest ancillary to a principal sum that is to be paid by way of damages", the main exceptions being Poland, the Netherlands and Germany. *Cf.* the more optimistic view in Gotanda, *supra* note 2525.

206 Affolder summarises four main forms of restriction on compound interest: prohibitions under Shari'a law, where interest-bearing loans are illegal; public policy restrictions; maximum interest restrictions (for example, in the United States) and restrictions for reasons of unconscionability or gross extortion: Affolder, *supra* note 3, at 49.

207 Gotanda, *supra* note 25, at 19; MARBOE, *supra* note 2, ¶¶ 6.294-6.299.

208 Equitas v. Walsham [2013] EWHC 3264 ¶ 123(v) (Eng.).

209 *See, e.g.,* LCIA Arbitration Rules 2014, art. 26.4.

210 Equitas v. Walsham [2013] EWHC 3264 ¶ 123 (Eng.); Kazakhstan Kagazy PLC & Ors. v. Zhunus & Ors. [2018] EWHC 369 ¶ 76 (Eng.). Wherever compound interest is awarded, it will be necessary to determine not just the applicable rate but also how frequently interest should be compounded. For a prescient critique of the former position under English law, *see* F A Mann, *Problems of Compound Interest*, 106 L. Q. REV. 176 (1990) .

211 *See, e.g.,* Director General of Fair Trading v. First National Bank Plc [2002] 1 AC 481, where the House of Lords upheld an express contractual provision that allowed compound, variable interest rates on post-judgment debts.

212 An equitable jurisdiction to award compound interest also exists in cases of fraud: Kazakhstan Kagazy PLC & Ors v. Zhunus & Ors, [2018] EWHC 369 ¶ 31 (Eng.).

213 Housing Trust v. YP Seaton & Associates Co. Ltd. (Jam.) [2015] UKPC 43 (appeal taken from Jam.).

214 *See, e.g.,* Great Britain v. Spain (Spanish Zone of Morocco) 2 R.I.A.A. 615, 650 (Perm. Ct. Arb., 1924); MARBOE, *supra* note 2, ¶¶ 6.224.

215 F A Mann, *Compound Interest as an Item of Damage in International Law*, 21 UC DAVIS L. REV. 577 (1988); Stephen Schwebel, *Compound Interest in International Law*, 2(5) TRANSNAT'L DISP. MGMT. 1 (2005); Affolder, *supra* note 3;

agreement requiring compound interest to be paid, in *Anaconda-Iran* v. *Iran*.[216] In the last five to ten years however, the position has changed, and tribunals and parties in investor-State disputes now unashamedly refer to the acceptance of compound interest as a *jurisprudence constante*,[217] the key cases being identified as *Kuwait* v. *Aminoil*,[218] the ICSID award in *Santa Elena* v. *Costa Rica*[219]and *Starrett Housing Corporation* v. *Iran*.[220] It now appears to be accepted that international law confers a power on tribunals (absent any treaty or other applicable rules to the contrary) to award interest on a compound basis if it is necessary to ensure reparation.[221] In inter-State disputes, however, the position is somewhat different, and simple interest continues to be the norm for pre- and post-award interest.[222] The justification for this approach is unclear, although some commentators have suggested that it ensures that the award of compensation reflects a fair and just outcome (particularly where the interest is more symbolic than compensatory).[223] There is room for this to change, however, given both the trend towards compound interest in investor-State awards, and the conclusion reached by Professor Gaetano Arangio-Ruiz in his report as a Special Rapporteur of the ILC on the topic of State responsibility, that "*compound interest should be awarded whenever it is proved that it is indispensable in order to ensure full compensation for the damage suffered by the injured State.*".[224]

H. Economic Coherence

Whatever legal factors may influence the calculation of pre-award interest, economic considerations must also play a role, whether to ensure that the award of interest achieves its purpose, or simply because insufficient attention to economic issues may result in an award that is unsound as a matter of logic. Some of the recurring economic pitfalls include applying simple interest while basing the measure of loss on an investment that uses compound rates,[225] failing to

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Gotanda, *supra* note 9, at 259-262. In *Affaire des réclamations françaises contre le Pérou* (Fr. v. Peru), 1 R.I.A.A. 215, 220 (Oct. 11, 1920), a mixed commission refused an award of compound interest, but recognised that it would need to be allowed where it had clearly been accepted by a debtor.

216 Anaconda-Iran v. Iran (Case No 167), 13 Iran-U.S. Cl. Trib. Rep. 199 at (1986) at 234-215.

217 *See, e.g.,* Hulley Enterprises Ltd.v. Russian Federation, PCA Case No. AA 226, Final Award (July 18, 2014), ¶ 1689; Koch Minerals S.a.r.L. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/19, Award (Oct. 30, 2017), ¶ 11.5. *But see* the exceptional cases listed in MARBOE, *supra* note 2, ¶¶ 6.249-6.258.

218 The Government of the State of Kuwait v. The American Independent Oil Co. (AMINOIL), (1982) 66 ILR 518.

219 Compañia del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica, ICSID Case No. ARB/96/1, Award (Feb. 17, 200), ¶ 106.

220 Starrett Housing Corporation v. Iran (Case No. 24), Concurring opinion of Howard M. Holtzmann, 16 Iran-U.S. Cl. Trib. Rep. 112, 252.

221 As to the how frequently interest should be compounded, there is no constant practice, and no prescribed standard for choosing one compounding period over another: Gotanda & Senechal, *supra* note 3, at 533 n.148 noting that most financial institutions award interest on a daily or bi-monthly compounded basis for deposits. Gotanda & Senechal recommend annual compounding, on the basis that it reflects a "common default practice in the business community" (Gotanda & Senechal, *supra* note 3, at 534).

222 Arctic Sunrise Arbitration (Neth. v. Russ.), PCA Case No. 2014-02, Award on Compensation (July 10, 2017), ¶ 125 ; Costa Rica v. Nicar., International Court of Justice, Judgment, 2018 I.C.J. (Feb. 2, 2018), ¶ 153; The Rhine Chlorides Arbitration concerning the Auditing of Accounts,, (Neth./Fr.), Case No. 2000-2004, Award (Mar. 12, 2004), ¶ 139 ; Norwegian Shipowners' Claims (Nor. v. U.S.), Award, 1 R.I.A.A. 307 (Perm. Ct. Arb. 1922), ¶ 36 ; Mixed-Claims Commission. For one of the few exceptional cases where compound interest was awarded, *see* Affaire des chemins de fer Zeltweg-Wolfsberg et Unterdrauburg-Woellan (Austria /Yugoslavia), 3 R.I.A.A. 1795 (Perm. Ct. Arb. 1933).

223 Nevill, *supra* note 87; *See also* RIPINSKY & WILLIAMS, *supra* note 2, at 383; Gotanda, *supra* note 25, at 1.

224 Arangio-Ruiz ILC Report, *supra* note 87, at 30; CRAWFORD, *supra* note 22, at 538.

225 As F.A. Mann noted of the decision in Sylvania Technical Systems, Inc. v. Iran, 8 Iran-U.S. Cl. Trib. Rep. 320-322 (1985), the Iran U.S. Claims Tribunal's decision not to award compound interest was inconsistent with their decision

specify the period for compounding,[226] not taking into account the impact of capital export or foreign exchange restrictions on what a claimant could have done with a principal sum,[227] choosing a borrowing rate that does not correspond to the risk associated with the purpose of the claimant's financing (e.g. financing for general corporate spending versus a risky project), not considering the way the award debt might be traded on the debt market,[228] and failing to consider whether an interest rate is appropriate in light of country, currency or investor-specific factors.[229]

One controversial issue (in investment arbitration) is whether the pre-award interest rate should match the discount rate used to adjust future cash flows for the purposes of assessing the net present value of investments or businesses. According to some economic experts, awarding pre-award interest at a substantially different rate than the discount rate generates an '*invalid round trip*' precluding full compensation.[230] In their view, full compensation requires the claimant's opportunity cost of capital to be used both for pre-award interest and in setting the discount rate, so as to take into account the passage of time since the breach, which will itself have contributed to the deprivation of cash flows potentially limiting the claimant's ability to pay dividends or repay its debt (which will, in turn, result in claims for compensation from both shareholders and lenders).

The arguments for and against this theory have already been rehearsed extensively.[231] It remains hotly debated in both legal and economic circles and does not yet reflect a mainstream view. However, given that in a few recent investor-State and commercial awards claimants have successfully obtained interest based on their cost of equity,[232] and cost of debt[233] the 'invalid round trip' theory might still have its day.

IV. Conclusion

Although interest will often be dealt with only at the end of an award, the potential quantum of compensation it can yield demands that it be treated with greater depth and rigour, both by parties in submissions, and by tribunals in their awards. Many of the complex issues associated with interest relief can, in general, be reasoned and resolved appropriately by reference to the different purposes of interest, taking into account the particular circumstances of the case. A purposive approach ensures that there is coherence in a tribunal's reasoning for the basis of its award and the various elements of any interest relief, from the principal sum to which the

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to use six month certificates of deposits as their standard, given those certificates realise interest on a compound basis: Mann, *supra* note 215, at 580.

226 Mann, *supra* note 215.

227 For the impact this consideration can have, *see* Funnekotter v. Zimbabwe, ICSID Case No. ARB/05/6, Award (Apr. 22, 2009), ¶ 144.

228 *But see* Gater Assets Ltd. v. Nak Naftogaz Ukrainiy [2007] EWCA (Civ) 988, ¶ 28 (Eng.) where this was rejected as an argument.

229 *See* Kazakhstan Kagazy PLC & Ors v. Zhunus & Ors. [2017] EWHC (Comm) 3374, for the importance of these factors.

230 M.A. Abdala et al., *Invalid round trips in setting pre-judgment interest in international arbitration*, 5(1) WORLD ARB. & MED. REV. 1, 10-11 (2011), *citing* S Escher & K Krueger, *The Cost of Carry & Prejudgment Interest*, 6 LIT. ECO. REV. 12 (2003); *Cf.* Gotanda & Senechal, *supra* note 3, n.1.

231 Dolgoff & Duarte-Silva, *supra* note 195, at 101-103.

232 *See, e.g.,* the use of a cost of equity rate in Conoco v. PDVSA, or the rate equivalent to a cost of equity in Funnekotter v. Zimbabwe ICSID Case No. ARB/05/6, Award (Apr. 22, 2009), ¶ 144.

233 Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan, ICSID Case No. ARB/13/1, Award (Aug. 22, 2017), ¶ 998.

interest is applied, the rate, the time period, and whether that interest is granted on a simple or compound basis. There is no reason to constrain the flexibility of tribunals. As with most other aspects of compensation, whether and what interest will be appropriate in any particular case will be case specific. Tribunals should accordingly retain a broad discretion to tailor an award of interest, provided this is properly reasoned by reference to its underlying purpose.