

INTERNATIONAL ARBITRATION PRACTICE GUIDELINE

**Drafting Arbitral Awards**  
**Part II — Interest**

Chartered Institute of Arbitrators

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## Drafting Arbitral Awards Part II — Interest

### *Introduction*

1. This Guideline sets out the current best practice in international commercial arbitration for awarding interest. It provides guidance on:
  - i. how to deal with claims to award interest (Article 1);
  - ii. over what period interest should accrue (Article 2);
  - iii. at what rate interest should be awarded (Article 3); and
  - iv. whether simple or compound interest should be awarded (Article 4).
2. This Guideline should be read in conjunction with the *Guideline on Drafting Arbitral Awards Part I — General* and the *Guideline on Drafting Arbitral Awards Part III — Costs*.<sup>1</sup>
3. In this Guideline references to ‘paying party’ should be understood as the party who is directed to make a payment to another party and references to ‘receiving party’ should be understood as the party who receives a payment.

### *Preamble*

1. The purpose of an award of interest is to compensate a party for loss of the opportunity to use money to which it is entitled and, at the same time, to prevent the counterparty from being unjustly enriched as a consequence of wrongfully withholding money that did not belong to it. In international commercial arbitration where there is often a significant interval between the origin of a dispute and the time when a final award is issued by the arbitrators, interest may play an important role in compensating the receiving party for the delay in receipt of money and it can represent a significant proportion of the total sum awarded.
2. One of the main challenges for arbitrators considering whether to award interest is that different legal systems apply different approaches to the same issue. Further, most national laws and arbitration rules provide little guidance as to how to deal with a request for an award of interest and do not specify how interest is to be calculated.<sup>2</sup> Complications may

also arise due to the fact that some countries prohibit interest altogether because it is inconsistent with their religious beliefs and other countries consider certain types of interest to be contrary to public policy.<sup>3</sup>

3. In the absence of express provisions allowing the arbitrators to award interest and provided that there is no prohibition under the arbitration agreement, including the applicable arbitration rules, and/or the law of the place of arbitration (*lex arbitri*), it is widely accepted that arbitrators have a broad discretion whether to award interest, as part of their inherent powers.<sup>4</sup>
4. This Guideline examines the relevant factors that arbitrators should take into account when deciding whether interest should be awarded, for what periods, on what sums and at what rates.

#### Article 1 — General principles

1. Arbitrators should establish what powers they have, if any, to award interest under the arbitration agreement, including any arbitration rules and the *lex arbitri* as well as the substantive law applicable to the contract (*lex causae*).
2. Arbitrators should invite the parties to make submissions and present evidence as to whether interest should be awarded and if so, at what rates, on what sums and for what periods, at an early stage of the proceedings.
3. When determining interest, arbitrators should have regard to all the circumstances of the case and take into account the economic reality within which the parties operate with a view to reaching a decision which is both just and fair to all parties.
4. An award of interest should compensate the receiving party. It should not punish the paying party.
5. An award of interest should state the arbitrators' decision as to interest and should contain reasons for any determination of rates

**and dates as well as whether interest awarded is simple or compound.**

*Commentary on Article 1*

*Paragraph 1*

*Applicable law(s)*

- a) Some national laws provide that the right, if any, to interest is a matter governed by the substantive law of the contract, while others provide that it is a matter governed by the procedural law of the arbitration. Accordingly, when considering the issue as to whether to award interest arbitrators should take into account: (1) the substantive law applicable to the contract (*lex causae*),<sup>5</sup> (2) the *lex arbitri*, (3) the applicable arbitration rules and (4) any provisions in the arbitration agreement. They may also choose to consider the law of the place of likely enforcement, if known.
- b) Arbitrators have to be wary that the laws of certain countries forbid the application of interest because of public policy or overriding mandatory rules and therefore an award ordering interest may be unenforceable in such a country. Arbitrators who anticipate that the receiving party may seek to enforce their award in such a country should consider whether it is appropriate to make a separate partial award in respect of interest<sup>6</sup> or to award interest as a form of ‘compensation’ without any specific reference to interest.

*Express or implied terms of the agreement between the parties*

- c) Arbitrators should also determine whether the contract between the parties contains express or implied terms as to interest to which they should give full effect, subject to any mandatory provisions of the applicable law prohibiting interest. If an express term as to interest exists, it may assist the arbitrators in determining such issues as (1) the

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period for which interest may be awarded, (2) the rate and (3) whether interest should be simple or compound. Alternatively, interest may be awarded on the basis of a term implied by a trade usage.

*Paragraph 2*

*Early consideration of matters related to the award of interest*

- a) Arbitrators should encourage the parties to agree, or at least to discuss, the issue of interest at an early stage in the arbitral proceedings, such as the preliminary meeting or case management conference. If no claim at all is made for interest and the arbitrators consider that this is an oversight, they would be justified in drawing the oversight to the attention of the parties, subject to the provisions of the arbitration agreement including any arbitration rules and/or the *lex arbitri*.
- b) Issues to discuss should include the rate of interest, the date from which interest should start to accrue and the type of interest. In cases where there is a disagreement as to the currency in which award should be made or there are multiple currencies, arbitrators should invite submissions and consider the matter because this may affect the rate of interest.

*Scope of arbitrators' powers to order interest*

- c) Arbitrators may apply interest to any amounts awarded, including (1) a pecuniary sum awarded to one of the parties, (2) an amount claimed in the arbitration and outstanding at the commencement of the arbitration but paid before the award was made up to the date of payment and (3) costs.<sup>7</sup>

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*Paragraph 3*

*Just and fair compensation*

When awarding interest, arbitrators should, as far as possible, seek to award an appropriate level of compensation for the receiving party, without unfairly injuring the paying party. They should avoid either overcompensating or undercompensating the receiving party and unfairly benefiting the paying party. Arbitrators should decide what is just and fair for both the paying and the receiving parties based on both parties' commercial circumstances. In exercising any broad discretion that they have in awarding interest, arbitrators should use the same level of care and diligence as they do in determining awards of damages and awards of costs.

*Paragraph 4*

*Compensatory nature of interest*

The purpose of awarding interest is to compensate the injured party by placing it in the same position as it would have been in if no breach had occurred. Accordingly, the amount of interest should be designed purely to compensate a receiving party for being kept out of its money and provide it with a form of commercially realistic restitution without punishing the paying party. Courts in some jurisdictions may refuse to enforce awards of interest that they consider punitive or usurious according to their national laws.<sup>8</sup>

*Paragraph 5*

*Treatment of interest in awards*

In the award on interest arbitrators should describe the basis of their power to decide on the matter and any agreed and/or adopted procedure. They should summarise the parties' positions and arguments regarding interest and provide reasons for their decision.<sup>9</sup> Arbitrators should

calculate the amount(s) of interest payable up to the date of the award, applying the relevant interest rates. They should also provide sufficient information so that interest can be calculated for the period between the date of the award and final payment of all sums due. Finally, the decision as to interest should be repeated in the dispositive part of the award in order to be enforceable.

**Article 2 — Period of interest accrual**

- 1. Arbitrators should determine the date or dates when liability for interest starts to accrue.**
- 2. Arbitrators should include in their award of interest:**
  - i) the amount of interest payable up to the date of the award ('pre-award interest'); and**
  - ii) the information required to calculate the interest payable between the date of the award and the date of payment ('post-award interest').**

*Commentary on Article 2*

*Paragraph 1*

*Time from which interest accrues*

In their award, the arbitrators should identify the date or dates from which interest started running and state the interest rate or rates to be applied to the amounts in question for the applicable time periods. Generally, interest should be awarded from the date or dates of default or breach of contract if the damage started to accrue on that date. Alternatively, if the arbitrators conclude that it is not possible to establish the exact date or dates when the damage started to accrue, for example, where damages were incurred over a period of time, they may conclude that it is just and fair to both parties to award interest from a middle or average date from which the damage started to accrue. In the

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absence of evidence as to when damage began to be incurred, the arbitrators may conclude that it is just and fair to both parties to award interest from the date of the formal demand for payment (ie demand of payment made in writing with notice to the debtor) or from the date of the commencement of the arbitration. In the case of debts, interest should normally be awarded from the date when the debt fell due.

*Paragraph 2*

*Period over which interest accrues*

Pre-award interest accounts for the time between the original breach and the award. Post-award interest accounts for the period between the date of the award and the date on which the sums awarded are actually paid. To encourage prompt payment, arbitrators may decide to allow the paying party a grace period say, for example, of 30 to 60 days, during which interest will not accrue.<sup>10</sup> Additionally, they may specify that interest should accrue for the grace period in the event that the award is not satisfied before the grace period expires.

**Article 3 — Rate of interest**

- 1. Once the date or dates for which interest accrues have been determined, arbitrators should decide the applicable interest rate or rates.**
- 2. Arbitrators frequently award the same rate for both pre-award and post-award interest, although they should consider in all cases whether it would be more appropriate to charge a different rate for each period.**

*Commentary on Article 3*

*Paragraph 1*

- a) If the parties do not agree on the rate of interest in their contract or during the arbitration, it is up to the arbitrators to determine the appropriate rate. The rate should be reasonable and take into account all relevant circumstances, in particular applicable contractual provisions and interest rates prevailing in the markets for the relevant currency during the relevant period.

*Determining the interest rate*

- b) It is good practice to assess the rate of interest by reference to the rate at which a party in the position of the receiving party would have had to pay to borrow the sum awarded for the period in question.<sup>11</sup> The starting point for that assessment is the rate of interest applicable to short term unsecured loans prevailing for the currency of payment at the place of payment.
- c) In the absence of evidence of that rate, reference may be made to rates in the country of the relevant currency, place of performance or the domicile of the receiving party. An alternative approach is to consider the rate of interest at which a party in the position of the paying party would have to borrow to pay the sum awarded.<sup>12</sup> If arbitrators consider that the parties intended to avoid the norms of their respective jurisdictions, they may conclude that it is more appropriate to award the rate or rates used on the international financial market for that currency.<sup>13</sup>
- d) In any case, arbitrators should avoid determining a rate of interest that it is so low that the paying party will have little incentive to pay. At the same time, arbitrators should also avoid determining a rate of interest so high that the receiving party may be disinclined to pursue enforcement of its award vigorously.



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- e) The fact that a particular claimant was in a special position such that it could only borrow the money at a very high rate or it was able to borrow at favourable rates is only relevant if it was known or ought to have been known at the inception of the relationship when the contract was entered into. The arbitrators may wish to enter into this type of analysis only if they are provided with persuasive evidence by the parties.

*Currency of compensation*

- f) The question of what is the currency of compensation is usually fixed in the contractual provisions for payment. If it is not, arbitrators may consider that another currency is more appropriate for compensation depending on the specific circumstances of the case. Arbitrators have a wide discretion in determining the currency of the award and in dealing with issues of currency conversion. However, arbitrators need to be wary of the fact that interest rates may vary significantly depending on the currency to which they are applied. When deciding the question of currency, it is good practice for arbitrators to state the reasons for their choice.

*Paragraph 2*

*Consistency between the rate of pre-award and post-award interest*

Arbitrators should consider separately what to award in respect of pre-award interest and post-award interest and should also decide whether to choose a fixed or floating rate for both the pre-award and post-award interest. Arbitrators may consider it appropriate to award a single rate for both periods, making no distinction between pre-award and post-award interest,<sup>14</sup> particularly if interest rates are the same in both periods. Alternatively, if interest rates are fluctuating, arbitrators may consider it more appropriate to award different rates which better reflect increases or decreases in the value of money over the period(s) in

question. Arbitrators should be wary of the fact that awarding post-award interest at a higher rate may be argued to be punishing the paying party which is contrary to the general principle that awards of interest should be to compensate and not punish (see Article 1.4 above). In the event that arbitrators consider it appropriate to award post-award interest at a higher rate, they should explain the reasons for their decision in order to reduce the risk of challenge.

**Article 4 — Simple or compound interest**

**Arbitrators should decide whether to award interest on a simple or compound basis. If they determine that the application of simple interest will not provide adequate compensation to the injured party, they may award compound interest, in the absence of any contrary provisions in the arbitration agreement, including any applicable rules and the *lex arbitri*.**

*Commentary on Article 4*

‘Simple interest’ is interest payable only on the principal sum awarded and not on the accumulated interest. ‘Compound interest’, on the other hand, is interest that is applied periodically, depending on the compounding period, on both the principal sum awarded and accumulated interest.

*Simple interest*

- a) Arbitrators should award simple interest where they consider that it provides the appropriate level of compensation to the receiving party for the delayed receipt of the principal sum awarded.

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*Compound interest*

- b) Arbitrators should award compound interest where they consider that it provides the appropriate level of compensation to the receiving party for the delayed receipt of the principal sum awarded to include, for example, circumstances where: (1) the parties have agreed on the payment of compound interest; (2) a party's failure to fulfil its obligations caused the receiving party to incur financing costs on which it paid compound interest; (3) the receiving party has established that it would have earned compound interest in the normal course of business on the money owed if it had been paid on time.<sup>15</sup>
- c) However, before awarding compound interest, arbitrators should always check the applicable law(s) and rules because certain jurisdictions may prohibit the payment of compound interest or limit the circumstances in which it may be awarded.

*Compounding period*

- d) If compound interest is awarded, arbitrators should state the length of the compounding period. The compounding period is the frequency with which interest is calculated and added to the principal sum outstanding. As a result, the principal sum on which interest is calculated for the next compounding period is increased by reference to the interest earned from the previous period. Arbitrators should be aware that the impact of the choice of compounding period can be substantial, since the more frequent the compounding, the greater the amount of interest.

*Conclusion*

The availability and rate of interest in arbitration can have substantial practical importance, especially where the amount in dispute is large and/or the time periods involved are extended. This Guideline summarises the various considerations arbitrators should take into

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account when considering whether to award interest with the objective of reaching a decision that takes into account the financial and economic realities of each case.

**NOTE**

The Practice and Standards Committee (PSC) keeps these guidelines under constant review. Any comments and suggestions for updates and improvements can be sent by email to [psc@ciarb.org](mailto:psc@ciarb.org)

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*Endnotes*

1. See generally CIArb Guideline on Drafting Arbitral Awards Part I — General (2016) and CIArb Guideline on Drafting Arbitral Awards Part III — Costs (2016).
2. See Article 26(4) LCIA Rules (2014) as well as Section 49 English Arbitration Act 1996 which provide a broad discretion for awarding interest.
3. For an overview of countries which prohibit the payment of compound interest or limit the circumstances in which it may be awarded, see John Yukio Gotanda, ‘Compound Interest in International Disputes’ (2003) *Law and Policy in International Business*, pp. 403-407.
4. Jeffrey Waincymer, *Procedure and Evidence in International Arbitration* (Kluwer Law International 2012), p. 1177; Gary B. Born, *International Commercial Arbitration* (2nd ed, Kluwer Law International, 2014), p. 3103; International Law Association (ILA), ‘The Practice of Inherent and implied Powers’, Report from the Biennial Conference in Washington DC (April 2014), p. 10.
5. Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, OUP 2015), para 9.73; Born, n 4, pp. 3104-3108 and John Yukio Gotanda, ‘Awarding Interest in International Arbitration’ (1996) 90 *The American Journal of International Law*, p. 52;
6. Blackaby, n 5, paras 9.81-9.82; Julian D. M. Lew and others, *Comparative International Commercial Arbitration* (Kluwer Law International 2003), para 24-89.
7. It is important to note that under the English Arbitration Act 1996, interest on costs may only be awarded in respect of the period after they have been awarded. See Bruce Harris, Rowan Planterose and Jonathan Tecks, *The Arbitration Act 1996: Commentary* (Blackwell

- 2014), p. 256.
8. Steven H. Reisberg and Kristin M. Pauley, 'An Arbitrator's Authority to Award Interest on an Award until "date of payment": Problems and Limitations' (2013) 16(1) *International Arbitration Law Review*, p. 27.
  9. See CI Arb Guideline on Drafting Arbitral Awards Part I — General (2016).
  10. See e.g., Final Award in Case No 16015 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, vol. XXXVIII (Kluwer Law International 2013), p. 201.
  11. See e.g., Article 7.4.9 of the UNIDROIT Principles of International Commercial Contracts.
  12. Lawrence W. Newman and David Zaslowsky, 'Awards of Interest in International Arbitration', *New York Law Journal*, 22 May 2014.
  13. See e.g., ICC Case No 11849, 2003 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration*, vol. XXXI (Kluwer Law International 2006), pp. 148-171.
  14. See Final Award in Case No 16015, n 10, para 106 and Blackaby, n 5, para 9.83
  15. Gotanda, n 3, p. 440; Rutsel Silvestre J. Martha, *Financial Obligations in International Law* (OUP 2015), p. 469; T. Senechal, 'Time Value of Money: A Case Study' (2007) 4(6) *Transnational Dispute Management*, p. 4 and Michael Knoll, 'A Primer on Prejudgment Interest' (1996) 75(2) *Texas Law Review*, pp. 307-308.