Pre-award and Post-award Interest: Requesting and Awarding in Domestic Arbitration Proceedings (U.S.)

A Practical Guidance® Practice Note by
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This practice note discusses the parameters for requesting and rendering pre-award and post-award interest on arbitration awards in domestic arbitration proceedings in the United States. Specifically, this note covers the arbitrator's or tribunal's authority to include such interest in final awards, the standards under which interest will be awarded, and various strategic considerations.

When commencing an arbitration proceeding, claimants often request that the arbitrator or tribunal include an award of pre-award interest (and, sometimes, post-award interest) in the final award. Claimants base this request on the assumption that they will prevail on the merits and the arbitrator or tribunal will render a monetary award in their favor. Respondents may oppose such relief unless, of course, they are interposing counterclaims, in which case they will likely request similar relief. In fact, prayers for such relief are so commonplace that parties readily assume that they are entitled to both pre-award and post-award interest as in a court litigation. Hardly anyone pays close attention to the mechanics of how that relief is awarded. The topic is rarely discussed as an agenda item at either the initial management conference (or preliminary hearing) or the final conference before the evidentiary hearing. At best, the arbitrator or tribunal may request briefing on the subject during the parties' posthearing submissions. Otherwise, it is often a matter that is left entirely to the discretion of the arbitrator or tribunal.

This note will discuss the authority for an arbitrator or tribunal to include amounts of pre-award and post-award interest in the final awards, along with guidance on issues to consider and practical tips on what to expect. There are different periods in the lifespan of an arbitration proceeding of which you should be mindful so that you and your client can fully realize your expectations for interest on an arbitration award.

For more information on domestic arbitration proceedings, see Arbitration in the United States Resource Kit (Federal), JAMS Arbitration Resource Kit, AAA Arbitration Resource Kit, and CPR Arbitration Resource Kit.

The Authority to Award Interest

Many parties' arbitration agreements do not explicitly address awards of interest. Rather, at most, the parties will have agreed to authorize the arbitrator or tribunal to award any remedy that is generally available in court under applicable law. This broad grant of authority often is interpreted as including awards of pre-award and post-award interest.

Because most arbitration agreements are silent on the issue of pre-award and post-award interest, the next logical source of authority is to look at the governing arbitration procedural law. However, even there, the authority of arbitrators to award interest on their final awards is often not addressed in the governing statutes. For example:

- Both the Federal Arbitration Act (9 U.S.C. § 1 et seq.) and Article 75 of the New York Civil Practice Law and Rules (CPLR) are silent on the subject of interest, making

it unclear whether an arbitrator or tribunal has that authority. But see Matter of Levin & Glasser, P.C. v. Kenmore Prop., LLC, 896 N.Y.S.2d 311, 312 (1st Dep't 2010) ("To be sure, the Rules of the Chief Administrator do not authorize an award of pre-award interest. But neither do they forbid it and, for several reasons, we think the silence of the Rules on this subject is an insufficient basis for concluding that the arbitrators have no authority to award pre-award interest.").

- The Uniform Arbitration Act (UAA), enacted by 35 states and used by 14 others to enact substantially similar legislation, is also silent concerning the subject of the arbitrator awarding interest.
- The Revised Uniform Arbitration Act (RUAA), enacted by 22 states, does not directly address an arbitrator's authority to award pre- or post-award interest, but, rather, impliedly authorizes these awards within the arbitrator's discretion. See RUAA § 21(c) ("As to all remedies other than those authorized by subsections (a) and (b), an arbitrator may order such remedies as the arbitrator considers just and appropriate under the circumstances of the arbitration proceeding.").

Notably, under RUAA § 4(a), Section 21 is waivable by the parties. Thus, you may agree to limit or eliminate certain remedies "to the extent permitted by law."

If your arbitration agreement does not explicitly address the inclusion of interest in the final award, you should look to the substantive law governing the claims at issue to determine:

- Whether interest should be awarded
- For what period
- At what rate –and–
- The calculation methodology (i.e., simple or compound)

See, e.g., Gruberg v. Cortell Group, Inc., 531 N.Y.S.2d 557, 558 (1st Dep't 1988) ("In a contract dispute brought before an arbitrator the question of whether interest from the date of the breach of the contract should be allowed in an arbitration award is a mixed question of law and fact for the arbitrator to determine."); Penco Fabrics, Inc. v. Louis Bogopulsky, Inc., 146 N.Y.S.2d 514, 515 (1st Dep't 1955) ("The question whether interest was to be allowed on the award from the date when payment of the invoices was found to be due was for the arbitrators to determine.").

Also carefully review any applicable or governing administrating authority's or other arbitral organization's rules. More explicitly than Section 21 of the RUAA, those rules generally will vest the arbitrator or tribunal with the discretion to include pre-award and post-award interest in the final award. See, e.g., American Arbitration Association Commercial Arbitration Rules (2013), Rule R-47(d) ("The award of the arbitrator(s) may include (i) interest at such rate and from such date as the arbitrator(s) may deem appropriate."); CPR Institute Administered Arbitration Rules (2019), Rule 10.4 ("The Tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law."); JAMS Comprehensive Arbitration Rules & Procedures (2014), Rule 24(g) ("The Award of the Arbitrator may allocate attorney's fees and expenses and interest (at such rate and from such date as the Arbitrator may deem appropriate) if provided by the Parties' Agreement or allowed by applicable law."). But see ADR Options Rules of Procedure for Arbitrations, Rule 13 ("Subject to relevant substantive legal principles, no monetary award shall be imposed for delay damages or pre-judgment interest, unless all parties agree, in advance and in writing, that the prevailing party would be entitled to such an award."). The consistent theme of most arbitral organization rules is to afford the arbitrator and tribunal with discretion to include pre-award and post-award interest as they deem appropriate, absent any contrary agreement of the parties or applicable law.

See also Strategic Considerations below.

The Relevant Period and the Rate of Interest

The calculation and inclusion of any amount of interest in the final award involve two related concepts:

- The period during which you are calculating interest –and–
- The applicable interest rate used to calculate the value of the interest award over that period

Both the relevant period and the interest rate will have consequences for the ultimate amounts of interest awarded.

Pre-award Interest

Pre-award interest refers to the period between the:

- Date of the loss, damage, or breach –and–
- Date the arbitrator or tribunal issues the award

Although you can easily identify the latter period, be sure that the record clearly establishes the date of the claimant's loss, damage, or breach. That date may be easily determinable or even self-evident. For example, when the claimant suffered an adverse employment action or when a contract was breached often are easily ascertainable dates.

However, depending upon the factual circumstances (e.g., how and when the loss, damage, or breach was discovered), pinpointing that date may be more complicated. There may even be several separate and distinct periods when the matter involves multiple claims with different dates for loss, damage, or breach.

The substantive law governing the claim typically only requires that the claimant demonstrate damages to a reasonable degree of certainty. See, e.g., Ramco Oil & Gas Ltd. v. Anglo-Dutch (Tenge) L.L.C., 207 S.W.3d 801, 808 (Tex. App. 2006) (citing Tex. Instruments, Inc. v. Teletron Energy Mgm't, Inc., 877 S.W.2d 276, 279 (Tex. 1994)) ("Profits are not required to be exactly calculated; it is sufficient that there be data from which they may be ascertained with a reasonable degree of certainty and exactness."); Beverly Hills Concepts, Inc. v. Schatz & Schatz, Ribicoff & Kotkin, 717 A.2d 724, 736 (Conn. 1998) ("In order to recover lost profits, . . . the plaintiff must present sufficiently accurate and complete evidence for the trier of fact to be able to estimate those profits with reasonable certainty."); Delahanty v. First Pa. Bank, N.A., 464 A.2d 1243, 1257–58 (Pa. Super. Ct. 1983) ("Although the law does not command mathematical precision from evidence in finding damages, sufficient facts must be introduced so that the court can arrive at an intelligent estimate without conjecture."). Accordingly, by extension, the party seeking an interest award need only establish the relevant date to that same degree of certainty.

The substantive law governing the claim will also provide the arbitrator or tribunal with the underlying authority to determine the prevailing party's entitlement to pre-award interest. For example, New York's CPLR provides that "[i] nterest shall be recovered upon a sum awarded because of a breach of performance of a contract, or because of an act or omission depriving or otherwise interfering with title to, or possession or enjoyment of, property, except that in an action of an equitable nature, interest and the rate and date from which it shall be computed shall be in the court's discretion." See N.Y. C.P.L.R. 5001.

If the governing substantive law provides for the application of a specific prejudgment interest rate, you should rely on that authority to urge the arbitrator or tribunal to adopt that rate. See, e.g., 41 Pa. Stat. § 202 (establishing 6% rate where a document is silent as to the governing interest rate). In the absence of directly applicable authority, consider analogizing that the applicable federal or state statutory interest rate on court judgments is the appropriate rate to use to calculate pre-award interest. See, e.g., Exel, Inc. v. Southern Refrigerated Transp., Inc., 259 F. Supp. 3d 767, 785 (S.D. Ohio 2017) (concluding that a federal statute addressing post-judgment interest would be used to calculate prejudgment interest); TruServ Corp. v. Morgan's Tool & Supply Co., 39 A.3d 253, 265 (Pa. 2012) (concluding that prejudgment interest accrues at the statutory rate of 6%).

Post-award Interest

Post-award interest refers to two separate periods:

- The period between the date the award is issued and either:
  - Voluntary satisfaction of the award before any subsequent court proceeding –or–
  - The entry, if any, of a court judgment on the award (i.e., confirmation of the award)
- The period from entry of the court judgment, including any appeals, until payment is made in satisfaction of the judgment

Unlike with pre-award interest, the dates used to calculate post-award interest (e.g., the date the award is issued, the date the court enters judgment on the award, and the date the award or judgment is satisfied) are comparatively clearer and easily ascertainable.

In the context of an arbitration proceeding, post-award interest typically refers to the inclusion of interest during the period up to the entry of a court judgment on the award. If the governing substantive law provides for a specific rate to calculate prejudgment interest, you should rely on that authority to urge the arbitrator or tribunal to adopt that rate. If there is no directly applicable authority, you should analogize that the applicable federal or state statutory interest rate on court judgments is the appropriate rate to use to calculate post-award interest. In those situations, the same interest rate will likely apply to both the pre- and post-award interest calculations. Accordingly, most arbitrators and tribunals often will not distinguish between pre- and post-award interest. See, e.g., N. Blackaby, C. Partasides, et al., Redfern & Hunter On International Arbitration (2009) at 9.85 ("[I]in modern practice arbitral tribunals often decline to distinguish between pre- and post-award interest. Instead, arbitral tribunals often award a single rate of interest to run for the whole period . . . up to the date of payment of the award.").

After a court issues judgment on the arbitration award, the merger doctrine deprives arbitrators and tribunals of authority to award post-award interest. Under that doctrine, a claim reduced to a judgment merges into that judgment and any interest rate agreed upon by the parties

disappears for post-judgment purposes. See, e.g., Johnson v. Riebesell, 586 F.3d 782, 794 (10th Cir. 2009) ("[T]here is no arbitration exception to the general merger doctrine."); Tricon Energy Ltd. v. Vinmar Int'l, Ltd., 718 F.3d 448, 457 (5th Cir. 2013). Accordingly, a court-confirmed arbitration award (i.e., an award converted into a judgment) similarly merges into and is superseded by the judgment. Moreover, because "an arbitration panel may not establish a post-judgment interest rate itself," the parties can agree to a specific post-judgment interest rate for the arbitrator or tribunal to apply. See Newmont U.S.A. Ltd. v. Ins. Co. of N. Am., 615 F.3d 1268, 1275–77 (10th Cir. 2010). Otherwise, any award of post-judgment interest on a (former) arbitration award is the same as an award of post-judgment interest on any other applicable court judgment.

When determining the appropriate interest rate, applicable federal or state law will likely apply. For example, under 28 U.S.C. § 1961, federal court judgments (with certain exceptions) are entitled to interest "at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding [ ] the date of the judgment. . . . Interest shall be computed daily to the date of payment . . . and shall be compounded annually." But see Newmont, 615 F.3d at 1277 (parties can contract for their own non-statutory post-judgment interest rate with "language clearly, unambiguously, and unequivocally stating the parties' intent to bypass § 1961"). State laws and practices will vary considerably. Some states establish post-judgment interest rates by statute. See, e.g., Cal. Civ. Proc. Code § 685.010(a) (establishing a post-judgment interest rate of 10% per year); Ga. Code Ann. § 50-21-31 (establishing a post-judgment interest rate of 7% per year); N.Y. C.P.L.R. 5004 (establishing a post-judgment interest rate of 9% per year). Other states establish specific post-judgment interest rates on an annual basis. See, e.g., Fla. Stat. Ann. § 55.03(1); Ohio Rev. Code Ann. § 5703.47.

Calculating Interest

There are two principal methods under which interest is calculated and included in arbitration awards—simple interest and compound interest.

Simple Interest

Simple interest is, as the name implies, the simplest way in which to calculate the amount of interest. The annual amount of the interest is calculated as a percentage of the principal amount, which, in this case, is the monetary value of the award. The mathematical formula can be expressed as:

Monetary Award x Time x Interest Rate = Interest Award

For example, if the arbitrator or tribunal concludes that the claimant is entitled to a monetary award of $100,000 for a breach that occurred three years ago, then at a 5% annual interest rate, the amount of pre-award interest is equal to:

$100,000 award x 3 years x 0.05 interest rate = $15,000

Remember that if the interest rate is expressed as an annual percentage, then the period must also be expressed in terms of years. For example, if the period between the breach and the date of the award is 17 months, then time would be expressed as 17 divided by 12, or 1.42 years.

The arbitrator or tribunal will generally exercise their discretion in how the relevant period in annual terms is expressed. While some arbitrators and tribunals are so precise as to account for the exact number of days involved, others often use rounding or broad estimates.

Compound Interest

Compound interest accounts for the opportunity cost of the money over time. If the claimant prevails, the respondent technically owed the monetary award at the time of the damage, loss, or breach. Accordingly, the claimant was deprived of the ability to utilize those funds between the time of the damage, loss, or breach and when the arbitrator or tribunal renders the award. Compound interest, therefore, accounts for interest on the interest.

Using the same example as above, the pre-award interest in the first year alone would be:

$100,000 award x 1 year x 0.05 interest rate = $5,000

For subsequent years, you will add the prior year's interest to the monetary award before the calculation:

Year 2:	($100,000 award + $5,000 interest (first year)) x 1 year x 0.05 interest rate = $5,250
Year 3:	($100,000 award + $5,000 interest (first year) + $5,250 interest (second year)) x 1 year x 0.05 interest rate = $5,512.50

The total pre-award interest would then equal $5,000 (first year interest) + $5,250 (second year interest) + $5,512.50 (third year interest) = $15,762.50, which is $762.50 more than the $15,000 calculated using only a simple interest methodology.

Both simple and compound interest methodologies provide a prevailing party with additional monies to account for the opportunity cost of the monetary award over time. However, because simple interest is calculated only on the monetary award—while compound interest is calculated on the monetary award plus all intervening interest previously earned—compound interest will always result in a larger award.

You can also compound interest in smaller, discrete periods. For example, you could compound interest on a monthly, weekly, or even daily basis. However, in the absence of the parties' express agreement or applicable law or rules, it would be unusual for the arbitrator or tribunal to compound interest other than annually when calculating pre- or post-award interest. The arbitrator or tribunal also may lack the authority to award interest on a basis for which the parties have not had an opportunity to comment.

Rather than leave the actual calculation mechanics to the arbitrator or tribunal, some arbitrators or tribunals will have the parties calculate and submit the precise amount of pre-award and/or post-award interest for inclusion in the final award. To assist you in this process, consider utilizing various online resources that provide algorithms to calculate both simple and compound interest. See, e.g., Webmath.com (Simple Interest); Webmath.com (Compound Interest).

Strategic Considerations

The inclusion of either pre-award and/or post-award interest can have a marked impact on the total award rendered by the arbitrator or tribunal depending upon a variety of factors, including the:

- Parties' agreement
- Applicable law and rules
- Elapsed time
- Relevant periods in question
- Interest rate
- Total monetary award at issue

Specifically, both the parties and the arbitrator or tribunal should recognize the importance of the different periods for which interest may be awarded and the applicable rate(s) of interest for each of those periods. Consider explicitly addressing the subject in your arbitration agreement or, at the very least, having a comprehensive discussion with all interested parties long before the arbitration hearings close and the opportunity to advise the arbitrator or tribunal on the matter passes. Arbitrators and tribunals may also affirmatively address this issue as part of their case management responsibilities so that they have adequate input from the parties before rendering the final award.

Additional strategic considerations for parties, arbitrators, and tribunals include:

- Whether the parties' arbitration agreement should explicitly address the subject of pre-award and post-award interest and, if so, whether it should address:
  - Entitlement to such relief
  - The applicable interest rate
  - The applicable interest rate law(s) –and–
  - The periods during which you will calculate interest
- Whether the applicable substantive or procedural law addresses:
  - If the final award should include interest
  - The appropriate rate to apply –or–
  - The calculation methodology
- The extent to which the adopted or incorporated arbitral organization rules (if any) vest discretion in the arbitrator or the tribunal to render pre- or post-award interest and whether that discretion should be cabined or expanded in any way
- Whether you want to address the inclusion of pre- or post-award interest with the arbitrator or tribunal at the initial case management conference (or preliminary hearing), the final prehearing conference, or in your posthearing submissions, including discussion of the:
  - Entitlement to interest
  - Relevant periods –and–
  - Appropriate rate of interest
- Whether circumstances in the evidentiary record militate in favor of or against the:
  - Entitlement to interest
  - Appropriate rate to apply –or–
  - Application of either simple or compound interest methodologies
- Whether the decretal paragraphs in the final award should contain explicit amounts of pre- and post-award interest (if any), or whether it is sufficient for the arbitrator or tribunal to merely identify the applicable rate of interest and the governing period(s) (leaving the parties to perform the calculations later)

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Mr. Cheng has over 20 years of experience as an IP and general commercial litigator with a focus on trademarks, copyrights, patents, and trade secrets. He has handled a broad array of business disputes and counseled high net-worth individuals and small to middle-market business entities in industries as varied as high-tech, telecommunications, entertainment, consumer products, fashion, food and hospitality, retail, and financial services. In 2007, the National Asian Pacific American Bar Association named him one of the Best Lawyers Under 40.

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