

An Arbitrator's Authority to Award Interest on an Award until "Date of Payment": Problems and Limitations

Steven H. Reisberg

Kristin M. Pauley*

✉ Arbitration awards; Arbitrators' powers and duties; Enforcement; Interest; International commercial arbitration; United States

While it is common to assume that an arbitration award will provide for the payment of interest, a party may find at the enforcement stage that its expectations will not be fully realised unless attention is paid to the different rules that can apply to the three different time periods for which interest may be awarded. The issue of interest is often discussed in terms of two time periods: "pre-award" and "post-award" interest. However, closer examination reveals that there are three distinct time periods for which interest may be awarded.

These three time periods are: (i) the pre-award period (i.e. from the date of loss to the date the award is issued); (ii) the period of time between the date an award is issued and the entry of a court judgment upon the award; and (iii) the post-judgment period (i.e. from entry of a judgment, including any appeals, until payment is made in satisfaction of the judgment). While the interplay of different national rules dealing with interest can "be metaphysical in their theoretical complexity",¹ it is suggested that viewing the issue in terms of these three time periods can be helpful and clarifying because the same rules do not necessarily govern each of the three time periods. As to the pre-award time period, it is now generally accepted that arbitrators usually apply the

substantive law of the contract.² In sharp contrast, the law governing interest for the post-judgment period will most likely be the law of the enforcement jurisdiction.³

This article will focus primarily on the enforcement of arbitration awards under the New York Convention in the United States. It is important to understand that under US law an arbitrator will not be recognised as having authority to award interest for the post-judgment period. This is because the United States follows the doctrine of "merger", meaning that an arbitration award upon court confirmation is considered to be "merged" into and superseded by the judgment. As a result, the post-judgment interest rate will be the same as that applicable to court judgments. Under US statutory law, the post-judgment interest rate applied to federal court judgments is currently in the range of 0.2 per cent.⁴ This may be a substantial surprise to a party seeking to enforce an award in which the arbitrators have ruled that the prevailing party is entitled to interest at a rate of 8 per cent "until the award is paid." This rule is subject to a very strict exception, and what the parties need to do in order to qualify for this exception will be discussed.⁵

Recognition of the presence of these three separate and distinct time periods for which interest may be awarded should assist both parties and arbitrators. Parties in their contracts as well as their submissions to arbitrators may consider it advisable to address each of these three time periods. In particular, parties may be well-advised when making their submissions to the arbitrators to consider where the award may need to be enforced, so that the national laws of the place of enforcement can be consulted and taken into account. Likewise, arbitrators may be well-advised in some cases to separately address any award of interest for each of these three periods so as to maximise enforcement of their awards. It is also recommended that arbitral institutions consider amending their rules so as to provide the arbitrators with specific authority to grant interest for each of these three time periods, particularly for the post-judgment time period, as that may assist in having the award fully enforced under certain national laws.

* Steven H. Reisberg is a partner in the New York office of Willkie Farr & Gallagher LLP and a member of the Litigation and Intellectual Property practice groups. Kristin M. Pauley is an associate in the Litigation Department.

¹ See Gary B. Born, *International Commercial Arbitration* [2009] 2505. This can be the case particularly when mandatory laws or public policy at the place of arbitration conflict with the express terms or the designated substantive law of the contract, as can happen in the case of the issue of interest, for example, in countries such as Saudi Arabia which base their legal system on Shariah law. See Julian D.M. Lew, *The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East*, [1987] in *Contemporary Problems in International Arbitration* 340, 348–349.

² See Born, *International Commercial Arbitration* [2009] at 2503 ("arbitrators in practice generally looked to the substantive law governing the parties' underlying claims for standards regarding interest"); Thierry J. Senechal and John Y. Gotanda, *Interest As Damages*, [2009] 47 *Colum. J. Transat'l L.* 491, 507 (tribunals in commercial contract cases most commonly resolve interest claims by applying the substantive law of the contract).

³ See John Y. Gotanda [1988] *Supplemental Damages in Private International Law*, 73–75 ("Once an arbitral award is enforced in a country as a court judgment, interest then accrues at the domestic rate applicable to a civil judgment in that country, instead of at the rate set forth in the original award.").

⁴ See 28 U.S.C. §1961. Section 1961 establishes a market rate of interest equal to the average yield on one-year US treasury bills for the calendar week preceding the date of judgment.

⁵ See pp.30-31 *infra*.

I. General Background

The authority of arbitrators to award interest is often addressed only generally, or sometimes not at all, in governing legislation. The UNCITRAL Model Law,⁶ for example, contains no provisions regarding interest, nor does the US Federal Arbitration Act (FAA),⁷ the Swiss Law on Private International Law,⁸ or the French New Code of Civil Procedure.⁹ Similarly, the UNCITRAL Arbitration Rules and The Rules of Arbitration of the International Chamber of Commerce (ICC Rules) are silent on the subject of interest.¹⁰ The International Arbitration Rules of the International Centre for Dispute Resolution (ICDR) address the issue in general, providing that the arbitral tribunal “may award such pre-award and post-award interest ... as it considers appropriate.”¹¹

The English Arbitration Act of 1996 is a notable exception. Under the prior Arbitration Act of 1950, arbitrators had authority to award only simple interest up to the date of the award.¹² They did not, however, have authority to award interest for the period after the date of the award except “at the same rate as a judgment debt.”¹³ This has been changed. The English Arbitration Act of 1996 grants an arbitrator, unless otherwise agreed by the parties, the authority to award simple or compound interest (i) “in respect of any period up to the date of the award” as well as (ii) “from the date of the award (or any later date) until payment.”¹⁴ Similarly, the London Court of International Arbitration (LCIA) Rules expressly provide the arbitral tribunal with similar authority:

“in respect of any period which the Arbitral Tribunal determines to be appropriate ending not later than the date upon which the award is complied with.”¹⁵

The general authority of arbitrators in international arbitration to award interest has long been well-established.¹⁶ It is also generally well-accepted that arbitrators should look to the substantive law governing the claims when deciding whether interest should be awarded, for what period of time, and at what rate.¹⁷ This is because in most jurisdictions interest for the pre-judgment period is regarded as a matter of substantive law.¹⁸ However, there remains substantial debate over the methods used by arbitrators in awarding interest, particularly regarding the use of simple or compound interest and how the rate of interest should be determined.¹⁹

It has also been argued that the power of an arbitral tribunal to award interest, even if allowed under the substantive law of the contract, may be limited by mandatory laws in effect at the arbitral seat.²⁰ That may be the case where the seat is located in certain Middle Eastern countries, where any award of interest may be forbidden by the law of the forum.²¹ While these are important issues, the focus of this article is the judicial recognition and enforcement (or rejection) of an arbitrator’s awards of interest at the enforcement stage.

II. Enforcement And Refusal By Courts To Enforce Pre-Award and Pre-Judgment Awards Of Interest

In general, national courts will enforce an arbitrator’s interest award, “even where the award is made under foreign law, and regardless of whether the applicable rates exceed those under national law.”²² In most cases, arbitrators will have used the substantive law governing

⁶ See UNCITRAL Model Law, U.N. GAOR, 40th Sess., Supp. No.17, U.N. Doc. A/40/17, Annex 1 at 81–93 (June 21, 1985). Gary Born notes, however, that a “number of states that have adopted the [UNCITRAL] Model Law have modified the statute, to include an express authorization for the arbitrators to award interest, but typically without specifying any standards governing such awards.” See, Born, *International Commercial Arbitration* [2009] at 2503 (“The typical formulation in such legislation is ‘[u]nless otherwise agreed by the parties, the arbitral tribunal may award interest.’”) (citation omitted).

⁷ See 9 U.S.C. §1.

⁸ See Bundesgesetz über das Internationale Privatrecht (IRPG), Federal Law on International Private Law, art.176-94 (December 18, 1987) (Switz.).

⁹ See Nouveau Code De Procédure Civile (N.C.P.), art.1442-1507 (Fr.).

¹⁰ See Int’l Chamber of Commerce, Arbitration and ADR Rules, Amended and Effective January 1, 2012.

¹¹ Am. Arbitration Ass’n, Int’l Ctr. For Dispute Resolution, Rules for Non-Administered Arbitration, r.28.4, Amended and Effective January 1, 2010.

¹² Arbitration Act 1950, 14 Geo. 6, c. 27, § 20 (U.K.).

¹³ Id. This same restriction also applied in the case of an arbitration seated in the United Kingdom, but governed by foreign law because the award of post-award interest was considered a procedural, not a substantive, matter. See M. Hunter & V. Triebel, “Awarding Interest in International Arbitration”, [1989] 6 J. Int’l Arb., No.1, 12–13.

¹⁴ See Arbitration Act 1996, c.23, § 49(3) and (4) (UK).

¹⁵ See London Court of Int’l Arbitration Rule 26.6, Effective January 1, 1998.

¹⁶ See Klaus Peter Berger, General Principles of Law in International Commercial Arbitration: How to Find Them—How to Apply Them, [2011] 5 *World Arbitration & Mediation Review* 97, 130–136 (noting that the practice of international tribunals “to award interest goes back to the famous ‘Alabama’ Award” rendered in 1872); John Y. Gotanda, Compound Interest in International Disputes [2002–03] 34 *Law & Policy in International Business* 394, 399 (“Indeed, the practice has become so widespread, it can be said that the liability to pay interest as part of an award of damages is an accepted international legal principle.”).

¹⁷ See David J. Branson & Richard E. Wallace, Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach, [1988] 28 Va. J. Int’l L. 919, 930; Angeline Welsh, The Law Applicable to the Award of Interest: A Roadmap Through the Maze, [2011] 5 *World Arbitration & Mediation Review* 23.

¹⁸ Branson & Wallace, *Awarding Interest in International Commercial Arbitration: Establishing a Uniform Approach*, [1988] at 930–31 (noting that in most jurisdictions, interest is regarded as a matter of substantive law); See, e.g. *In re Exxon Valdez v Exxon Corp.*, 484 F.3d 1098, 1101 (9th Cir. 2007) (“It is well settled that prejudgment interest is a substantive aspect of a plaintiff’s claim, rather than a merely procedural mechanism.”); *Emmenegger v Bull Moose Tube Co.*, 324 F.3d 616, 624 (8th Cir. 2003) (“the question of prejudgment interest is a substantive one”).

¹⁹ See, e.g. John Y. Gotanda, *A Study of Interest*, Villanova Univ. Sch. Of Law, School of Law Working Paper Series, paper 83 (2007); Gotanda, *Compound Interest in International Disputes* [2002–03] at 394.

²⁰ See Born, *International Commercial Arbitration* [2009] at 2504. We believe that the better view is that in international arbitrations the arbitrator should be guided by the substantive law governing the dispute. While that portion of the award may not be upheld by the courts at the seat of the arbitration because of local mandatory laws, the full award (including pre-judgment interest) should be enforceable in other countries under the Convention where the awarding of interest is not against public policy.

²¹ See Julian D.M. Lew, The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East [1987] *Contemporary Problems in International Arbitration* 340, 348–349; See also Born, *International Commercial Arbitration* [2009] at 2506 n.467 (citing cases in which the arbitrators refused to award interest, notwithstanding contractual provisions for such, because the contracts at issue were governed by Islamic law, which generally forbids payment of interest).

²² Born, *International Commercial Arbitration* [2009] at 2507; *Waterside Ocean Nav. Co. v Int’l Nav. Ltd. (In re Waterside Ocean Nav. Co.)*, 737 F.2d 150, 153–54 (2d Cir. 1984) (“[W]e do not see why pre-judgment interest should not be available in actions brought under the Convention”); *Am. Constr. Mach. & Equip. Corp. v Mechanised Constr. of Pakistan Ltd.*, 659 F. Supp. 426, 429 (S.D.N.Y. 1987) (confirming arbitral award made under Swiss law in Geneva, and pursuant to Geneva procedural laws), *aff’d*, 828 F.2d 117 (2d Cir. 1987); *Al-Haddad Bros. Enter., Inc. v M/S Agapi*, 635 F. Supp. 205, 210 (D. Del. 1986) (enforcing foreign arbitral award, which included grant of 15 per cent pre-award interest per annum).

the contract when determining any award of interest for the pre-judgment time periods, regardless of the seat of the arbitration.²³ Indeed, the awarding of interest for the period up to the date of the award is viewed as so fundamental that courts have recognised the power of the arbitrator to include an award of interest up to the date of the award, even where a party fails to specifically assert a claim for such interest in the proceedings.²⁴

The primary exception is that the courts in the enforcing jurisdiction may refuse to enforce the portion of an award granting interest where it finds the award of interest to be "penal", "usurious", or otherwise contrary to its public policy.²⁵ This is illustrated by a decision of an Austrian court, which held that the mere fact that the award of interest was "at a rate that far exceeds the domestic legal interest" would not be sufficient to constitute a violation of its public policy.²⁶ Indeed, the court noted that awards of interest at rates of 26 per cent, 30 per cent and even 35 per cent per year have been enforced.²⁷ However, the rate of interest is not without limits, and "must remain within the limit of legality."²⁸ In that case, the court refused to enforce the interest portion of the award because use by the tribunal of the contractually agreed rate of 0.2 per cent per day, compounded daily, had resulted in a de facto interest rate in excess of 100 per cent per year.²⁹

An example of a court refusing to enforce an award of interest on the grounds that it was penal, not compensatory, is found in *Laminoirs-Trefileries-Cableries de Lens, S.A. v Southwire Co. (In re Laminoirs-Trefileries-Cableries de Lens, S.A.)*, 484 F. Supp. 1063, 1069 (N.D. Ga. 1980). In that case, the court accepted that the dispute was governed by French law, and had no problem enforcing that portion of the award that applied a French legal rate of interest of 10.5 per cent for the pre-judgment time period.³⁰

The arbitrators, however, consistent with French law, had further held that the "interest rates assessed should rise 5 per cent per annum after two months from the date of the award," unless the award was paid.³¹ This was in accord with French law, which at the time provided:

"In the case of a judgment, the rate of legal interest shall be increased by 5 points upon the expiration of a period of two months from the day on which the court decision becomes enforceable, even if only provisionally."³²

The court nevertheless refused to enforce the portion of the award that the rate of interest would increase by 5 points if not paid within two months. The court explained that "the imposition of an additional 5 per cent interest by the arbitrators" was "penal rather than compensatory."³³ As a result, even though the court accepted that French law was the governing law, the portion of the award adding the additional 5 per cent commencing 60 days after the award issued was held to be not enforceable under art.V, para.2(b) of the Convention.³⁴

Nonetheless, it remains extremely rare for a US court to refuse to enforce an interest award on public policy grounds. See, e.g. *Brandeis Intsel Ltd. v Calabrian Chem. Corp.*, 656 F. Supp. 160, 170 (S.D.N.Y. 1987) (stating that absent a showing that the interest award was, under English law, "penal only and relate[d] to the punishing of public wrongs as contradistinguished from the redressing of private injuries," the award was not contrary to the public policy of the United States); *Int'l Standard Elec. Corp. v Bridas Sociedad Anonima Petrolera Industrial y Comercial*, 745 F. Supp. 172, 182 (S.D.N.Y. 1990) ("We find no merits in ISEC's claim that the interest component of the Award is penal in nature.") (international award); *Am. Constr. Mach. & Equip. Corp., Ltd.*, 659 F. Supp. 426, 428 (S.D.N.Y. 1987) (enforcing interest at the rate of 17 per cent) (international award).

²³ See, e.g. *Ass'n of Serv. Indus. Firms v Serv. Indus. Firm*, XVII Y.B. Comm. Arb. 11, 26 (US 1992) (applying 5 per cent Swiss statutory rate of interest because contract was governed by Swiss law; New York was arbitral seat); Final Award in ICC Case No.6162, Case No.6162 of 1990, XVII Y.B. Comm. Arb. 153, 162-63 (ICC Int'l Ct. Arb. 1992) (applying 5 per cent Egyptian rate of interest, because contract was governed by Egyptian law, Switzerland was arbitral seat); Case No.6230 of 1990, XVII Y.B. Comm. Arb. 164, 175-76 (ICC Int'l Ct. Arb. 1992) (applying Swiss statutory interest rules, which looked to official discount rates at place of payment, because Swiss law governed contract; Switzerland was arbitral seat); Case No.5485 of 1987, XIV Y.B. Comm. Arb. 156, 173 (ICC Int'l Ct. Arb. 1989) (applying Spanish statutory rates of interest because Spanish law governed agreement; France was arbitral seat). This equally applies to the denial of interest. See *Fertilizer Corp. of India v IDI Mgmt., Inc.*, 517 F. Supp. 948, 962 (S.D. Ohio 1981) (confirming Indian arbitral award but granting no pre-judgment interest because India, whose substantive law governed the dispute, allowed interest only from the date of judgment).

²⁴ See *Gordon Sel-Way, Inc. v Spence Bros., Inc.*, 475 N.W.2d 704, 711 (Mich. 1991) (arbitrators committed no substantial or material error in including pre-award interest in their award, even though the parties' contract was silent concerning the right to interest); *Westminster Constr. Corp. v PPG Indus., Inc.*, 376 A.2d 708, 711 (R.I. 1977) ("[A]rbitrators may award interest, even if not claimed, unless otherwise specifically provided by the parties' in the agreement.").

²⁵ Born, *International Commercial Arbitration* [2009] at 2507-08. Enforcement of an award of compound interest has also been stated to be "less clear." See Nigel Blackaby & Constantine Partasides with Alan Redfern & Martin Hunter, *Redfern & Hunter On International Arbitration*, at s.9.78 (Oxford: Oxford University Press, 2009). For a decision upholding the award of compound interest, see *Judgment of January 9, 1995, Inter Maritime SA (Switz.) v Russin & Vecchi (U.S.)*, XXII Y.B. Comm. Arb. 789, 797-98 (Switz. Tribunal Fédéral 1997) (award of compound interest did not violate Swiss public policy).

²⁶ See *Case No.306221/046 of 2005*, XXX Y.B. [2005] Comm. Arb. 421, 431 (Austria Oberster Gerichtshof).

²⁷ See *Case No.306221/046 of 2005*, XXX Y.B. [2005] Comm. Arb. 421, 431 (Austria Oberster Gerichtshof).

²⁸ See *Case No.306221/046 of 2005*, XXX Y.B. [2005] Comm. Arb. 421, 431 (Austria Oberster Gerichtshof).

²⁹ See *Case No.306221/046 of 2005*, XXX Y.B. [2005] Comm. Arb. 433 (Austria Oberster Gerichtshof).

³⁰ *Laminoirs-Trefileries-Cableries de Lens, S.A.*, 484 F. Supp. at 1068.

³¹ *Laminoirs-Trefileries-Cableries de Lens, S.A.*, 484 F. Supp. at 1069.

³² *Laminoirs-Trefileries-Cableries de Lens, S.A.*, 484 F. Supp. at 1069. (citing French Law No.75-619, July 11, 1975).

³³ *Laminoirs-Trefileries-Cableries de Lens, S.A.*, 484 F. Supp. at 1069.

³⁴ *Laminoirs-Trefileries-Cableries de Lens, S.A.*, 484 F. Supp. at 1069. (citing 9 U.S.C. § 201, art.V, pt.2(b), Convention on the Recognition and Enforcement of Foreign Arbitral Award).

Indeed, as regards the post-award period, courts in the United States have even *added* interest to arbitration awards.³⁵ United States courts have long held that the courts in confirming international arbitration awards may add an award of interest for the post-award, pre-judgment time period under federal law at rates set by the court as a matter within its discretion.³⁶ These cases are best understood as being in response to an award that by its own terms failed to address the post-award period.³⁷ Where, on the other hand, the arbitrator's award expressly provides for interest for the post-award period, the courts will enforce the interest rate set by the arbitrators up until the date of entry of judgment.³⁸ This same rule does not apply to the pre-award period. Courts will not add interest for the pre-award time period, as an award of interest for that time period is viewed as within the exclusive jurisdiction of the arbitrator.³⁹

III. Limits On The Power Of An Arbitrator To Set The Rate Of Interest That Will Apply For The Time Period From Judgment Until The Award Is Paid For Awards Confirmed In The U.S.

It has been reported that the "modern practice" is for arbitral tribunals not to distinguish between pre-award and post-award interest, but instead to award a single rate of interest for the entire period up to the date of payment.⁴⁰ However, the law in many countries, including the United States, is that once:

"an arbitral award is enforced in a country as a court judgment, interest then accrues at the domestic rate applicable to civil judgments in that country, instead of at the rate set forth in the original award."⁴¹

In the United States, at the enforcement stage, the substantive law governing the contract becomes moot. In cases where enforcement of an arbitration award may likely include the United States, the failure to take the law of the enforcement jurisdiction into account can have a dramatic effect on the rate of interest recoverable for the post-judgment time period.

In the United States, an arbitral award stating that interest shall accrue "until the award is paid" at the rate of 8 per cent will be unenforceable with respect to the post-judgment period.⁴² Instead, the federal post-judgment interest statute, 28 U.S.C. §1961, will govern.⁴³ This is because the United States follows the doctrine of merger, whereby once a claim is reduced to a judgment, "the original claim is extinguished" and "a new claim, called a judgment debt arises."⁴⁴ The:

"general rule under US federal law is that a debt created by contract merges with a judgment entered on that contract, so that the contract debt is extinguished and only the judgment debt survives."⁴⁵

This rule has been applied to international and domestic arbitration awards.⁴⁶

The case of *Carte Blanche (Singapore) Pte., Ltd. v Carte Blanche Intern., Ltd.*, 888 F.2d 260, 269 (2d Cir. 1989) concerned an International Chamber of Commerce arbitration award. The arbitrators had awarded interest to accrue at the rate of 10 per cent until date of payment. The district court confirmed the award, except it reduced the rate of post-judgment interest to the statutory rate provided for by s.1961. On appeal, the appellate court held that the rate established by s.1961 for judgments entered in the federal courts was mandatory and did not permit any exercise of judicial discretion in its application,

³⁵ See, e.g. *Sun Ship, Inc. v Matson Nav. Co.*, 785 F.2d 59, 62–63 (3d Cir. 1986) (remanding for calculation of post-award, pre-judgment interest on arbitration award); *Ryan v Kontrick*, 710 N.E.2d 11, 17 (Ill. App. Ct. 1999) (adding an award of post-award, pre-judgment interest).

³⁶ See *Industrial Risk Insurers v M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1447 (11th Cir. 1998), cert. denied, 525 US 1068 (1999) (post-award interest "should normally be awarded when damages have been liquidated by an international arbitration award"); *Waterside Ocean Nav. Co.*, 737 F.2d at 154–55 (confirming English arbitral award and granting post-award, pre-judgment interest); *P.M.I. Trading Ltd. v Farstad Oil, Inc.*, No. 00 Civ. 7120, 2001 WL 38382 at 3 (S.D.N.Y. 2001) ("post-award, pre-judgment interest is available for judgments rendered under the Convention and is presumed to be appropriate"); *Al-Haddad Bros. Enters., Inc.*, 635 F. Supp. at 210 ("Federal courts have the power to grant such post-award, pre-judgment interest when enforcement of foreign arbitral awards is sought").

³⁷ This can be the case where the award sets forth damages, including interest, calculated up to the date of the award. See, e.g. *Al-Haddad Bros. Enters., Inc.*, 635 F. Supp. at 210 (award calculated damages up to the date of the award; court added interest for the post-award, pre-judgment period). Similarly, in *P.M.I. Trading Ltd.* 2001 WL 3838 at 3, the award stated that payment, which included interest, was to be made within 30 days. The court in confirming the award added interest as a matter of US federal law for the period starting 30 days after the award until the date of judgment. See *P.M.I. Trading Ltd. v Farstad Oil, Inc.*, 2001 WL 3838 at 3.

³⁸ *Carte Blanche (Singapore) Pte., Ltd. v Carte Blanche Intern., Ltd.*, 888 F.2d 260, 269 (2d Cir. 1989) (arbitrator's award of 10 per cent interest "until date of payment" confirmed for the post-award, pre-judgment period); *Budejovicky Budvar, N.P. v Czech Beer Importers, Inc.*, 2006 WL 1980308, at pp. 6–7 (D. Conn. July 10, 2006) (same).

³⁹ See *Schlobohm v Pepperidge Farm, Inc.*, 806 F.2d 578, 581 (5th Cir. 1986) ("[W]here the parties made an agreement intended to avoid court litigation by resolving the entire dispute through arbitration, intervention by the court to award additional relief would be inconsistent with the language and policy of the Federal Arbitration Act"); *Levin & Glasser, P.C. v Kenmore Prop., LLC*, 70 A.D.3d 443, 445–46 (1st Dep't 2010) ("Given that arbitrators had authority to award pre-award interest and made no such award," the court lacked authority to add pre-award interest in connection with confirming the award). The exception helps prove the rule. See *Finger Lakes Bottling Co., Inc. v Coors Brewing Co.*, No.09 Civ.6024, 2010 WL 4104690, at *4 (S.D.N.Y. October 18, 2010) (granting pre-award interest because arbitrator had concluded that such issue was "beyond the scope of the arbitration"); *Schlobohm*, 806 F.2d at 580–84 (granting pre-award interest, albeit in unusual circumstances where the tribunal arguably invited a judicial interest award). See generally Born, *International Commercial Arbitration* [2009] at 2508.

⁴⁰ See Blackaby & Partasides, et al, *Redfern & Hunter On International Arbitration* (2009) at 9.85 ("[I]n 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.").

⁴¹ See Gotanda [1988] *Supplemental Damages in Private International Law*, at §3.4; *Nissho-Iwai Co. v Occidental Crude Sales, Inc.*, 848 F.2d 613, 623 (5th Cir. 1988) ("[P]ost-judgment interest is better characterised as procedural because it confers no right in and of itself. Rather, it merely follows and operates on the substance of determined rights.").

⁴² As discussed below, the lack of authority is subject to a very narrow and strict exception.

⁴³ Section 1961 establishes a market rate of interest equal to the average yield on one-year US treasury bills for the calendar week preceding the date of judgment.

⁴⁴ See *Kotsopoulos v Asturia Shipping Co., S.A.* 467 F.2d 91, 95 (2d Cir. 1972) (internal citation omitted); See also *Soc'y of Lloyd's v Reinhart*, 402 F.3d 982, 1004 (10th Cir. 2005) ("[W]hen a valid and final judgment for the payment of money is rendered, the original claim is extinguished, and a new cause of action on the judgment is substituted for it. In such a case, the original claim loses its character and identity and is merged in to the judgment.") (internal quotation marks omitted); *Restatement, Judgments*, §47 (1942).

⁴⁵ *Westinghouse Credit Corp. v D'Urso*, 371 F.3d 96, 102 (2d Cir. 2004).

⁴⁶ See *Parsons & Whitmore Alabama Mach. & Servs. Corp. v Yeargin Constr. Co.*, 744 F.2d 1482, 1484 (11th Cir.1984) (per curiam) (domestic arbitration award). This same rule also applies to arbitration awards which are reduced to judgment in state courts. In such cases, the post-judgment interest rate applicable to state court judgments applies. See *Marine Mgmt, Inc. v Seco Mgmt., Inc.*, 176 A.D.2d 252, 253 (2d Dep't 1991), aff'd, 600 N.E.2d 627 (1992); *Banque Nationale De Paris v 1567 Broadway Ownership Assocs.*, 248 A.D.2d 154 (1st Dep't 1998).

and was equally binding on judgments based on arbitration awards.⁴⁷ As the appellate court further explained, this result was also required under the FAA because that statute requires that a judgment confirming, modifying, or correcting an arbitration award "shall have the same force and effect, in all respects, as, and be subject to all provisions of law relating to, a judgment" entered in any domestic case.⁴⁸

IV. "Contracting Out" Of The U.S. Statutory Post-Judgment Interest Rates

United States federal and state courts have recognised a narrow exception to the application of mandatory post-judgment interest statutes. The rate set by the parties will be used in place of the statutory rate if the parties have agreed upon, and expressly stipulated to, the rate at which post-judgment interest would be payable on any judgment.⁴⁹

"Where there is a clear, unambiguous, and unequivocal expression to pay an interest rate higher than the statutory interest rate until the judgment is satisfied, the contractual interest rate is the proper rate to be applied."⁵⁰

While the cases discussed below concern US domestic arbitration awards, the exact same rule has been applied in a case seeking enforcement of a UK judgment,⁵¹ and therefore should also apply to awards under the Convention. Most importantly, as shown below, this exception is very strictly construed.

In *Westinghouse Credit Corp. v D'Urso*, the party's underlying contract provided that if payment "is not made on the due date, then interest shall be added to the Amount Due from the date payment was due to the date payment is made."⁵² The rate of interest set by the parties in their contract was 15.5 per cent. The federal statutory rate mandated by Section 1961 was 4.8 per cent. The appellate court agreed that the "parties may by contract set a post-judgment rate at which interest shall be payable," but concluded that parties had not done so "in [that] case."⁵³ In short, the party's agreement in the contract that interest shall be due "from the date payment was due to the date payment is made" did not satisfy the exception.

In *Marine Mgmt., Inc. v Seco Mgmt, Inc.*, the agreement provided that in the event of default a rate of 25 per cent interest would apply until "the date of the

actual receipt of payment." The court likewise held that this language was not sufficient and did not satisfy the exception.⁵⁴ According to the court, the "date of the actual receipt of payment" language, under the general rule of merger, referred only to the debt itself—and not to any subsequent judgment into which the contract debt was merged and superseded.⁵⁵

To successfully "contract out" of the statutory post-judgment interest rates, it is therefore critical that the language used specifically refer to the post-judgment period. Examples of language found adequate to satisfy the exception are found in the following cases. See, e.g. *Citicorp Real Estate, Inc. v Smith*, 155 F.3d 1097, 1107-08 (9th Cir. 1998) (note provided for "interest at the default rate ... from March 1, 1991 to the date of entry of judgment *and, after judgment until collection*") (emphasis in original); *Jack Henry & Assoc. Inc. v BSC, Inc.*, 753 F. Supp2d 665 (E.D. Ky. 2010) ("If judgment is entered ... the judgment so entered shall be interest at the Default Rate ..."), *Chesapeake Fifth Ave. Partners, LLC v Somerset Walnut Hill, LLC*, Civil Action No.3:08 cv 764, 2009 WL 1298217, at *3 (E.D. Va. May 8, 2009) (contract rate of 17 per cent will apply because the agreement provided for "interest at [17 per cent] as of the date of entry of the judgment"); *Bank of Am., N.A. v Solow*, No.601892/07, 2008 WL 1821877, at *6 (Sup. Ct. N.Y. Cnty. April 17, 2008), *appeal dismissed*, 59 A.D. 3d 304 (1st Dep't 2009), *leave to appeal dismissed*, 910 N.E.2d 1001 (2009) (awarding post-judgment interest at the higher contractual rate where agreement stated that interest "shall continue to accrue from the due date thereof until such amount shall be paid in full (after as well as before judgment)"); *Mehp Park Ave. Ownership LLC v DKS Contractors, Inc.*, No.0602382/2005, 2006 WL 5157666 (Sup. Ct. N.Y. Cnty. June 29, 2006) (finding that the parties had:

"clearly, unambiguously, and unequivocally expressed their intent to override the general rule on merger, and to specify a post-judgment interest rate of 18 per cent per annum"

by stating in their agreement that the "default rate shall ... accrue *both before and after judgment*") (emphasis in original).

⁴⁷ See 888 F.2d at 269; accord *Parsons & Whittmore Alabama Mach. & Servs. Corp.*, 744 F.2d at 1484 (s.1961 applies to domestic arbitration award).

⁴⁸ See 888 F.2d at 269; accord *Parsons & Whittmore Alabama Mach. & Servs. Corp.*, 744 F.2d at 1484 (s.1961 (citing 9 U.S.C. §13)).

⁴⁹ *Westinghouse Credit Corp.*, 371 F.3d at 101 (2d Cir. 2004) ("We agree that parties may by contract set a post-judgment rate at which interest shall be payable") (domestic award); *Cent. States, Southeast & Southwest Areas Pension Fund v Bomar Nat'l, Inc.*, 253 F.3d 1011, 1020 (7th Cir. 2001) ("It is well-established that parties can agree to an interest rate other than the standard one contained in 28 U.S.C. §1961."); *ITT Diversified Credit Corp. v Lift & Equip. Serv., Inc.* 816 F.2d 1013, 1018 (5th Cir. 1987) ("While 28 U.S.C. §1961 provides a standard rate of post-judgment interest, the parties are free to stipulate a different rate, consistent with state usury and other applicable laws.")

⁵⁰ *Retirement Accounts, Inc. v Pacst Realty LLC*, 49 A.D.3d 846, 847 (2d Dep't 2008) (New York law); See also 3 Thomas H. Oehmke, *Commercial Arbitration* §124:2 (2010) ("Parties may 'contract out' of statutory interest rates if their agreement expresses the parties' intent to deviate from a post-judgment interest rate set by statute.")

⁵¹ See *Soc'y of Lloyd's*, 402 F.3d at 1004 ("[W]e acknowledge that parties may contract to, and agree upon, a post-judgment interest at a rate other than that specified in §1961," but finding the parties had not done so) (seeking enforcement of a UK judgment).

⁵² *Westinghouse Credit Corp.*, 371 F.3d at 99.

⁵³ *Westinghouse Credit Corp.*, 371 F.3d at 101.

⁵⁴ 176 A.D.2d at 253.

⁵⁵ *Id.*; accord *Banque Nationale De Paris v 1567 Broadway Ownership Assocs.*, 248 A.D.2d 154 (1st Dep't 1998) ("Since the loan documents do not constitute a clear, unambiguous, and unequivocal expression that defendant agreed to pay the default [interest] rate until the judgment was satisfied," there was no reason to depart from the rule that the statutory rate applies once a judgment is entered).

It is also important to note that the issue of whether the parties have expressly agreed to “contract out” of the federal post-judgment interest has itself been held to be an issue within the scope of the jurisdiction of the arbitrators to decide. In *Newmont U.S.A. Ltd. v Ins. Co. of N. Am.*, the arbitrators, based on their interpretation of art.XIII of the Reinsurance Agreement, included in their award pre- and post-judgment interest at the rate of 1.5 per cent per month.⁵⁶ The district court modified the award with respect to post-judgment interest replacing it with the rate set forth in §1961.⁵⁷ The conclusion by the district court that the language used in the Agreement was not sufficient to override §1961 was likely correct.⁵⁸ Nevertheless, the Appellate Court reversed.

The *Newmont* Court noted that the arbitration clause was broad, that “nothing in the Reinsurance Agreement purports to limit the arbitration panel’s authority to decide post-judgment interest issues,” and “the parties made arguments before the arbitration panel concerning Article XIII and the post-judgment interest issue.”⁵⁹ Because: parties indicate may override the statute using “clear, unambiguous and unequivocal language”.

Whether the parties had done so in the Reinsurance Agreement was a “quintessential fact question.”⁶⁰ Accordingly, there was:

“no reason why an arbitration panel with authority to decide a contractual dispute cannot also determine whether the contract in question includes language stating the parties’ intent to bypass §1961.”⁶¹

While “an arbitration panel may not establish a post-judgment interest rate itself,” it “may determine whether the parties have sufficiently contracted for their own rate, and, if they have, indicate that rate should be applied.”⁶² Because “the post-judgment issue was arbitrable,” the District Court had erred in setting aside the arbitrators’ determination of that issue.⁶³

In the arbitration at issue in *Citicorp Real Estate, Inc. v Smith*, 155 F.3d 1097, 1107-08 (9th Cir. 1998), Citicorp Real Estate, Inc. (Citicorp) requested interest at the

Default Rate set in the contract “to the date of judgment, and, after judgment until collection.” The Appellate Court concluded that the arbitrator’s award reflected this request using “similar language”, by ordering that interest would accrue at the rate specified “until judgment or paid in full.”⁶⁴ While the exact language used in the contract is not reported in the case, the request by Citicorp to the arbitrators to have the contract rate applied “after judgment until collection” most likely substantially aided its ability to have the court conclude that the parties had contracted out of the federal statutory rate.

Finally, a general choice-of-law provision has been held to be insufficient to override the federal post-judgment interest statute. In *Soc’y of Lloyd’s v Reinhart*, the Second Circuit acknowledged that parties may by contract agree to a post-judgment interest rate. “However, agreeing to be bound by English law does not amount to agreeing to a particular post-judgment interest rate.”⁶⁵ Similarly, in *Budejovicky Budvar, N.P. v Czech Beer Importers, Inc.*, the petitioner argued that the parties had agreed to resolve disputes by arbitration under Czech law and that the contractual language stating that “an interest rate of 7.65 per cent will accrue until the date of full payment” is interpreted under Czech law as applying, not only to the debt created by the contract and to the arbitration award, but also to any judgment subsequently entered enforcing the award.⁶⁶ The court rejected this argument and awarded post-judgment interest at the rate set by §1961, holding as a matter of law that a Czech choice-of-law provision alone cannot be sufficient to override §1961.

Thus, the lesson to be drawn from these cases is that parties may set the rate of interest to apply to the post-judgment time period, but the parties must express such intent with clear and specific reference to the post-judgment period. Moreover, parties would be well-advised to request that the arbitrators specifically rule on and address the rate of post-judgment interest in the award.

⁵⁶ 615 F.3d 1268, 1274 (10th Cir. 2010).

⁵⁷ 615 F.3d 1268, 1271 (10th Cir. 2010).

⁵⁸ Article XIII of the Reinsurance Agreement stated: “Either party will pay to the other an interest charge at the monthly rate of ... 1.5 per cent [] on any amount that is not paid within the time required by this Agreement, said charge to commence at the time any such payment is required by this Agreement.” 615 F.3d 1268, 1272 (10th Cir. 2010).

⁵⁹ 615 F.3d 1268, 1276 (10th Cir. 2010).

⁶⁰ 615 F.3d 1268, 1276–77 (10th Cir. 2010).

⁶¹ 615 F.3d 1268, 1277 (10th Cir. 2010).

⁶² 615 F.3d 1268, 1277 (10th Cir. 2010).

⁶³ 615 F.3d 1268, 1277 (10th Cir. 2010).

⁶⁴ 186 F.3d 1097, 1108 (9th Cir. 1998).

⁶⁵ 402 F.3d at 1004.

⁶⁶ 3:05CV1246 JBA, 2006 WL 1980308, at *6–7 (D. Conn. July 10, 2006); See *FCS Advisors Inc. v Fair Finance Co. Inc.*, 605 F.3d 144, 148 (2d Cir. 2010) (inclusion of a New York choice-of-law provision inadequate to show that the parties had agreed to apply New York State law to the calculation of post-judgment interest).