



Compound Interest in International Disputesⁱ

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I. Introduction

One cannot imagine that a sophisticated businessman ... would invest his companies' funds in instruments yielding simple rates of interest. Nor is it conceivable that ... [his] lenders w[ould] provid[e] his companies with capital at simple rates of interest.

In today's economic world, compound interest, and not simple interest, is the norm in both third-party financing and investment vehicles. Yet, in disputes between transnational contracting parties, simple interest awards are the norm.

This odd disparity between awards of international tribunals and standard business norms can have striking consequences. In disputes between transnational contracting parties, awards of interest are often significant and, in some cases, may even exceed the principal owed.² For example, in one recent arbitration, a panel awarded the claimant approximately \$4 million for the property expropriated by the respondent and approximately \$12 million in compound interest.³ With interest awards of this magnitude, an award based on simple interest would be far less than an award based on compound interest.

In international disputes, the traditional view is that a tribunal may award only simple interest.⁴ In fact, a federal district court in Washington, D.C. recently opined in a dispute between an American contractor and the Government of Iran that the prohibition on compound interest was so well settled that it could be considered a principle of customary international law.⁵ However, as the United States Court of Appeals for the District of Columbia Circuit pointed out, this statement was incorrect.⁶ Yet, the Court of Appeals declined to award the claimant compound interest for the loss of the use of its money.⁷ This arguably left the claimant without full compensation.

Perhaps misunderstandings over the availability of compound interest stem from the lack of comparative study of the issue.⁸ Indeed, some commentators have simply presumed that compound interest may not be paid because it is generally prohibited in many legal systems.⁹ This has led one authority to argue that laws simply have not kept pace with modern financial practices and that tribunals should not apply them when awarding interest.¹⁰

In this article, I examine the laws of various countries on the awarding of interest to learn whether there exists a prohibition on the awarding of compound interest. I found that many countries do indeed provide generally for the payment of only simple interest on damage awards. However, my study also reveals that many countries have made exceptions to this practice, and that these exceptions are significant and allow for the awarding of compound interest in a number of important circumstances. I conclude that, if utilized, these exceptions may enable tribunals to fully compensate parties for their loss of the use of money.

The article is divided into seven parts. Part II provides an overview of the payment of interest. Part III reviews the circumstances under which interest may be awarded pursuant to the laws of various countries in Europe, Oceania, Asia, and North and South America. My study finds a divergent practice concerning awards of compound interest; some prohibit it, others allow it in certain circumstances, and a number of statutes are silent on the issue. Part IV reviews the decisions of international tribunals on compound interest. I determine that these tribunals have traditionally awarded only simple interest, but that recently a few tribunals have granted compound interest. Part V examines whether compound interest should be awarded in disputes between transnational parties. I conclude that, where an award of interest is warranted, in general, it would be more appropriate for a tribunal to award compound, as opposed to simple, interest. This is because today almost all financing and investment vehicles involve compound interest. Thus, limiting interest awards in all cases to simple interest would result in the claimant not being made whole for its loss. In addition, it would confer a windfall on the respondent, who likely had the use of the claimant's money for less than the cost of borrowing it. Part VI sets forth the circumstances under which awards of compound interest are appropriate. I argue that there are three situations where such an award is warranted: (1) when the parties have expressly agreed to the payment of compound interest; (2) when the respondent's failure to fulfill its obligations caused the claimant to incur financing costs in which it paid compound interest; and (3) when the claimant can prove that it would have earned compound interest in the normal course of business on the money owed if the claimant had been paid in a timely manner. Awarding compound interest in these circumstances would be consistent with the laws of many countries and would better achieve the goals of awarding interest than does the traditional practice of granting only simple interest. Part VII offers a brief conclusion.

II. Overview of Interest

Interest is a sum paid or payable as compensation for the temporary withholding of money.¹¹ It has been distinguished from usury, which was considered to be a form of unjust enrichment in that persons were receiving more than what they had lent.¹² Unlike usury, interest has been “considered the compensation due to a creditor because of a loss which he had incurred through lending.”¹³ Throughout history, the charging of interest has been regulated, restricted, and prohibited: both Aristotle and Plato disapproved of interest;¹⁴ the Old Testament placed restrictions on the charging of interest (but it did not absolutely bar it);¹⁵ and, until 1830, the Roman Catholic Church placed various restrictions on, and often prohibited, the charging of interest.¹⁶ However, under Roman law, interest was well accepted as a sum “due from a debtor who delayed or defaulted in repayment of a loan. The measure of the [amount] due for the default or delay was ...the difference between the creditor's current position and what it would have been if the loan had been timely and fully repaid.”¹⁷

Today, interest is a standard form of compensation for the loss of the use of money.¹⁸ In fact, it is often awarded without proof of actual loss. Courts and tribunals presume that the delayed payment of money deprives the injured party of the ability to invest the sum owed.¹⁹ The U.S. Supreme Court justified this practice, noting:

It is the dictate of natural justice, and the law of every civilized country, that a man is bound in equity, not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach. ... Every one who contracts to pay money on a certain day knows that, if he fails to fulfill his contract, he must pay the established rate of interest as damages for his non-performance. Hence, it may correctly be said that such is the implied contract of the parties.²⁰

There are three reasons for requiring a respondent to pay interest to a claimant that has succeeded on its damages claims. The first rationale is to fully compensate the claimant by restoring it to the position it would have enjoyed if the breach had not occurred.²¹ In this context, the payment of interest recognizes that, by refusing to pay the claimant immediately, the respondent has deprived the claimant of the ability to invest the sum owed. Thus, interest compensates the claimant for the loss of the use of its money because of this delay.²²

The second reason for awarding interest is to prevent unjust enrichment of the respondent.²³ Respondents that retain the use of money owed to the claimants during the resolution of the dispute are said to have unfairly benefited from its use.²⁴ They are receiving the earning capacity of the borrowed money without compensating the claimants for the loss of its use.²⁵ The respondents thus should pay the opportunity cost of the money withheld to the claimants.²⁶

The third reason for awarding interest is that it promotes efficiency.²⁷ Without interest, claimants will not be fully compensated for their loss. As a result, respondents may be insufficiently deterred, may not try to avoid future litigation, and, indeed, may even take steps to delay the resolution of the dispute because respondents profit from the use of claimants' money while the dispute is being resolved.²⁸ This possibility may also cause claimants to be over-deterred and to take excessive precautions to avoid future litigation.²⁹ Thus, interest awards encourage parties both to avoid disputes and, if they do occur, to resolve them in a timely manner.³⁰

There are two principal forms of interest: simple interest and compound interest.³¹ An award of compound interest means that the interest payment for a certain period is added to the principal sum owed and that sum is treated as a new principal for calculating the interest for the next period.³² In other words, the creditor-claimant receives interest upon interest.³³ By contrast, when only simple interest is awarded, the interest is calculated only on the principal owed; the interest owed for a certain period does not merge with the principal and become part of the base upon which future interest is calculated.³⁴ As more fully explained below, there has been a tendency to award only simple interest.³⁵

III. National Laws and Compound Interest

Most countries, either by statute or by judicial decision, permit awards of interest as “compensation for the use or detention of money.”³⁶ A few countries prohibit the payment of interest, primarily because it is inconsistent with their religious beliefs.³⁷ However, even some of these countries have allowed it in certain commercial transactions.³⁸ 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.³⁹ This unanimity does not, however, extend to awards of compound interest. Many countries either prohibit the payment of compound interest or limit the circumstances in which it may be awarded.

The following survey examines the laws in various countries on the payment of interest to make two determinations: (1) what countries permit an injured party entitled to damages to receive compound interest; and (2) under what circumstances an injured party may receive such interest.

A. Europe

1. Common Law System (England)

Awards of interest in England are governed by both statute and common law. Originally, the power to award interest was constrained to Lord Tenterden's Act. This statute provided that interest was payable on "all [d]ebts or [s]ums certain, payable at a certain [t]ime or otherwise ...by virtue of some written [i]nstrument" or otherwise if there was a demand of payment in writing giving notice to the debtor that interest will be claimed.⁴⁰ In 1934, the power to award interest was modified in the Law Reform (Miscellaneous Provisions) Act.⁴¹ The 1934 Act provided that "[i]n any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."⁴² However, interest on interest was not authorized.⁴³ In 1982, the Administration of Justice Act removed any application of the 1934 Act to the Supreme Court and County Courts with respect to the awarding of interest⁴⁴ and added a section on interest to the Supreme Court Act, 1981.⁴⁵ The Supreme Court Act, 1981 now provides only for simple interest awards.⁴⁶

In general, there are four exceptions to the statutory prohibitions on compound interest. The first two exceptions have been recognized in England since the 1983 decision in *London, Chatham & Dover Railway Co. v. South Eastern Railway Co.*⁴⁷ In that case, the House of Lords recognized that compound interest can be awarded: (1) when the contract provides for it to be paid;⁴⁸ and (2) when the course of dealing or usage of trade creates an implied term for payment of compound interest.⁴⁹

The third exception is that compound interest may be awarded in equity.⁵⁰ Equity awards compound interest whenever a fiduciary, such as an executor or a trustee, misuses money under his or her control and benefits from it.⁵¹ Compound interest is also awarded in equity when "a wrongdoer deprives a company of money which it needs for use in its business."⁵²

The fourth exception, set forth in *Wadsworth v. Lydall*, allows awarding compound interest as special damages.⁵³ In *Wadsworth*, the plaintiff agreed to sell a farm to the defendant, and the plaintiff was to use the proceeds from the sale to purchase another property.⁵⁴ The defendant breached its obligations and the plaintiff sued for the principal owed as well as for interest that the plaintiff incurred as additional financing charges.⁵⁵ The court noted that the claim for interest did not fall within the exceptions set forth in *London, Chatham & Dover*.⁵⁶ However, the court said that case applied only to claims for general damages and thus did not prohibit awards of interest as special damages. The court explained:

[T]he House of Lords [in *London, Chatham & Dover*] was not concerned with a claim for special damages. The action was an action for an account. The House was concerned only with a claim for interest by way of general damages. If a plaintiff pleads and can prove that he has suffered special damage as a result of the defendant's failure to perform his obligation under a contract, and such damage is not too remote on the principle of *Hadley v. Baxendale* ... , I can see no logical reason why such special damage should be irrecoverable merely because the obligation on which the defendant defaulted was an obligation to pay money and not some other type of obligation.⁵⁷

The court held that, "since the defendant knew or ought to have known that the plaintiff would need to acquire another farm or smallholding, using the £10,000 payable under the contract for the purpose, and that if the £10,000 was not paid the plaintiff would be compelled to incur expense in arranging alternative finance and paying interest, the claims ... were not too remote and were payable by the defendant."⁵⁸ The House of

Lords approved of this approach in *President of India v. La Pintada Cia Navegacion S.A.*,⁵⁹ where the court held that, in the absence of an agreement between the parties regarding the payment of interest due on a debt, a creditor could not claim interest as general damages when the debt was paid late, but before proceedings for its recovery commenced.⁶⁰ However, if special damages were proved, such as interest paid on an overdraft, a creditor could recover those damages.⁶¹

While English law carefully limits the authority of judges to award compound interest, it permits arbitrators greater discretion. Section 49(3) of the Arbitration Act of 1996 provides:

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 -

(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.⁶²

Thus, an arbitral tribunal has considerable latitude when it comes to the question of interest.

It should also be noted that The Late Payment of Commercial Debts (Interest) Act, 1998, provides for simple interest on debts owed "for the supply of goods or services where the purchaser and the supplier are each acting in the course of a business."⁶³ This Act was originally designed to protect only small businesses against the late payment of commercial debts. In 2002, the scope of the Act was broadened to comply with a 2000 European Union Directive requiring member states to introduce measures to protect commercial creditors against late payment. It now applies to claims for interest by all commercial creditors who are owed money by commercial organizations.⁶⁴ The applicable interest rate is 8% above the Bank of England base rate and interest accrues at a simple, as opposed to compound, rate.⁶⁵ There were two reasons for allowing only the payment of simple interest. First, simple interest is easier to calculate than compound interest. Second, the "Act is meant to protect businesses that have been deprived of their money for months, rather than years, so in most cases the difference between simple and compound rates would be minimal."⁶⁶

2. Civil Law Systems

Whether compound interest is permitted and, if so, when it may be paid, varies greatly among civil law countries in Europe. Some codes prohibit it,⁶⁷ others allow it in certain circumstances,⁶⁸ and some do not explicitly address the issue.⁶⁹

France. In France, damages are limited to foreseeable losses or to the actual loss sustained or benefit deprived.⁷⁰ Article 1153 of the French Civil Code provides "[i]n obligations which are restricted to the payment of a certain sum, the damages resulting from delay in performance shall consist only in awarding interest at the statutory rate, except for special rules for commerce and suretyship. Those damages are due without the creditor having to prove any loss."⁷¹ However, article 1153 further provides that where a debtor in delay has caused, by his or her bad faith, harm independent of such delay, the creditor may recover damages and interest independent of the interest accruing on overdue payments.⁷² Thus, in such circumstance, a creditor may be able to recover interest exceeding the legal rate (which may include interest on interest), provided that the creditor can prove this loss.

The legal rate of interest is equal to the discount rate set by the Bank of France on December 15th of the preceding year.⁷³ Ordinarily, interest is not paid on interest.⁷⁴ However, under article 1154 of the French Civil Code, "[i]nterest due upon capital may produce interest either by judicial demand or by special agreement, provided that, either in the demand or in the agreement, the interest in question has been due for at least a whole year."⁷⁵ This article has been held to authorize the payment of compound interest in the circumstances set forth in the statute.⁷⁶

Germany. In Germany, the failure to perform a duty arising under an obligation may give rise to a claim for compensation for the loss resulting from this breach.⁷⁷ The circumstances under which a creditor may be entitled to interest on damages are set

forth in both the Civil Code and the Commercial Code.

Civil Code section 246 fixes a statutory rate of interest at four percent per annum for debts that bear interest by virtue of a statute or a legal transaction.⁷⁸ Where a debtor is delayed in payment, section 288 of the Civil Code provides instead a default rate of five percent per annum above the basic interest rate during the period of default, and, in cases where a consumer is not a party, a claim for remuneration bears interest at a rate of eight percent above the basic rate.⁷⁹ Section 288 further provides that an injured party “may claim higher interest on a different legal basis” and that “the right to claim additional loss is not excluded.”⁸⁰ Commercial Code section 352 fixes the statutory rate of interest at five percent per year in commercial transactions.⁸¹ Both codes bar compound interest⁸² with three notable exceptions. First, “[c]redit institutions which have been authorized to issue interest-bearing bearer bonds in the amount of loans made by them, may demand in advance on such loans payment of interest on arrears of interest.”⁸³ Second, compound interest can be claimed as damages “if the claimant has actually paid compound interest to his bank.”⁸⁴ Third, compound interest may be paid if the claimant “would have received compound interest had he invested the principal sum claimed.”⁸⁵

Italy. In Italy, article 1224 of the Civil Code provides that interest is due from the date that a debtor defaults on the payment of a sum of money and accrues at the legal rate,⁸⁶ which is ten percent per annum.⁸⁷ However, if greater damages are proven, additional compensation may be awarded.⁸⁸ As in France, compensation is limited to those damages that were foreseeable at the time the obligation arose.⁸⁹ Compound interest is available when there has been prior usage or a prior agreement as long as interest has been due for at least six months.⁹⁰

Switzerland. The legal rate at which interest accrues in Switzerland is five percent per annum in the absence of an agreement, law, or custom to the contrary.⁹¹ However, where a debtor defaults on the payment of a money debt, the debtor must pay five percent interest despite a lower contractual rate.⁹² The Swiss Code of Obligations explicitly provides that “interest for default is not chargeable on interest for default.”⁹³ For loans of money in commercial transactions, interest is payable even if the agreement fails to provide for interest; however, in noncommercial transactions, interest is payable only if the agreement provides for it.⁹⁴ Unless agreed upon in the contract, the interest rate for loans of money “correspond[s] to the usual rate of interest customary for loans of [that type] at [that] time and place.”⁹⁵ Article 314 of the Code provides that “[a] greements stipulating in advance that the interest shall be added to the capital and shall bear compound interest are invalid; commercial rules, however, regarding current account and similar commercial customs where compound interest is computed, especially in the case of savings-banks, shall not be affected hereby.”⁹⁶

Spain. In Spain, liability for non-payment of money includes interest, either at an agreed upon rate or the legal rate.⁹⁷ Compound interest is permitted if judicially demanded, “even if the obligation is silent on this point.”⁹⁸

Belgium. In obligations that are limited to a sum certain, Belgian law provides that interest is due at the legal rate.⁹⁹ Compound interest may be paid pursuant to the parties' agreement or judicial summons so long as the interest has been due for at least one year.¹⁰⁰

3. European Union

“The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals.”¹⁰¹ The European Court of Justice has been accorded the responsibility “to ensure that in the interpretation and application of [the] Treaty the law is observed.”¹⁰² The Court has jurisdiction over two main types of cases: (1) actions against Member States; and (2) actions against Community institutions.¹⁰³ And, in particular, the Court is authorized to serve as an arbitrator pursuant to dispute settlement clauses of contracts concluded by or on behalf of the Community.¹⁰⁴ As contractual liability is governed by the law applicable to the contract in question, the national law of a Member State is usually applied to resolve issues of contract law, including the application of statutory interest rates.¹⁰⁵ Where national law is not used to resolve contractual issues, the Court will generally resolve such issues according to general principles of Member States, often

arbitrarily choosing a rate of 6% or 8% as a fair rate.¹⁰⁶ Interest rates are also set by reference to the prevailing rate at a European financial institution, such as the European Central Bank.¹⁰⁷ Usually, simple interest is awarded, but the European Court of Justice has noted "it does not appear that the legal systems of the Member States include in general a fundamental principle opposed to the charging of compound interest."¹⁰⁸

B. Oceania

1. Australia

In Australia, courts in each territory may award interest on money recovered as debt or damages.¹⁰⁹ Interest upon interest is expressly prohibited in all territories except Tasmania.¹¹⁰ However, there is a significant exception to this rule: it does not "apply in relation to any debt upon which interest is payable as of right by virtue of an agreement or otherwise."¹¹¹ Thus, compound interest may be available as of some other right, such as by express agreement or special damages.

The High Court of Australia discussed this exception in *Hungerfords v. Walker*.¹¹² In that case, the claimant sought the return of overpaid taxes and compound interest as damages for the loss of the use of money.¹¹³ The court held that, under the circumstances, compound interest could be awarded even though section 30c of the Supreme Court Act of South Australia expressly prohibited such interest.¹¹⁴ The court explained that section 30c was not the exclusive authority for the awarding of interest and did not preclude the development of any common law principle permitting the recovery of damages for the loss of the use of money.¹¹⁵ The court ruled that an award of compound interest was needed because simple interest would not fully compensate the claimant for the loss of the use of the money owed.¹¹⁶

This result is similar to the practice in England.¹¹⁷ However, in *Hungerfords*, the court declined to adopt a distinction between allowing recovery of compound interest as special damages and not permitting it as general damages unless the statutory requirements were satisfied (which is the practice in England).¹¹⁸ The court in *Hungerfords* viewed such a distinction as illogical and instead stated that compound interest could be awarded whenever the loss of the use of money was foreseeable.¹¹⁹

Compound interest is also available if the respondent's breach of its obligations caused the claimant to borrow at compound interest rates. *J.A.D. International Pty. Ltd. v. International Trucks Australia Ltd.* illustrates this exception.¹²⁰ There, the claimant sought compound interest on damages resulting from the respondent's rescission of a contract.¹²¹ The court ruled that it was appropriate to award compound interest because the respondent's actions forced the claimant to incur third-party financing on a compound basis.¹²²

As with statutes on the payment of interest in judicial proceedings, the arbitration acts of the various territories allow for the payment of compensatory interest, but expressly prohibit compound interest.¹²³ However, at least one court has ruled that the exceptions in court proceedings that allow compound interest also apply to arbitrations.¹²⁴

2. New Zealand

In New Zealand, awards of interest are governed by the Judicature Act of 1908.¹²⁵ The Act provides:

In any proceedings in the High Court or the Court of Appeal for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate, not exceeding the prescribed rate, as it thinks fit on the whole or any part of the period between the date when the cause of action arose and the date of the judgment.¹²⁶

The statutory rate of interest is seven and a half percent.¹²⁷ As in Australia, the statute prohibits the payment of interest upon interest.¹²⁸ However, it does not apply to debts where interest is payable as a matter of right, including interest that is due under other rules of law.¹²⁹ Thus, compound interest is available if it is agreed upon.¹³⁰ Additionally, compound interest is available as special damages¹³¹ and, in some circumstances, in equity.¹³²

C. Asia

1. Japan

The Civil Code of Japan provides that if a party does not perform its obligations in a timely manner, it is responsible to the other party for the resulting damages.¹³³ The Code sets the rate of interest at five percent per annum unless the parties have agreed to a different rate of interest.¹³⁴ If interest has accrued for more than one year and the debtor has failed to pay it despite being given a demand for payment by the injured party, it may be added to the principal and, therefore, compounded.¹³⁵

2. China and Hong Kong

In China, if a party breaches a contract, that party is liable for any resulting damage, including interest.¹³⁶ A tribunal will ordinarily award interest at the contractually agreed rate.¹³⁷ However, in the absence of an agreement between the parties it is unclear what rate of interest would apply because the relevant statutory provisions do not prescribe a rate of interest to be paid in the event of a default or set forth a procedure to calculate such interest.¹³⁸

In Hong Kong, compound interest may be awarded in equity, including, for example, where the respondent has breached its fiduciary duties. In addition, Hong Kong's Arbitration Act gives arbitrators the discretion to award compound interest.¹³⁹

3. Taiwan

In Taiwan, in the absence of an agreed upon rate, the rate of interest on a debt is five percent per annum.¹⁴⁰ The rate of interest may not exceed twenty percent.¹⁴¹ In addition, compound interest is prohibited, except when "the parties have agreed upon in writing that the creditor may add to the capital the interest which has been in arrears for more than one year but has not been paid notwithstanding the demand of the creditor."¹⁴²

4. Korea

In Korea, damages for failing to pay a monetary debt on time incur interest at the legal rate.¹⁴³ The legal rate of interest in commercial activities is six percent per annum.¹⁴⁴ Otherwise, the legal rate of interest is five percent per annum.¹⁴⁵ Parties may agree to a different rate of interest, so long as it does not exceed the statutory ceilings.¹⁴⁶

5. India

In India, courts are given the authority to award interest pursuant to the Code of Civil Procedure. It provides:

Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged, from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the date of payment, or to such earlier date as the Court thinks fit.¹⁴⁷

The payment of interest is also governed by the Interest Act of 1978, which states that, "[i]n any proceeding for the recovery of any debt or damages or in any proceedings in which a claim for interest in respect of any debt or damages already paid is made, the court may, if it thinks fit, allow interest to the person entitled to the debt or damages or to the person making such claim, as the case may be, at a rate not exceeding the current rate of interest, for the whole or part of the following period"¹⁴⁸ In addition, the Act prohibits the payment of compound interest.¹⁴⁹ However, like English courts, the Supreme Court of India, in *Renusagar Power Co. v. General Electric Co.*, has ruled that this statutory prohibition on interest upon interest does not preclude awards of compound interest under contractual provision, usage, or statute.¹⁵⁰ There, the court relied on this exception to uphold an arbitral award of compound interest because it was "common knowledge that provision is made for the payment of compound interest in contracts for loans advanced by banks and financial institutions and the said contracts are enforced by courts."¹⁵¹

D. The Americas

1. Mexico

In Mexico, the Civil Code provides that if a party is obligated to perform and does not, that party is liable for resulting damages and losses.¹⁵² When the performance is an obligation to pay a specific amount, damages and losses may not exceed the legal interest on the principal unless agreed.¹⁵³ In addition, if a buyer delays in the payment for goods, the “buyer owes interest for the lapse of time between delivery and payment of the purchase price in the following situations: I. If it was so agreed; II. If the subject-matter of a sale was delivered and generates profits or income; or, III. If, [*inter alia*,] the purchaser defaults in payment [due at a certain time].”¹⁵⁴

Mexico's Commercial Code governs interest for the late payment of debt. In the absence of an agreement, the rate of interest for the late payment of debt is six percent per annum.¹⁵⁵ Compound interest is prohibited unless agreed upon.¹⁵⁶

2. Argentina

The Argentine Civil Code provides that a debtor is not liable for damages that are due to a fortuitous event unless the debtor has assumed that liability or the liability (default) was due to the negligence of the debtor.¹⁵⁷ Obligations to pay a sum of money bear interest at the rate agreed to by the parties.¹⁵⁸ If there exists no such agreement, the obligation bears legal interest or, if no legal interest is determined, the judge will fix the interest.¹⁵⁹ Compound interest may be awarded if its payment has been agreed to by the parties or “when the debt having been judicially liquidated with interest, the judge orders the resulting sum paid, and the debtor defaults in payment.”¹⁶⁰ In contracts for the sale of goods, both a defaulting seller and a defaulting buyer must pay interest, either on the sum of money received by the seller or on the sum of money owed by the purchaser, respectively.¹⁶¹

Commercial loans are governed by the Argentine Commercial Code.¹⁶² Any delay of payment results in interest commencing from the date of the demand.¹⁶³ In the absence of stipulation, the parties are presumed to be bound by the rate of interest charged by public banking institutions.¹⁶⁴ In addition, the Commercial Code provides that a debtor “who litigates without a valid reason, shall be condemned to pay interest up to two and a half times that which the public banks are collecting, the courts duly adjusting the increase of the rate in the decision attending to the greater or lesser malice with which the debtor has litigated.”¹⁶⁵ The Commercial Code also provides that “interest due may produce interest, by action at law, or special agreement. In the case of an action it is necessary that interest should be due for at least a year.”¹⁶⁶

3. Canada

In Canada, awards of interest are governed by the applicable statute, judicial law, or both. The Federal Court Act states that “the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings in the Court in respect of any cause of action arising in that province.”¹⁶⁷ The Federal Court Act gives the power to award interest to a “person who is entitled to an order for the payment of money in respect of a cause of action arising outside any province or in respect of causes of action arising in more than one province.”¹⁶⁸ Although interest on interest is prohibited, the section does not apply “where interest is payable by a right other than under this section.”¹⁶⁹

The territories and provinces also have individual statutes allowing for compensatory interest.¹⁷⁰ Most prohibit the award of compound interest.¹⁷¹ However, the prohibition on compound interest typically does not apply when the payment of interest or similar compensation is otherwise provided by law.¹⁷² In general, compound interest may be awarded pursuant to a court's equitable jurisdiction.¹⁷³ Courts have construed this authority narrowly, awarding compound interest where fraud is apparent or where the wrongdoer is a fiduciary who has stolen funds or wrongfully profited from the retention of trust money.¹⁷⁴ In addition, like in England, Canadian courts allow compound interest as special damages.¹⁷⁵ In Quebec, interest is governed by the Civil Code, which allows compound interest only “where that is provided by agreement or by law or where additional interest is expressly demanded in a suit.”¹⁷⁶

4. United States

Unlike most other countries, the United States has no federal statute governing the payment of compensatory interest in all judicial actions.¹⁷⁷ Individual states, however, have enacted laws providing for the payment of interest.¹⁷⁸ Most states either prohibit or limit awards of compound interest.¹⁷⁹ For example, in New York and California, compensatory interest is calculated as simple interest.¹⁸⁰ Nevertheless, in both states, there are exceptions to the general rule. In New York, compound interest may be awarded if the authority to do so is expressly provided by statute or agreement of the parties.¹⁸¹ It may also be awarded when a fiduciary has acted in bad faith.¹⁸² Similarly, in California, compound interest may be awarded pursuant to statute or the parties' agreement.¹⁸³ In addition, pursuant to section 3288 of the California Civil Code, a jury may award compound interest in actions not arising from a contract.¹⁸⁴ Under this provision, compound interest has been awarded in actions involving a willful breach of fiduciary duty.¹⁸⁵

Delaware courts similarly follow the traditional rule that, absent either a contract or express statutory provision authorizing compound interest prior to judgment, only simple interest may be awarded.¹⁸⁶ One such statute, section 262(i) of the Delaware Code, gives courts the discretion to award compound interest in actions when shareholders seek the fair value of their shares in a merger.¹⁸⁷ Pursuant to this provision, some Delaware courts have recently begun to award compound interest on the grounds that the practice is consistent with market realities.¹⁸⁸ The rationale for this practice was explained by the Delaware Chancery Court in *Onti, Inc. v. Integra Bank, Inc.*:¹⁸⁹

It is simply not credible in today's financial markets that a person sophisticated enough to perfect his or her appraisal rights would be unsophisticated enough to make an investment at simple interest – in fact, even passbook savings accounts now compound their interest daily. This fundamental economic reality strongly indicates to me that, our litigants typically being at least as financially sophisticated as passbook savings holders and seeking at least the same return, interest on appraisal cases should be compounded *daily*, not monthly. As for the defendant company in an appraisal action, it is even harder to imagine a corporation today that would seek simple interest on the funds it holds. One cannot imagine that a sophisticated businessman ... would invest his companies' funds in instruments yielding simple rates of interest. Nor is it conceivable that [a businessman's] lenders w[ould] provid[e] his companies with capital at simple rates of interest.¹⁹⁰

Courts also have allowed compound interest on the ground that the respondent unjustly benefited from what amounted to an interest free loan by failing to fulfill its obligations,¹⁹¹ or that the respondent's action deprived the claimant from being able to invest the money and earn such interest.¹⁹²

In federal courts, absent specific statutory authority, issues concerning the payment of compensatory interest are typically resolved pursuant to the applicable state law.¹⁹³ In diversity actions,¹⁹⁴ the United States Supreme Court has ruled that, to determine which state's compensatory interest law applies, a federal court must use the choice of law rules that would be used by a state court in which the federal court sits.¹⁹⁵ Even in many federal question suits, state law influences the resolution of compensatory interest issues.¹⁹⁶

When federal courts approach compensatory interest issues without consulting state law, district courts exercise broad discretion in resolving claims for compensatory interest.¹⁹⁷ As a result, compound interest has been awarded more frequently.¹⁹⁸ For example, federal courts often award compound interest in admiralty actions.¹⁹⁹ Further, they commonly award compound interest when calculating compensatory interest on back pay in successful employment discrimination suits.²⁰⁰ In addition, compound interest has been awarded in patent infringement actions, although the courts deciding such cases are not unified in their approach.²⁰¹ Federal courts have also awarded compound interest when the claimant incurred interest at a compound rate because of the respondent's delay in paying the underlying obligation.²⁰²

In *In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, the United States Court of Appeals for the Seventh Circuit justified awarding compound interest as the best way to compensate a claimant for the lost use of money.²⁰³ The court explained:

By committing a tort, the wrongdoer creates an involuntary creditor. It may take time for the victim to obtain an enforceable judgment, but once there is a judgment the obligation is dated as of the time of the injury. In voluntary credit transactions, the borrower must pay the market rate for money. (The market rate is the minimum appropriate rate for prejudgment

interest, because the involuntary creditor might have charged more to make a loan.) Prejudgment interest at the market rate puts *both* parties in the position they would have occupied had compensation been paid promptly.²⁰⁴

Recently, in *McKesson Corp. v. Iran*, the United States District Court for the District of Columbia refused to award compound interest to a minority shareholder of an Iranian dairy company after Iran had expropriated the shareholder's interest in the company.²⁰⁵ Relying on commentary and Iran-U.S. Claims Tribunal decisions, the district court found that only simple interest is awarded as a matter of customary international law.²⁰⁶ Although it noted that international tribunals have awarded compound interest in a number of cases, the court stated that it was "constrained to follow the custom, not the rare exception."²⁰⁷

On appeal, the United States Court of Appeals for the District of Columbia Circuit stated that the district court had erred in concluding that only simple interest may be awarded under international law.²⁰⁸ The D.C. Circuit stated that "most contemporary sources ... take the view that 'although compound interest is not generally awarded under international law or by international tribunals, special circumstances may arise which justify some element of compounding as an aspect of full reparation.'"²⁰⁹ Nevertheless, the court upheld the award of interest because the district court had not abused its discretion in awarding only simple interest.²¹⁰

Finally, federal courts have generally enforced foreign awards of compound interest.²¹¹ Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention),²¹² arbitral awards rendered in signatory countries are enforceable in all other signatory countries. This rule is subject to a narrow list of defenses, the most relevant of which is that an award need not be recognized and enforced if it "would be contrary to the public policy of that country."²¹³ In general, domestic courts have rejected claims that an award of interest is not enforceable on public policy grounds simply because the award was made under foreign law, the rate of interest exceeded municipal rates, or compound interest was awarded even though local law prohibits the payment of such interest.²¹⁴

* * *

As this survey discloses, very few countries that allow awards for interest absolutely prohibit compound interest. It is true that in most countries the payment of simple interest is the norm. Perhaps some of these laws originate from the days when disputes were resolved quickly and, therefore, the difference between simple and compound interest would not have been significant.²¹⁵ In addition, it may have been difficult for courts to award compound interest without the use of calculators and computers.

In any event, the survey also shows that many countries allow for awards of compound interest in limited circumstances. For example, the laws of many countries permit compound interest if the contract between the parties provides for it.²¹⁶ In addition, compound interest may be available when the respondent's actions forced the claimant to borrow money at compound rates.²¹⁷ Furthermore, compound interest may be awarded if it is part of the course of dealing or usage or trade, or otherwise can be proven as special damages.²¹⁸ Some countries also allow awards of compound interest when a party has breached a fiduciary duty.²¹⁹ Finally, a few countries expressly allow arbitral tribunals to award compound interest.²²⁰

IV. Tribunal Decisions

Tribunals typically use one of three methods to resolve claims for interest. Ordinarily, they will turn first to the agreement for guidance. When the agreement contains a provision addressing the payment of interest, the tribunal usually resolves the interest claim accordingly.²²¹ However, agreements usually fail to deal with the payment of interest and, when they do, the provision is often ambiguous.²²² In such circumstances, the tribunal may turn to the second method: it can select a law to resolve the interest claim by applying one of numerous choice-of-law rules.²²³ Finally, the tribunal can decide the issue in accordance with general principles of law²²⁴ or on the basis of fairness and reasonableness.²²⁵

Tribunals deciding disputes between transnational contracting parties traditionally have awarded only simple interest.²²⁶ For example, in *R.J. Reynolds Tobacco Co. v. Iran*, the Iran-U.S. Claims Tribunal noted "[t]here are few rules within the scope of the subject of

damages in international law that are better settled than the one that compound interest is not allowable."²²⁷

Society of Maritime Arbitrators ("SMA") panels also typically award only simple compensatory interest.²²⁸ SMA panels have awarded compound interest when the contract expressly provided for it.²²⁹ They have also granted it in a few cases without providing reasons for the award.²³⁰

Recently, four arbitral panels deciding cases under the auspices of the International Centre for the Settlement of Investment Disputes ("ICSID") departed from tradition and awarded compound interest to the successful parties. In *Metalclad Corp. v. United Mexican States*, the claimant sought damages for the breach of certain articles of the North American Free Trade Agreement ("NAFTA") and compound interest on any monetary award. The tribunal awarded claimant a total of U.S.\$16,685,000.²³¹ With respect to the claim for interest, the tribunal noted that the authority to award interest was conferred by article 1135(1) of NAFTA, which states that a tribunal may award "monetary damages and any applicable interest."²³² The tribunal determined that an award of six percent interest, compounded annually, was appropriate because it would restore the claimant to a "reasonable approximation of the position in which it would have been if the wrongful act had not taken place."²³³ The Supreme Court of British Columbia later set aside the award of interest on the ground that the tribunal had erred in selecting the date from which it calculated the amount of compensatory interest. The Court, however, did not discuss the award of compound interest.²³⁴

In *Maffezini v. Spain*, the claimant sought the return of money lent to a corporation affiliated with the Kingdom of Spain as well as compound interest.²³⁵ The tribunal awarded in principal damages 30 million Spanish Pesetas and in compound interest 27.6 million Spanish Pesetas.²³⁶ The tribunal explained that interest should be compounded on an annual basis "[s]ince the funds were withdrawn from [the claimant's] time-deposit account," which would have enabled the claimant to earn compound interest.²³⁷

In *Compania del Desarrollo de Santa Elena v. Costa Rica*, the claimants sought damages and compound interest after Costa Rica expropriated its property in 1978.²³⁸ The tribunal first determined that the property was worth U.S.\$4.15 million when it was expropriated. With respect to the claim for compound interest, the tribunal acknowledged that there exists "a tendency in international jurisprudence to award only simple interest."²³⁹ After surveying the cases and commentary on compound interest, the tribunal determined that an award of such interest was not prohibited by international law.²⁴⁰ In fact, the tribunal recognized that other tribunals deciding disputes between transnational parties had awarded compound interest.²⁴¹ In addition, it noted that international tribunals tended to award only simple interest in cases of injury or simple breach of contract,²⁴² but they have awarded compound interest in cases relating to the valuation of property or property rights.²⁴³ The tribunal awarded claimants approximately U.S.\$11.85 million in compound interest, concluding that this award was needed to provide the claimants with the full present value of the property that was taken twenty-two years ago.²⁴⁴

In *Wena Hotels Ltd. v. Arab Republic of Egypt*, an ICSID tribunal ruled that the respondent expropriated the claimant's property and failed to protect the claimant's investment and, as a result, it awarded the claimant U.S.\$8,061,896.55 in damages.²⁴⁵ Although the claimant sought interest on this amount, it neither specified the interest rate at which interest should accrue nor addressed whether the interest should be compounded. Nevertheless, the tribunal determined that: (1) it was appropriate to award interest, (2) interest should accrue at a rate of 9%, and (3) the interest should be compounded quarterly.²⁴⁶ The tribunal explained the reasons for the award of compound interest, which totaled U.S.\$11,431,386.88:

[A]n award of compound (as opposed to simple) interest is generally appropriate in most modern, commercial arbitrations. ... "[A]lmost all financing and investment vehicles involve compound interest. ... If the claimant could have received compound interest merely by placing its money in a readily available and commonly used investment vehicle, it is neither logical nor equitable to award the claimant only simple interest."²⁴⁷

In *Final Award in Case No. 1930 of 12 October 1999*, a Netherlands Arbitration Institute (NAI) panel issued an award that included compound interest.²⁴⁸ There, the panel ruled that the claimant was entitled to damages based on respondent's deceit in the misappropriation of funds.²⁴⁹ Turning to the claim for interest, the tribunal noted that the substantive law was Dutch law, but that the law governing arbitration was the law of the

place of arbitration, London, England. Applying England's Arbitration Act of 1996, which gives arbitral tribunals the power to award compound interest,²⁵⁰ and Dutch law, which allows interest upon interest,²⁵¹ the NAI panel awarded the claimant interest at the statutory rate in the Netherlands, compounded annually.²⁵²

* * *

In sum, the traditional practice is not to award compound interest in international arbitrations. However, in recent years, tribunals have sometimes departed from this practice and have granted successful claimants compound interest.

V. Should Compound Interest Ever Be Awarded?

This study confirms that most countries and tribunals deciding transnational disputes follow the traditional practice of awarding only simple interest. However, this practice may not fully compensate the claimant and may result in an inefficient dispute resolution process.

The practice of awarding interest as an element of damages has become so widespread that it is an accepted international legal principle.²⁵³ And, as noted in section II, one of the primary purposes of awarding interest is to make the claimant whole by compensating “for the delay with which the payment to the successful party is made.”²⁵⁴ Awarding only simple interest as a general rule undermines this goal because a business engaged in transnational activities is likely to be sophisticated in financial matters and would have done one of two things had the respondent not caused a monetary loss to the claimant: (1) it would have paid off any debt used to finance its operations, which may have included a finance charge of compound interest; or (2) it would have invested the sum owed in a financial vehicle that would have had a compounding effect.

As Iran-U.S. Claims Tribunal Judge Howard Holtzmann pointed out in his dissent in *Starrett Housing Corp. v. Iran*, many businesses today “operate[] on the basis of back-to-back loans and a substantial line of credit with their banks. It is normal commercial practice that banks customarily charge compound interest.”²⁵⁵ An award of compound interest in this circumstance would be necessary to make the claimant whole as respondent's delayed payment would have increased on a compounded basis the claimant's financing costs. Moreover, there is no unfairness to the respondent in requiring it to pay compound interest in this situation, provided that the claimant can show that it is entitled to receive such interest because it incurred additional costs. It is well accepted that “parties dealing knowingly and rationally at arm's length provide compensation for the use of money in every deferred payment transaction, and compute the amount of this compensation by the techniques of interest compounding.”²⁵⁶

Alternatively, if the respondent had paid punctually, the claimant could have invested the money in an investment vehicle, such as a certificate of deposit or a money market account, that paid compound interest.²⁵⁷ Thus, awarding the claimant only simple interest would result in the claimant receiving less than it could have earned by investing the funds owed in an established commercial investment vehicle.²⁵⁸ Furthermore, simple interest fails to achieve the goal of restoring claimant to its pre-injury condition by compensating it for the opportunities lost by not being able to earn a return on the sum owed by the respondent.

It is important to point out that the difference between awards of compound interest and simple interest can be significant.²⁵⁹ For example, in *Kuwait v. American Independent Oil Co. (AMINOIL)*,²⁶⁰ the arbitral tribunal awarded interest, compounded annually, at a rate of seventeen and one half percent for a period of five years.²⁶¹ This amounted to U.S.\$96.7 million in interest on an award of U.S.\$83 million. If the tribunal had awarded simple interest instead of compound interest, the total amount of interest would have been U.S.\$72.6 million. Thus, an award of simple interest would have resulted in the claimant receiving U.S.\$24.1 million less than it did.²⁶²

The tribunal's decision in *Compania del Desarrollo de Santa Elena, S.A. v. Costa Rica*²⁶³ provides another example where the difference between awards of simple and compound interest is significant. There, the tribunal ruled that the claimant was entitled to a total of U.S.\$16 million for property that it determined had a value of U.S.\$4.15 million when it was expropriated by the respondent twenty-two years earlier. The tribunal noted that it calculated the U.S.\$11.85 million interest award based on a rate that was compounded

semi-annually.²⁶⁴ By contrast, if the tribunal had awarded simple interest, it would have totaled U.S.\$5.7 million, which is less than half the actual interest award.²⁶⁵

Because the payment of compound interest can result in a large award of interest, and, as was the case in *Compañía del Desarrollo de Santa Elena*, even exceed the principal awarded, some tribunals have been reluctant to award such interest.²⁶⁶ This concern was expressed by Chamber III of the Iran-U.S. Claims Tribunal in *Anaconda-Iran, Inc. v. Government of Iran*:

The mathematical result of a full application of [compound interest], particularly in view of delays that any adjudication of a dispute involves, is that interest due could, by far, exceed the principal awards awarded. ... Consequently, to [award compound interest] would cause a benefit, and indeed a profit, to accrue to the successful party, which would be wholly out of proportion to the possible loss that the successful party might have incurred by not having the amounts due at its disposal.²⁶⁷

The payment of compound interest, however, does not result in a windfall to the claimant – it simply restores the claimant to the position it would have been in had it been paid in a timely manner. As Professor F.A. Mann pointed out:

[I]t is completely wrong to attach any significance to the fact that the award of interest or compound interest may lead to the payment of a sum exceeding the capital due from the wrongdoer. This may happen in many cases as a result of the wrongdoer's delaying tactics or the court's work load. But during that period the wrongdoer has enjoyed the fruits of the money withheld.²⁶⁸

Moreover, the claimant has been deprived of the opportunity to invest the money owed. In view of the readily available investment vehicles paying compound interest²⁶⁹ and the accepted practice of investing in them,²⁷⁰ it is inconceivable that if the claimant had been timely paid, it would have placed the money in an investment vehicle paying only simple interest.²⁷¹

It also is important to recognize that some businesses choose not to invest profits earned in investment vehicles offered by financial institutions, such as certificates of deposits. Instead, they may put these funds back into the business itself or distribute the money to their shareholders.²⁷² In both situations, there would be a compounding effect.

If the claimant business chooses to pay dividends, the dividends would compound for both the payee and the payor. The payee (investor) has the immediate earning capacity of the money and can reinvest the dividend payment into any common commercial savings device that would pay a compound rate of return.²⁷³ The payor (business) would earn a compound rate of return because it would be increasing the intrinsic value of the business and be increasing its stock price.

If, however, the business chose to reinvest its earnings in its own company, a compound rate of return would still result. This is because the business would be accelerating its growth, which would also increase the business' intrinsic value and increase its stock price.²⁷⁴

In short, in the modern world of international commerce, almost all financing and investment vehicles involve compound, as opposed to simple, interest. Thus, it is neither logical nor equitable to award a claimant only simple interest when the respondent's failure to perform its obligations in a timely manner caused the claimant either to incur finance charges that included compound interest or to forego opportunities that would have had a compounding effect on its investment.²⁷⁵

VI. Circumstances Warranting Awards of Compound Interest

Ordinarily, compensatory interest is recoverable without proof of actual loss; damages are presumed because the delay in payment deprives the claimant of the ability to invest the sum owed.²⁷⁶ As shown by the study in Part III, however, this practice appears to apply only to claims for simple interest. The laws of many countries provide for the awarding of compound interest if the claimant can prove that it is entitled to such interest. This is also the approach used by some arbitral tribunals.²⁷⁷ There appears to be no consensus, however, on what claimants need to show in order to be entitled to an award of compound interest.²⁷⁸

There are three situations when it would be appropriate for a tribunal deciding a transnational dispute to award compound interest: (1) when the parties have expressly agreed to the payment of compound interest; (2) when the respondent's failure to fulfill

its obligations caused the claimant to incur financing costs in which it paid compound interest; and (3) when the claimant can prove that it would have earned compound interest in the normal course of business on the money owed if it had been paid in a timely manner.²⁷⁹

A. Enforcing the Parties' Agreement on the Payment of Compound Interest

When the agreement between the parties addresses the subject of the payment of interest (or precludes it), the tribunal ordinarily should enforce that contractual provision. This approach is consistent with the laws of many countries.²⁸⁰ It is also in accord with the general practice of arbitral tribunals.²⁸¹ Moreover, it gives effect to the intent of the parties and furthers one of the fundamental characteristics of international commercial arbitration—the parties' freedom to agree upon the rules that will govern the resolution of their dispute.²⁸² In addition, it encourages parties to predetermine the consequences of a breach of the agreement and facilitates settlements because the parties will be able to forecast accurately the amount of interest that an arbitrator would award. If arbitration is necessary, it also eliminates the need to engage in the often lengthy and complex process of determining which national law should be applied to the interest claim and thus reduces the cost of the proceedings.

When the parties contract for a rate of interest in the event of a breach, tribunals are more willing to apply the agreed rate rather than a legal rate.²⁸³ For example, in *Petra Jamaica v. Ocean Logistics Corp.*, a dispute arose over the charter of a vessel, and an SMA panel awarded the owners of the vessel approximately \$58,000.²⁸⁴ The owners sought interest pursuant to the contract between the parties. The SMA panel noted that the contract provided:

Interest on any amount due but not paid on the due date shall accrue from the day after that date up to and including the day when payment is made, at a rate per annum which shall be 1% above the U.S. Prime Interest Rate as published by the Chase Manhattan Bank in New York at 12:00 New York time on the due date, or, if no such interest rate is published on that day, the interest rate published on the next preceding day on which such rate was so published, computed on the basis of a 360 day year of twelve 30-days months, compounded semi-annually.²⁸⁵

Applying this provision, the panel awarded the owners approximately U.S.\$15,000 in interest.²⁸⁶

It should be noted that a tribunal should not enforce a clause calling for the payment of compound interest if to do so would violate an applicable fundamental public policy rule, or be clearly against the parties' true intentions, or result in extreme prejudice or injustice to one party.²⁸⁷ It does not appear that awards of compound interest would violate a fundamental public policy rule of a country that allows awards of interest generally.²⁸⁸

B. Awarding Compound Interest When Respondent Caused Claimant to Incur Charges of Such Interest

A claimant should also be entitled to an award of compound interest if the respondent's failure to fulfill its obligations caused the claimant to incur financing costs on which it paid compound interest.

Most businesses do not possess an unlimited amount of operating capital.²⁸⁹ As noted, many companies today finance their operations through lines of credit from financial institutions or through other third-party financing arrangements, which typically charge compound interest.²⁹⁰ If the claimant operated on such a basis and was paying compound interest, the claimant should be entitled to the cost of any additional financing charges caused by the respondent's breach of its obligations because such payments directly resulted from respondent's actions.²⁹¹ Similarly, an unexpected loss that results from the respondent's failure to fulfill its obligations may cause the claimant to borrow money to cover its loss. This will likely be either in the form of a loan or an extension in the business' line of credit.²⁹² In some situations, a business utilizes other resources to finance its operations. For example, a business may issue equity to gain the financing it requires because of the loss.²⁹³ In any case, if a claimant borrows to cover its loss, then the most appropriate way to fully compensate it is to award the claimant its cost of borrowing. Furthermore, if that cost amounted to claimant paying compound interest, the claimant should receive that amount.²⁹⁴

The arbitral tribunal's decision in *Award of May 30, 1979 in ICC Case Nos. 3099 and 3100* illustrates the practice of allowing the claimant to recover interest paid to a third-party on money that the claimant had to borrow because respondent failed to fulfill its obligations.²⁹⁵ There, claimant sold the respondent refined oil products and crude oil and the respondent failed to pay some of the invoices for the goods delivered. The arbitral tribunal ruled that the respondent was liable to the claimant for the principal sum owed, as well as interest that accrued pursuant to the rates set forth in the various contracts.²⁹⁶ The claimant also asserted that, because the respondents failed to pay the invoices in a timely manner, it had to borrow U.S.\$26 million from an American bank, bearing interest that totaled 8.273% per annum.²⁹⁷ The tribunal recognized that the respondent's action caused this loss to the claimant, but it also noted that the claimant was entitled to receive interest under the contract. To make the claimant whole (and to avoid overcompensating the claimant), the tribunal awarded claimant, *inter alia*, the interest due under the contracts and the difference between the interest paid to the bank and the interest due under the contracts.²⁹⁸

In short, awarding a claimant compound interest is appropriate if it can show that it incurred the interest as a result of the respondent's action. This proposal is based on the principle of fully compensating the claimant for all damages directly resulting from the respondent's wrongful actions. It is a well accepted practice that is recognized both in many national laws and by international tribunals.²⁹⁹

C. Awarding Compound Interest Based on the Claimant's Lost Opportunity Cost

Even if the claimant did not incur finance charges of compound interest to cover its loss from the respondent's breach of its obligations, the claimant still may be entitled to an award of compound interest. The claimant must show that, if it had been timely paid, it would have invested the money owed in a vehicle that would have had a compounding effect.

It is a settled principle that a respondent is liable to repair all damages that have accrued naturally as a result of the failure to perform its obligations.³⁰⁰ This includes the obligation to pay the claimant interest for its lost opportunity cost, which may be in the form of interest.³⁰¹ However, the opportunity cost in a commercial enterprise is a forgone investment opportunity.³⁰² Thus, awarding compound interest at the claimant's opportunity cost would be the most appropriate way to compensate it for the loss of the use of its money.

A business has a vast number of investment opportunities that can consist of, for example, an investment in a standard financial investment like a certificate of deposit or other interest bearing account. If a claimant can prove that in its regular course of business it would place funds, such as those owed by the respondent, into such vehicles and that it would have earned compound interest from this investment, it should be entitled to such interest.³⁰³

As noted above, businesses also may reinvest their earnings in their business or pay the excess cash out to their shareholders in the form of dividends.³⁰⁴ This reinvestment may have a compounding effect. The claimant should be entitled to this amount if it can prove its lost opportunity cost. How a claimant does so may be a difficult, but not insurmountable task.³⁰⁵ For example, a claimant could produce historical financial records and expert testimony to show the rate of its return on investment during the relevant time period.³⁰⁶ In appropriate cases, this could provide the basis for the compound rate because it illustrates profit the business could have earned if it been paid the money owed in a timely manner.³⁰⁷

The problems with this approach include: (1) it could be speculative, (2) it could increase the cost to resolve interest issues, and (3) it could result in awards of interest being unpredictable.³⁰⁸ These potential problems may be minimal. First, the problem of speculative awards could be reduced by requiring the claimant to provide sufficient evidence to prove that it would have earned compound interest on the principal owed.³⁰⁹ If the claimant cannot prove this, it still should be entitled to simple interest (unless there are other circumstances that would preclude an award of interest altogether). Second, it is true that this approach could be expensive and time consuming. As noted above, however, in some cases, the difference between simple and compound interest may be millions of dollars, and, thus, a thorough examination of the issue may be justified.³¹⁰ Also, if it is not significant, a claimant may decide that it is not worth the effort to pursue compound interest. Third, awards of interest are already very unpredictable and this

approach not significantly add to an already chaotic situation.³¹¹ More importantly, however, an award at the claimant's opportunity cost more accurately approximates a full and fair compensation for delay damages.³¹² It may also facilitate settlements because it would remove the incentive for the respondent to delay the resolution of the dispute.³¹³

Finally, awarding compound interest in this circumstance would be consistent with the various approaches that tribunals use to award interest, including relying on procedural rules or substantive laws, general principles of law, and the principles of fairness and reasonableness.³¹⁴

If arbitral rules give the tribunal broad discretion to award interest, then the tribunal clearly has the authority to award compound interest unless to do so would violate some fundamental rule of public policy. For example, the rules for the arbitration of international disputes of the London Court of International Arbitration Rules,³¹⁵ the American Arbitration Association,³¹⁶ the Center for Public Resources Institute for Dispute Resolution Rules for Non-Administered Arbitration of International Disputes,³¹⁷ and the World Intellectual Property Organization Arbitration Rules³¹⁸ expressly grant tribunals the authority to award compound interest; thus, it would be appropriate for a tribunal deciding a case under any of those rules to award such interest.³¹⁹ Even when the rules are silent on the awarding of compound interest, they rarely prohibit it and instead give tribunals broad authority in issuing awards.³²⁰

Awarding compound interest when the claimant can prove that it would have been able to earn a compound rate of return on the principal had it had the opportunity to do so would be consistent with the laws of many countries. As illustrated in part III, civil law systems, while providing for the payment of simple interest without any proof of loss where damage results from delay in performance, often allow the recovery of compound interest if the claimant is able to prove that it would have received such money independent of the delay.³²¹ In common law countries, awarding compound interest in this circumstance would essentially be awarding the claimant a form of special damages to compensate it for its loss.³²² This would mean that the party claiming interest would have the burden of proof on the issue, including the burden in some countries to show that compound interest was in the contemplation of the parties.³²³ In view of the sophistication of businesses engaging in transnational commerce and modern financial practices, it is clear that the delay in payment would result in the loss of compound as opposed to simple interest.³²⁴ Moreover, because the practice of awarding compound interest in this circumstance would result in making the claimant whole for its loss, it would accord with the principles of fairness and reasonableness.

VII. Conclusion

Most legal systems award simple interest to compensate a claimant for the loss of the use of money. By contrast, today most financing and investment vehicles available to parties in transnational business involve compound interest. Thus, if the goals of interest are to promote compensation and restitution, then simple interest falls short of attaining those goals. Fortunately, there is no rule of international law prohibiting compound interest. Furthermore, many legal systems and rules under which parties often resolve international commercial disputes allow for awards of compound interest in certain circumstances. These circumstances include awarding compound interest when the parties have agreed for it to be paid, when the respondent's breach of its obligations causes the claimant to incur financing costs at a compound rate, and when the claimant proves that it would have earned compound interest if the money had been paid in a timely manner. Applying these principles would better compensate a claimant for the loss of the use of money than the traditional practice of awarding only simple interest. Such an approach would also reconcile the practice of awarding interest with modern economic practices.

Endnotes

ⁱ This article revises and develops my previous article published in 34 *Law & Policy in International Business* 393 (Winter 2003).

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¹ *Onti, Inc. v. Integra Bank*, 751 A.2d 904, 926-27 (Del. Ch. 1999).

2 See, e.g., *Am. Bell Int'l Inc. v. Iran*, 12 Iran-U.S. Cl. Trib. Rep. 170, 229-32 (1986) (awarding approximately \$28 million in interest on damages of approximately \$50 million); *Gov't of Kuwait v. Am. Indep. Oil Co.*, Mar. 24, 1982, 21 I.L.M. 976, 1042 (awarding \$97 million in interest on \$83 million in damages).

3 See *Compañía del Desarrollo de Santa Elena v. Costa Rica*, 15 ICSID (W. Bank) 169, 200, 202 (2000).

4 See *R.J. Reynolds Tobacco Co. v. Iran*, 7 Iran-U.S. Cl. Trib. Rep. 181, 191-93 (1984); Marjorie M. Whiteman, 3 *Damages in International Law* 1997 (1943).

5 See *McKesson Corp. v. Iran*, 116 F. Supp. 2d 13, 41 (D.D.C. 2000).

6 See *McKesson HBOC, Inc. v. Iran*, 271 F.3d 1101, 1111-12 (D.C. Cir. 2001).

7 See *id.* at 1112.

8 See F.A. Mann, *Further Studies in International Law* 377 (1990) [hereinafter *Further Studies*] (“[T]he problem of compound interest apparently has never been fully analysed. Most learned writers ignore it or fail to give any reason for their conclusions that compound interest is or is not payable.”).

9 Whiteman, *supra* note 4, at 1997; Charles Rousseau, *Droit International Public* V § 242 (1983).

10 See *Further Studies*, *supra* note 8, at 384-85.

11 See *McCullough & Co. v. Ministry of Post, Tel. & Tel.*, 11 Iran-U.S. Cl. Trib. Rep. 3, 29 (1986); Green Haywood Hackworth, 5 *Digest of International Law* 735 (1943) (citing *Illinois Central Railroad Co. (United States v. Mexico)*, *Opinions of the Commissioners* (1927) 187, 189); Dan B. Dobbs, 1 *Dobbs Law of Remedies* § 3.6(1) (2d ed. 1993). This article concerns the awarding of compensatory or pre-award interest, as opposed to moratory or post-award interest, which is interest on the award.

12 See Sidney Homer & Richard Sylla, *A History of Interest Rates* 73 (3d ed. 1991). The authors explain that interest and usury are separate concepts:

[The ancient and biblical] prohibition[s] [were] against usury, “where more is asked than is given.” The Latin noun *usura* means the “use” of anything, in this case the use of borrowed capital; hence, usury was the price paid for the use of money. The Latin verb *interreo* means “to be lost”; a substantive form *interisse* developed into the modern term “interest.” Interest was not profit but loss.

Id.

13 *Id.*

14 See Catholic Encyclopedia: *Usury*, available at <http://www.newadvent.org/cathen/15235c.htm> (last visited Nov. 2, 2002) (stating that Plato and Aristotle “considered interest as contrary to the nature of things”).

15 In particular, the Book of Deuteronomy prohibits loans with interest to brothers but not to strangers. *Deuteronomy* 23:19-20 (“Thou shalt not lend upon usury to thy brother; usury of money; usury of victuals, usury of any thing.... Unto a stranger thou mayest lend upon usury; but unto thy brother thou shalt not lend upon usury.”); see also Benjamin Nelson, *The Idea of Usury* 3-4 (2d ed. 1969) (examining the biblical prohibition against charging interest in certain situations).

16 See Clyde G. Reed & Cliff T. Bekar, *Religious Prohibitions Against Usury* 9 (Aug. 18, 1999) (unpublished manuscript, at <http://www.lclark.edu/~bekar/usury.pdf>) (stating that usury prohibitions were under theological attack and prohibition ended in 1830); see also Homer & Sylla, *supra* note 12, at 70-72 (describing the Catholic Church's restrictions on usury from the first century to the twelfth century). For example, St. Thomas Aquinas disapproved of usury, stating that “[t]o take usury from any man is simply evil” *Id.* at 71.

Over the years, this restriction has been subjected to inconsistent and evolving interpretations. See Nelson, *supra* note 15, at xix-xxv (noting how Deuteronomy's restriction has been interpreted throughout history); see also Homer & Sylla, *supra* note 12, at 71 (describing how groups interpreted Deuteronomy's usury prohibition). During the Protestant Reformation, Martin Luther campaigned against usury. See generally Nelson, *supra* note 15, at 29-72 (describing Luther's campaign against usury). On the other hand, John Calvin reasoned that usury was not inherently evil and was “permissible only if it is not injurious to one's brother.” Homer & Sylla, *supra* note 12, at 80 (describing Calvin's interpretation of biblical rules regarding usury).

17 *Library of Cong. v. Shaw*, 478 U.S. 310, 315 n.2 (1986) (citations omitted).

18 See Richard B. Lillich, *Interest in the Law of International Claims*, in *Essays in Honor of Voitto Saario and Toivo Sainio* 53 (1983); *Restatement (Second) of Contracts* § 354 cmt. a (1981); see also Dobbs, *supra* note 11, § 3.6(1).

19 See *McCullough & Co.*, 11 Iran-U.S. Cl. Trib. Rep. at 29; *Wena Hotels Ltd. v. Arab Republic of Egypt*, 41 I.L.M. 896, 919 (2002). See also Dobbs, *supra* note 11, § 3.6(3); Whiteman, *supra* note 4, at 1991-92. While interest is commonly awarded for the loss of the use of money, there is no consensus as to the time from which interest is calculated and the rates at which interest should accrue, and whether the interest awarded should be compounded. See John Y. Gotanda, *Awarding Interest in International Arbitration*, 90 *Am. J. Int'l L.* 40, 55 (1996).

[20](#) Spalding v. Mason, 161 U.S. 375, 396 (1896) (quoting Curtis v. Innerarity, 47 U.S. 146, 154 (1848)).

[21](#) See generally John C. Keir & Robin C. Keir, *Opportunity Cost: A Measure of Prejudgment Interest*, Bus. Law., Nov. 1983, at 129; Karin L. Kizer, *Minding the Gap: Determining Interest Rates Under the U.N. Convention for the International Sale of Goods*, 65 U. Chi. L. Rev. 1279 (1998); Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 Tex. L. Rev. 293 (1996); Robert L. Haig, 3 Bus. & Com. Litig. Fed. Cts. § 39.3; Restatement (Second) of Contracts § 344(a) (1981) (defining the creditor's expectation interest as "his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed").

[22](#) See Robert Sergesketter, *Interesting Inequities: Bringing Symmetry and Certainty to Prejudgment Interest Law in Texas*, 32 Hous. L. Rev. 231, 240-41 (1995) (recognizing that an inequitable result will occur between plaintiffs if one plaintiff financially recovers immediately after injury and another plaintiff must litigate to recover); see also Keir & Keir, *supra* note 21, at 133 (recognizing that the fundamental principle of damages is that compensation be adequate and full and that interest is allowed in order that damages be adequate in light of the delay in payment by the defendant). In one case, the award of interest was justified on the grounds that the claimant was forced to "borrow money to finance its current expenses on wages, operating and administrative costs or to use its own cash and incur an opportunity cost." Award of January 30, 1984, *summarized in* 10 Y.B. Com. Arb. (Int'l Council for Com. Arb.) 39, 41 (1985).

[23](#) See *Prejudgment Interest as Damages: New Application of an Old Theory*, 15 Stan. L. Rev. 107, 109 (Dec. 1962) ("To divest defendant of this unjustified benefit is not to penalize him, for it has been determined by the trial that it was never rightfully his.").

[24](#) See Sergesketter, *supra* note 22, at 240-41 (recognizing that "defendants are paying 'yesterday's debt with tomorrow's dollars'" by delaying payment to plaintiff).

[25](#) See Keir & Keir, *supra* note 21, at 136 (recognizing that the defendant has had the earning capacity of the money at his disposal, the injured party has not had use of the money owed during the delay before the trial, and while the delay might not be the fault of either party, the defendant is clearly receiving a benefit by having use of the money).

[26](#) In general, a claimant is entitled to receive in damages and interest only the amount that would restore it to the position in which it would have been had the respondent fulfilled its obligations in a timely manner. See Susan K. Freund, William E. McDonnell, Jr. & Hugh J. Cadden, *Prejudgment Interest in Commodity Futures Litigation*, 40 Bus. Law. 1267, 1268-69 (1985) (recognizing that the theory behind unjust enrichment is often applied when punishing defendants in breach of trust cases involving fiduciary misconduct).

[27](#) See Knoll, *supra* note 21, at 296-97.

[28](#) See *id.* at 297 (stating that without prejudgment interest, "defendants would have a powerful incentive to stretch out litigation."); see also Sergesketter, *supra* note 22, at 240-41.

[29](#) See Knoll, *supra* note 21, at 296 (recognizing that prejudgment interest will encourage both parties to take the appropriate level of precaution before engaging in a contractual relationship).

[30](#) See *id.* at 296-97; see also Louis B. Sohn & Richard R. Baxter, *Convention on the International Responsibility of States for Injuries to Aliens* § 83(1), Explanatory Note, at 242 (Draft No. 12 with Explanatory Notes, 1961) ("[R]unning of interest from the date of injury offers an inducement to the [respondent] to make prompt settlement of legitimate claims or to comply speedily with any award.").

[31](#) Other types of interest include, *inter alia*, conventional interest, gross interest, nominal interest, ordinary interest, and penalty interest.

[32](#) See Eugene F. Bringham & Joel F. Houston, *Fundamentals of Financial Management* 207 (8th ed. 1998). Compound interest is calculated through the use of the following formula: $FV = PV(1+i)^n$, where FV is the future value of the total award, including interest, PV is the present value of the award (*i.e.*, not including interest), *i* is the interest rate per compounding period, and *n* is the number of compounding periods.

[33](#) See *Stovall v. Ill. Cent. Gulf R.R. Co.*, 722 F.2d 190, 192 (5th Cir. 1984); *Mariculture Prod. Ltd. v. Lloyd's of London*, No. CV980163762S, 2002 WL 1446763, at *5 (Conn. Super. Ct. June 4, 2002); Richard A. Brealey & Stewart C. Meyers, *Principles of Corporate Finance* 36 (3d ed. 1988).

[34](#) See *Spodek v. Park Prop. Dev. Assoc.*, 759 N.E.2d 760, 761 (N.Y. 2001); Bringham & Houston, *supra* note 32, at 675.

[35](#) See, *e.g.*, *Compañía del Desarrollo de Santa Elena v. Costa Rica*, 15 ICSID (W. Bank) 169, 200 (2000) (noting the tendency in international law "to award only simple interest . . . in relation to cases of injury or simple breach of contract"); *McKesson Corp. v. Iran*, 116 F. Supp. 2d 13, 41 (D.D.C. 2000) (finding that "international courts have over a period of decades followed the custom of granting only simple interest"); 2 Chitty on Contracts 619 (27th ed. 1994) ("Compound interest is payable either by agreement or custom, but not otherwise."); Further Studies, *supra* note 8, at 378 (stating that international tribunals generally do not grant compound interest); Paolo Cerina, *Interest as Damages in International Commercial Arbitration*, 4 Am. Rev. Int'l Arb. 255, 261 (1993) (assuming that the majority of arbitral tribunals do not "award compound interest in order to avoid engaging in presumably complex (and expensive) calculations and the substantial sums involved"); Knoll, *supra* note 21, at 306 ("The traditional, common-law rule is that prejudgment interest is not compounded.").

[36](#) See generally John Yukio Gotanda, Supplemental Damages in Private International Law 12 (1998) [hereinafter Supplemental Damages] (containing a survey of countries on the awarding of compensatory interest).

[37](#) See Samir Saleh, *The Recognition and Enforcement of Foreign Arbitral Awards in the States of the Arab Middle East*, in *Contemporary Problems in International Arbitration* 340, 348-49 (Julian DM Lew ed., 1986) (noting that interest is prohibited in Qatar, Oman, and North Yemen).

[38](#) See Gotanda, *supra* note 19, at 48-50 (discussing circumstances where interest may be awarded under Iranian law).

[39](#) See *Asian Agric. Prod., Ltd. v. Sri Lanka*, June 27, 1990, 30 I.L.M. 580, 625; see also *McCullough & Co. v. Ministry of Post, Tel. & Tel.*, 11 Iran-U.S. Cl. Trib. Rep. 3, 26-31 (1986); Lillich, *supra* note 18, at 55.

[40](#) Civil Procedure Act, 1833, 3 & 4 Will. 4, c. 42, § 28 (Eng.).

[41](#) See Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. 5, c. 41, § 3 (Eng.).

[42](#) *Id.* § 3(1).

[43](#) See *id.* § 3(1)(a).

[44](#) See Administration of Justice Act, 1982, c. 53, § 15(5)(a) (Eng.).

[45](#) See *id.* § 15(1).

[46](#) See Supreme Court Act, 1981, c. 54, § 35A (Eng.). The Act reads:

Subject to rules of court, in proceedings ... before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and [the date of the payment or judgment, whichever came first].

Id.

[47](#) *London, Chatham & Dover Ry. Co. v. S. E. Ry. Co.*, [1893] A.C. 429, 440 (H.L.).

[48](#) See *id.* at 440; see also *Page v. Newman*, 109 Eng. Rep. 140 (K.B. 1829); *President of India v. La Pintada Cia Navegacion S.A.*, [1984] All E.R. 773, 778 (H.L.); *Tim Lawson-Cruttenden & Nicholas Phillips, Compound Interest*, 146 New L.J. 1391 (1996).

[49](#) See *London, Chatham & Dover Ry. Co.*, [1893] A.C. at 440; see also *Nat'l Bank of Greece S.A. v. Pinios Shipping Co. (No. 1)*, [1990] 1 AC 637 (H.L.) (holding that bank was entitled to capitalize interest due to implied usage of bankers); *Lawson-Cruttenden & Phillips, supra* note 52, at 1391.

[50](#) See *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, [1996] A.C. 669, 702 (H.L.); *Wallersteiner v. Moir*, [1975] 1 Q.B. 373 (Eng. C.A.).

[51](#) The rationale for this principle is that one in a fiduciary position must not be allowed to profit from the trust. *Wallersteiner*, [1975] 1 Q.B. at 388.

[52](#) *Id.* (explaining that an award of compound interest in this situation is appropriate because it is presumed that wrongdoer benefited from use of the plaintiff's money and that, had the plaintiff been paid, the plaintiff would have made the most beneficial use out of it).

[53](#) *Wadsworth v. Lydall*, [1981] 1 W.L.R. 598, 603 (Eng. C.A.).

[54](#) See *id.* at 599-601.

[55](#) See *id.* at 601.

[56](#) See *id.* at 603.

[57](#) *Id.* (internal citation omitted).

[58](#) *Id.* at 598-99.

[59](#) *President of India v. La Pintada Cia Navegacion S.A.*, [1984] All E.R. 773, 787 (H.L.); see also *President of India v. Lips Mar. Corp.*, [1987] 3 W.L.R. 572, 576 (H.L.) (stating that "interest could be recovered as damages for late payment if it was special damage which could be brought within the second part of the rule in *Hadley v. Baxendale*").

[60](#) See *La Pintada*, [1984] All E.R. at 774.

[61](#) See *id.* One commentator stated that there is a three-part test for awarding compound interest as special damages: (1) the claim for interest must be based on the actual loss sustained by the plaintiff; (2) the defendant must have had special knowledge before the contract was entered into; and (3) because of the special knowledge, the defendant ought to have foreseen that the loss claimed was likely in the event of a breach of contract. See *Lawson-Cruttenden & Phillips, supra* note 52, at 1391.

[62](#) Arbitration Act, 1996, c. 23, § 49(3) (Eng.). The Law Commission of England and Wales notes that this is the “only statute to provide specifically for compound interest.” LAW COM No. 287, *supra* note 50, § 2.44, at 16.

[63](#) Late Payment of Commercial Debts (Interest) Act, 1998, c. 20, § 2(1) (Eng.).

[64](#) Late Payments of Commercial Debts Regulations 2002, Statutory Instrument 1674 (Eng.), *available at* <http://www.legislation.hmso.gov.uk/si/si2002/20021674.htm>. The new regulations apply only to contracts made on or after August 7, 2002. *Id.*

[65](#) Late Payment of Commercial Debts (Rate of Interest) (No. 3) Order 2002, Statutory Instrument 2002 No. 1675 (Eng.), *available at* <http://www.legislation.hmso.gov.uk/si/si2002/20021675.htm>.

[66](#) Law Comm'n, LAW COM No. 287, Pre-Judgment Interest on Debts and Damages § 2.38, at 15 (Feb. 23, 2004), *available at* <http://www.lawcom.gov.uk/files/lc287.pdf> [hereinafter LAW COM No. 287].

[67](#) See Handelsgesetzbuch [HGB] § 353 (Ger.), *translated in* Simon L. Goren, *The German Commercial Code* 152 (2nd ed. 1994) (“Merchants are entitled among themselves to demand interest for claims arising from mutual commercial transactions from the date they fall due. Compound interest may not be demanded by virtue of this provision.”); Polgári Törvénykönyv [Ptk] § 232(1) (Hung.), *translated in* Ministry of Justice of the Hungarian People’s Republic, *Civil Code of the Hungarian People’s Republic* 130 (1982) (“Unless exception is made by a provision of law in contractual relationships, interest is due. In contractual relationships of private persons among themselves interest is due only when it was stipulated. Compound interest cannot be validly stipulated.”).

[68](#) See Code Civil [C. civ.] art. 1154 (Fr.), *translated in* George A. Bermann & Vivian Grosswald Curran, *French Law: Constitution and Selective Legislation* 4-70 (1998) (stating that in France “[i]nterest due upon capital may produce interest either by judicial demand or by special agreement, provided that, either in the demand or in the agreement, the interest in question has been due for at least a whole year”); Civil Code art. 482(1) (Pol.), *translated in* The Polish Civil Code 87 (Danuta Kierzkowska et al. eds., Olgierd A. Wojtasiewicz trans., 2000) (“One may demand interest for delay from the interest due only from the moment of filing the suit for it unless after the interest in arrear had become due the parties agreed to add the interest to the sum of the debt.”).

[69](#) See Interest Act §§ 5 (Swed.) (stating that, in Sweden, interest accrues upon debts due to breach of contract at a rate established by the Central Bank of Sweden plus two percentage points), [6](#) (stating that interest accrues on other overdue debts and debts for damages at a rate established by the Central Bank of Sweden plus eight percentage points), *translated in* Swedish Commercial Legislation § 5 RteL:1-3 (1995); *The Finnish Legal System* 128 (Jaakko Uotila ed., Leena Lehto trans., 2d ed. 1985) (stating that, under the Interest Act of 1982, interest accrues on debts due to breach of contract at a rate established by the Bank of Finland; interest on overdue payments or interest for default is 16% unless the rate of interest paid before the due date had been higher); *Grazhdanskii Kodeks RF* [GK RF] art. 395 (1) (Russ.), *translated in* Civil Code of the Russian Federation 186 (W.E. Butler trans., 1997) (“For the use of another’s monetary means as a consequence of unlawful withholding, avoidance of the return thereof, other delay in the payment thereof or the unjustified receipt or savings thereof at the expense of another person interest shall be subject to payment on the amount of these means.”). The Civil Code of Russia further provides:

The amount of interest shall be determined as the rate of bank interest on the day of performance of the monetary obligation or respective part thereof which existed at the place of residence of the creditor, and if the creditor is a juridical person, at the place of its location. In the event of the recovery of a debt in a judicial proceeding the court may satisfy the demand of the creditor by proceeding from the bank interest rate on the date of presenting the suit or on the date of rendering the decision. These rules shall apply unless another amount of interest has been established by a law or by the contract.

GK RF art. 395(1) (Russ.).

[70](#) See C. civ. arts. 1150, 1151 (Fr.), *translated at* http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm (“The obligor is liable only for the damages foreseen or which could have been foreseen at the time of the contract, so long as it is not due to his fraud that the obligation has not been performed. Even in the case where nonperformance of the agreement is due to the fraud of the obligor, the damages may include only that portion of the loss sustained by the obligee and of the benefit of which he was deprived, which is the immediate and direct consequence of the nonperformance of the agreement.”).

[71](#) C. civ. art. 1153 (Fr.).

[72](#) *Id.* (“Le créancier auquel son débiteur en retard a causé, par sa mauvaise foi, un préjudice indépendant de ce retard, peut obtenir des dommages *et intérêts* distincts des intérêts moratoires de la créance.”) (emphasis added). Interestingly, the emphasized text in the previous parenthetical (“*et intérêts*”) does not appear in many of the English translations of the French Civil Code. See, e.g., C. civ. art. 1153 (Fr.), *translated in* George A. Bermann & Vivian Grosswald Curran, *French Law: Constitution and Selective Legislation* 4-70 (1998) (“An obligee whose defaulting obligor has caused him injury independent of this delay, by his bad faith, may obtain damages [and interest] in addition to the interest for delay in performance.”) (bracketed text added to show omission); Legifrance, *French Civil Code*, at http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm (“A creditor to whom his debtor in delay has caused, by his bad faith, a loss independent of that delay may obtain damages [and interest] distinct from the interest on arrears of the debt.”) (translated by Georges Rouhette, Professor, University of Clermont-Ferrand I, with the co-operation of Anne Berton, Professor, University of

Clermont-Ferrand II) (bracketed text added to show omission). This discrepancy in translation may derive from the fact that the word "dommages-intérêts," comprising the words "dommages" (damages) and "intérêts" (interest(s)), is translated simply as "damages" in English. Article 1153 of the French Civil Code does, however, allow recovery of "dommages *et* intérêts" (damages *and* interest), not "dommages-intérêts" (damages).

[73](#) See Law No. 75-619 of July 11, 1975, art. 1, *translated in* Bermann & Curran, *surpa* note 64, at 4-162. Article 2 of Law No. 75-619 states: "If the discount rate set by the Bank of France on June 15th differs by three points or more from the discount rate set on the preceding December 15th, the legal interest rate is equal to the new discount rate for the six final months of the year." *Id.* at art. 2. Two months after a judgment, the legal interest rate is increased by five points. See *id.* at art. 3.

[74](#) See Moquet et al., 1 Doing Business in France § 6.03[5] (rel. 27, 2002).

[75](#) C. civ. art. 1154 (Fr.); see also *supra* text accompanying note 72 (discussing circumstances under which creditors may be able to recover interest exceeding legal rate under article 1153).

[76](#) See Gabrielle Kaufmann-Kohler & Antonio Rigozzi, *Correction and Interpretation of Awards in International Arbitrations Held in Switzerland*, Mealey's Int'l Arb. Rep., Apr. 2001, at 25, 27 (summarizing a case from the Swiss Supreme Court dealing with an ICC arbitration in which the tribunal held that an amount awarded would bear compound interest under article 1154 of the French Civil Code); Moquet et al., *supra* note 74, § 15.03[3] (stating that interest accrued on the principal amount of a loan may itself accrue interest under article 1154 when the interest payable has been due for at least a year); see also Final Award in Case No. 6962 of 1992, in *Collection of ICC Arbitral Awards 1991-1995* 299, 307 (Jean-Jacques Arnaldez et al. eds., 1997) ("Compound interest was neither provided for in the contract nor claimed in the request for arbitration and is therefore not to be awarded pursuant to Art. 1154 CC.").

[77](#) See Bürgerliches Gesetzbuch [BGB] § 280 (Ger.), *translated in*: Geoffrey Thomas & Gerhard Dannemann, *German Civil Code - Bürgerliches Gesetzbuch* (2002), German Law Archive, at: <http://www.iuscomp.org/gla/statutes/BGB.htm>. Section 280 provides:

- If the obligor fails to comply with a duty arising under the obligation, the obligee may claim compensation for the loss resulting from this breach. This does not apply if the obligor is not liable for the failure.
- The obligee may demand compensation for delay in performance only if the additional requirement in § 286 is satisfied.
- The obligee may demand compensation in lieu of performance only if the additional requirements of § 281, § 282 or § 283 are satisfied.

Id.

[78](#) See BGB § 246.

[79](#) See BGB § 288(1), (2).

[80](#) BGB § 288(3), (4).

[81](#) See HGB § 352 (Ger.).

[82](#) See HGB § 353 (Ger.) ("Merchants are entitled among themselves to demand interest for claims arising from mutual commercial transactions from the date they fall due. Compound interest may not be demanded by virtue of this provision."); BGB § 248(1) (Ger.) ("An agreement made in advance to the effect that arrears of interest shall again bear interest is void."); BGB § 289 (Ger.) ("Interest shall not be paid upon interest in default.").

[83](#) BGB § 248(2) (Ger.).

[84](#) Martin Hunter & Volker Triebel, *Awarding Interest in International Arbitration*, 6 J. Int'l Arb. 7, 18 (1989). Section 289 of the Civil Code states that "[t]he right of the creditor to compensation for any damage arising from the default remains unaffected [by the prohibition of interest on interest]."

[85](#) Hunter & Triebel, *supra* note 84, at 18. The authors also point out that, although traditionally an arbitral tribunal's award of compound interest would have been void as against German public policy, today "a German court or arbitral tribunal is empowered to order payment of compound interest if the relevant foreign proper law so provides, and would not be restrained by German public policy." *Id.* at 19.

[86](#) See Codice Civile [C.c.] art. 1224 (Italy), *translated in* The Italian Civil Code 323 (Mario Beltramo et al. trans. 1969) ("In obligations having as their object a sum of money. ... , legal interest ... is due from the day of the default even if it was not due previously and even if the creditor does not prove that he has suffered any damage. If interest was due at higher than the legal rate before the default, interest after default shall be due at the same rate.").

[87](#) See C.c. art. 1284 (It.). Prior to 1990, the legal rate of interest was 5% per annum. See *id.*; see also Final Award in case no. 1795 of 1 December 1996, *reprinted in* XXIV Y.B. Com. Arb. 196, 205 (1999) (awarding interest at the rate of 10% under article 1284 of the Italian Civil Code); Final Award in Case 8716 of February 1997, *reprinted in* 11 ICC Int'l Court Arb. Bulletin 61, 63 (Fall 2000) (awarding interest at a rate of 5% under Italian law).

[88](#) See C.c. art. 1224 (It.). However, additional compensation "is not due if the rate of interest to be paid after default was agreed." *Id.*

[89](#) See C.c. art. 1225 (It.). This is true only “[i]f the non-performance or delay is not caused by the fraud or malice of the debtor.” *Id.*

[90](#) See C.c. art. 1283 (It.).

[91](#) Schweizerisches Obligationenrecht [OR] art. 73 (Switz.), *translated in* Simon L. Goren, *The Swiss Federal Code of Obligations* 14 (1987).

[92](#) See OR art. 104 (Switz.). Nevertheless, an agreed upon rate higher than the legal rate may be claimed. See *id.* In the absence of an agreed upon date, a debtor is put in default when the creditor demands performance. See OR art. 102 (Switz.). “Where a certain date has been agreed upon for the performance, or where such a date results from a stipulated notice duly given, the debtor is in default on the expiration of such date.” *Id.*

[93](#) OR art. 105 (Switz.).

[94](#) See OR art. 313 (Switz.).

[95](#) OR art. 314 (Switz.).

[96](#) *Id.*

[97](#) See Código Civil [C.C.] art. 1108 (Spain), *translated in* Civil Code of Spain 275 (Julio Romanach, Jr. trans., 1994).

[98](#) C.C. art. 1109 (Spain).

[99](#) See Code Civil [Belg. C. Civ.] art. 1153 (Belg.), *translated in* The Constitution of Belgium and the Belgian Civil Code 223 (John H. Crabb trans., 1982).

[100](#) See Belg. C. Civ. art. 1154 (Belg.).

[101](#) NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration, [1963] ECR 3. The Court further stated:

Independently of the legislation of Member States, Community law not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.

[102](#) EC art. 220.

[103](#) See *generally* K.P.E. Lasok, *Law and Institutions of the European Union* 297 (7th ed. 2001). The Court of First Instance was established by Council Decision 88/591/EEC of November 25, 1988, as amended. Its jurisdiction “consists of categories of action which have been transferred to it from the Court of Justice by act of the Council from time to time.” Lasok, *supra*, at 323. For a discussion of the Court of Justice and the Court of First Instance, see *European Courts Practice & Precedent* (Richard Plender gen ed., 1997).

[104](#) See Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2001 O.J. (C 80) 1 art. 238 [hereinafter Treaty of Nice] (“The Court of Justice shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or private law.”)

[105](#) See, e.g., Case 30/03, *Commission of the European Communities v. Instituto Tecnológico para a Europa Comunitaria (ITEC)*, 2003 E.C.R. ___ (applying Luxembourg law to determine rate of default interest award where contract governed by Luxembourg law); Case 426/85, *E.C. Commission v. Zoubek*, 1988 E.C.R. 4057, 1 C.M.L.R. 257 (E.C.J. 1986) (applying Belgian law to determine applicable statutory rates of interest in breach of contract claim).

[106](#) See Case 21/86, *Samara v. Commission of the European Communities*, 1987 E.C.R. 795 (ordering Commission to pay default interest on arrearage of remuneration of Commission official, noting “in order to put the applicant back in the position which should lawfully have been hers, account be taken of the loss which she has incurred by reason of the fact that she was restored to that position only after an appreciable lapse of time and that she could not have the use of the sums to which she was entitled on the dates on which they would normally have fallen due. To that end the applicant should be awarded default interest at a flat rate of 8% per annum, running from the date on which each instalment [sic] became due until final settlement”); see *also* Case T-17/89, *Luaidi v. Commission of the European Communities*, 1992 E.C.R. II-293 (ordering Commission to pay compensatory interest for loss of purchasing power during arrearage of remuneration of the Commission officials with interest amount to be negotiated by parties). The court ordered the parties to negotiate a calculated interest amount based on official statistics of Community concerning changes in purchasing power in various Member States. See *id.* If the parties could not agree on an amount of interest to be paid, the parties were to resubmit to the court for a determination of the amount. See *id.*; Case 63 & 64/79, *Boizard v. E.C. Commission*, 1980 E.C.R. 2975, c C.M.L.R. (E.C.J. 1980) (awarding interest at rate of 8% on deductions from pensions improperly held by Commission); see *also* K.P.E. Lasok, *The European Court of Justice Practice & Procedure* 549 (1994) (stating that the rate of interest awarded in cases involving claims for default interest “tends to be 6%[,]” and that “[n]o reason has been given why this should be so”).

General principles of Member States are also used to determine interest issues in non-contractual liability cases. See Case C-152/88, Sofrimport SARL v. E.C. Commission, 1990 E.C.R. I-2477, 3 C.M.L.R. 80 (E.C.J. 1990) ("As the claim relates to the non-contractual liability of the Community under the second paragraph of Article 215, it must be considered in the light of the principles common to the legal systems of the Member States to which that provision refers. According to those principles a claim for interest is, as a general rule, permissible. On the basis of the criteria adopted by the Court in similar cases, the obligation to pay interest arises on the date of this judgment inasmuch as it establishes the obligation to make good the damages The rate of interest which it is proper to apply is 8 per cent."); Case 169/83, Leussink v. Commission of the European Communities, 1986 E.C.R. 2801 (awarding interest at rate of 8% on damages award in occupational accident case); Case 256/81, Pauls Agriculture Limited v. E.C. Council and Commission, 1983 E.C.R. 1707, 3 C.M.L.R. 176 (E.C.J. 1983) ("As the claim relates to the non-contractual liability of the Community under the second paragraph of Article 215, it must be considered in the light of the principles common to the legal systems of the Member States to which that provision refers. It follows that a claim for interest is, as a general rule, permissible. On the basis of the criteria adopted by the court on numerous occasions, the obligation to pay interest arises on the date of this judgment, inasmuch as it establishes the obligation to make good the damage. The rate of interest which it is proper to apply is 6%.")

[107](#) See *Pietro Del Vaglio v. Commission of the European Communities*, 2003 O.J. (C 184) 33 (basing interest award on rate set by European Central Bank for capital refinancing operations); Case T-171/99, *Corus UK Ltd. v. E.C. Commission*, 2001 E.C.R. II-2967, 5 C.M.L.R. 34 (C.F.I. 2001) (awarding damages based on proof of loss of investment accruing quarterly compounded interest, with award of simple interest based on interest rate set by European Central Bank for capital refinancing operations).

[108](#) Case 67/69, *Societa industriale metallurgica di Napoli (Simet) v. Commission of the European Communities*, 1971 E.C.R. 197 (awarding compound interest at rate set out by Article 91 of general staff Regulations of the European Coal and Steel Community); see also Case T-171/99, *Corus UK Ltd. v. E.C. Commission*, 2001 E.C.R. II-2967, 5 C.M.L.R. 34 (C.F.I. 2001) (noting that in claim for unjust enrichment, "where the loss consists of the loss of use of a sum of money over a period of time, the amount recoverable is generally calculated by reference to the statutory or judicial rate of interest, without compounding," and awarding damages based on proof of loss of investment accruing quarterly compounded interest, with award of simple interest based on interest rate set by European Central Bank for capital refinancing operations).

[109](#) See Supreme Court Act, 1933, § 69(1) (Austl. Cap. Terr.); Supreme Court Act, 1970, § 94(1) (N.S.W.); Supreme Court Act, 1979, § 84(1) (N. Terr. Austl.); Supreme Court Act, 1995, § 47(1) (Queensl.); Supreme Court Act, 1935, § 30C(1) (S. Austl.); Supreme Court Civil Procedure Act, 1932, § 34(1) (Tas.); Supreme Court Act, 1986, § 60(1) (Vict.).

[110](#) See Supreme Court Act, 1933, § 69(2)(a) (Austl. Cap. Terr.); Supreme Court Act, 1970, § 94(2)(a) (N.S.W.); Supreme Court Act, 1979, § 84(2)(a) (N. Terr. Austl.); Supreme Court Act, 1995, § 47(3)(a) (Queensl.); Supreme Court Act, 1935, § 30C(4)(a) (S. Austl.); Supreme Court Act, 1986, § 60(2)(a) (Vict.).

[111](#) Supreme Court Act, 1933, § 69(2)(b) (Austl. Cap. Terr.); see also Supreme Court Act, 1970, § 94(2)(b) (N.S.W.); Supreme Court Act, 1979, § 84(2)(b) (N. Terr. Austl.); Supreme Court Act, 1995, § 47(3)(b) (Queensl.); Supreme Court Act, 1935, § 30C(4)(b) (S. Austl.); Supreme Court Act, 1986, § 60(2)(b) (Vict.).

[112](#) *Hungerfords v. Walker* (1989) 84 A.L.R. 119.

[113](#) See *id.* at 121.

[114](#) See *id.* at 131.

[115](#) See *id.*

[116](#) *Id.* at 133. Also important to the court was the principle of *restitutio in integrum*, under which the plaintiff is entitled to full compensation for the loss that it sustains as a consequence of a wrong. *Id.* at 128.

[117](#) See *supra* notes 40-53 and accompanying text.

[118](#) See *Hungerfords*, 84 A.L.R. at 127.

[119](#) See *id.* at 127-28. The effect of this is to allow the awarding of compound interest under the first "limb" of *Hadley v. Baxendale*. *Australia v. Chessell* (1991) 101 A.L.R. 182, 189 ("It is to be observed that the High Court in *Hungerfords'* case has decided that it is, in appropriate cases, correct to include in awards of damages for breach of contract an amount for the loss of use of money and that such an award may be made in reliance upon the first limb of the decision in *Hadley v. Baxendale*. One is not restricted to the second limb").

[120](#) *J.A.D. Int'l Pty. Ltd. v. Int'l Trucks Australia Ltd.* (1994) 50 F.C.R. 378.

[121](#) See *id.* at 391.

[122](#) See *id.* The court also stated that compound interest would be warranted when the plaintiff has incurred the opportunity cost by having its own funds tied up. *Id.* at 392. ("There is no reason why interest awarded by way of such an indemnity should not be compound interest, where the evidence shows that the purchaser, in order to pay the purchase money has had to borrow on that basis, or has incurred the opportunity cost of compound interest, foregone by having his own funds tied up in the

purchase money."); see also Commercial Bank of Austl. v. Smith (1991) 102 A.L.R. 453, 479 (awarding compound interest at rates similar to that which plaintiff had been charged by bank).

123 See Commercial Arbitration Act, 1986, § 31 (Austl.Cap.Terr.); Commercial Arbitration Act, 1984, § 31 (N.S.W.); Commercial Arbitration Act, 1985, § 31 (N. Terr. Austl.); Commercial Arbitration Act, 1990, § 31 (Queensl.); Commercial Arbitration Act, 1986, § 31 (S. Austl.); Commercial Arbitration Act, 1986, § 31 (Tas.); Commercial Arbitration Act, 1984, § 31 (Vict.); Commercial Arbitration Act, 1985, § 31 (W. Austl.); see also International Arbitration Act, 1974, § 25 (Austl.).

124 See *Leighton Contractors Pty. Ltd. v. Kilpatrick Green Pty. Ltd.* (1992) 2 V.R. 505 (App. Div.). But see *Codelfa Constr. Pty. Ltd. v. State Rail Auth. of N.S.W.* (1982) 41 A.L.R. 367 (holding that the arbitrator's power to award interest was referable to the Supreme Court Act 1970 (N.S.W.), which precluded compound interest under section 94(2)(a)). This case, however, was decided before *Hungerfords*, 84 A.L.R. at 119. In *Leighton Contractors Pty. Ltd.*, the arbitrator had awarded the subcontractor in a construction contract compound interest as damages for financing costs resulting from delays. The contractor challenged the award on the basis of section 31(2)(a) of the Commercial Arbitration Act which disallows an award of interest upon interest. The court disagreed with the argument that the Act provided the exclusive remedy in terms of interest. The court determined that the legislature could not have intended to exclude common law damages. Instead, it determined that if another judicial remedy allowed for compensation, as under *Hungerfords*, there was no need for the arbitrator to exercise his discretion to award statutory interest, as that would constitute double compensation. Finally, the court pointed out that the damages set forth in *Hungerfords* are payable as of right under English common law. *Leighton Contractors Pty. Ltd.*, 2 V.R. at 512-13.

125 See Judicature Act, 1908, (N.Z.).

126 *Id.* § 87(1).

127 See *id.* at § 87(3).

128 See *id.* at § 87(1)(a).

129 See *id.* at § 87(1)(b).

130 See *Alington Group Architects Ltd. v. Attorney Gen.* [1998] 2 N.Z.L.R. 183 (awarding compound interest as interpreted in the contract and concluding that there is no presumption of simple interest).

131 See *Dods v. Coopers Creek Vineyards Ltd.* [1987] 1 N.Z.L.R. 530 (awarding interest at commercial rates as special damages under *Wadsworth v. Lydall*); *Broadbank Corp. v. Mosgiel Ltd.* [1985] 1 N.Z.L.R. 257 (holding that the principles of awarding interest as special damages under *Wadsworth v. Lydall* apply to New Zealand courts); *Krehic v. Clark* [1991] 1 N.Z.L.R. 703, 710 (awarding a higher interest rate than the statutory rate as special damages); *Fletcher v. Nat'l Mut. Life Nominees Ltd.* [1990] 3 N.Z.L.R. 641 (awarding interest as damages under special damage exception of *Wadsworth v. Lydall*). In *Dods v. Coopers Creek Vineyards Ltd.*, the court awarded interest as special damages for the late payment of debt at the same bank rates paid by the plaintiff. The court reasoned that it was appropriate to award such interest if the evidence established and proved a quantifiable loss and if the damage could reasonably have been in the contemplation of both parties when they made the contract. See *Dods*, 1 N.Z.L.R. at 537.

132 See *Equiticorp Indus. Group v. The Crown* [1996] 3 N.Z.L.R. 690, 701 (recognizing compound interest as recoverable in equity but not applying it in this case as The Crown was not engaged in making a profit but in running the country for the public good); *Gen. Communications Ltd. v. Dev. Fin. Corp. of N.Z.* [1990] 3 N.Z.L.R. 406, 407 (awarding compound interest against a trustee who had profited at a compound rate). But see *Day v. Mead* [1987] 2 N.Z.L.R. 443, 462 (refusing to exercise equitable jurisdiction and denying a claim for compound interest because the claimant had elected to bring his claim under the legal remedy of the Judicature Act rather than state his claim as one of equity).

133 See Minpō (Civil Code) art. 412 (Japan), translated in *Doing Business in Japan* (Statute Volume) app. 4A.(2003), provides:

1. Where a time certain is fixed for the performance of an obligatory duty the obligor shall be responsible for delay beyond such time.
2. If a time uncertain is agreed upon for the performance of an obligatory duty, the obligor shall be responsible for delay from the time when such obligor became aware of the arrival of the time for performance.
3. If no time is fixed for the performance of an obligatory duty, the obligor shall be responsible for delay as from the time demand for performance has been made upon him.").

134 See Minpō art. 404 (Japan). The legal rate of interest for commercial agreements is six percent per annum. Shōhō (Commercial Code) art. 514 (Japan), translated in *Doing Business in Japan* (Statute Volume) app. 5A (2003).

135 See Minpō; art. 405 (Japan); see also *Risoku Seigen Hō* (Interest Rate Restriction Act) (Law No. 100, 1954) art. 1 (Japan), translated in *Doing Business in Japan* app. 4B (2001) (stating that interest may not exceed certain statutory ceiling).

136 See Contract Law art. (P.R.C.) (Adopted and Promulgated by the Second Session of the Ninth National People's Congress March 15, 1999), available at http://www.novexc.com/contract_law_99.html (unofficial English translation); see also Foreign Economic Contract Law art. 23 (P.R.C.).

137 See Contract Law arts. 114, 207 (P.R.C.); see also Foreign Economic Contract Law art. 23 (P.R.C.); Civil Code [PRC Civ. C.] art. 112 (P.R.C.).

[138](#) The new Unified Contract Law does provides that in the case of a contract for loan of money between natural persons, if payment of interest was not prescribed or clearly prescribed, the loan is deemed interest free. See Contract Law art. 221. It also states that the interest rate on a loan provided by a financial institution engaged in lending operation shall be prescribed between the minimum and maximum rates mandated by the People's Bank of China. See Contract Law art. 204.

[139](#) See *China Everbright - IHD Pac. Ltd. v. Ch'ng Poh*, [2002] HKEC 218 (H.K.) ("Where fraud or breach of trust or some similar equitable obligation is involved, compound interest may be awarded on the basis that the defendant must not be allowed to make any profit from his trust."). See also Arbitration Ordinance, ch. 341, ¶ 2GH(1) (H.K.), translated in *2 H. Smit & v. Pechota*, National Arbitration Laws ¶ HKG V(1)-1 (2001) ("An arbitral tribunal may, in arbitration proceedings before it, award simple or compound interest from such dates, at such rates, and with such rests as the tribunal considers appropriate for any period ending not later than the date of payment."). Singapore's arbitration laws also give arbitrators the authority to award compound interest. Arbitration Act, 2001, ¶ 35(1) (Sing.), available at http://www.siac.org.sg/2_ArbAct.htm ("The arbitral tribunal may award interest, including interest on a compound basis, on the whole or any part of any sum that (a) is awarded to any party; or (b) is in issue in the arbitral proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of the award or payment, whichever is applicable."); International Arbitration Act, 1994, ¶ 12(4)(b) (Sing.), translated in *2A World Arb. Rep.* 2404.6 (Issue 12) (arbitral tribunals "may award interest (including interest on a compound basis) on the whole or any part of any sum which (i) is awarded to any party, for the whole or any part of the period up to the date of the award; or (ii) is in issue in the arbitral proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of payment.").

[140](#) See Civil Code [ROC Civ. C.] art. 203 (Taiwan), translated in *4 Commercial, Business and Trade Laws, Taiwan* (C.V. Chen & Allan P.K. Keese eds., 1983).

[141](#) See ROC Civ. C. art. 205 (Taiwan) ("If the rate of interest agreed upon exceeds twenty per cent (20%) per annum, the creditor is not entitled to claim any interest over and above twenty per cent (20%).").

[142](#) ROC Civ. C. art. 207 (Taiwan). *But see* ROC Civ. C. art. 233 ("Interest shall not be paid upon interest in default.").

[143](#) See Civil Act [Kor. Civ. Act.] art. 397(1) (S. Korea), translated in *3 Statutes of the Republic of Korea* 69 (Korea Legis. Res. Inst. ed., 1997). Responsibility for delay in performance begins on the specified due date. See Kor. Civ. Act art. 387(1) (S. Korea). If no time for performance has been specified, responsibility for delay commences when performance is demanded. See Kor. Civ. Act art. 387(2) (S. Korea). One may only claim compensation for ordinary damages or for damages arising from special circumstances if they were foreseen or foreseeable. See Kor. Civ. Act art. 393 (S. Korea) ("(1) The compensation for damages arising from the non-performance of an obligation shall be limited to ordinary damages. (2) The obligor is responsible for reparation for damages that have arisen through special circumstances, only if he had foreseen or could have foreseen such circumstances.").

[144](#) See Commercial Act [Kor. Comm. Act] art. 54 (S. Korea), translated in *4 Statutes of the Republic of Korea* 12 (Korea Legis. Res. Inst. ed., 1997).

[145](#) See Kor. Civ. Act art. 379 (S. Korea).

[146](#) See Kor. Civ. Act art. 397(1) (S. Korea).

[147](#) Code of Civil Procedure [India Code Civ. Proc.] art. 34(1) (India).

[148](#) Interest Act, 1978, § 3(1) (India). Interest runs from the date when the debt is payable if the debt is payable by virtue of a written instrument and at a certain time. See *id.* § 3(1)(a). Otherwise, interest will run from the date of written notice that interest will be claimed by the creditor to the debtor. See *id.* § 3(1)(b). The "current rate of interest" is the highest rate at which interest may be paid on certain classes of deposits by certain classes of banks under the Banking Regulation Act. See *id.* § 2(b).

[149](#) See *id.* § 3(3)(c).

[150](#) See *Renusagar Power Co. v. Gen. Elec. Co.* (1993) Supp. 3 S.C.R. 87-88; see also *Indian Supreme Court Upholds ICC Award to General Electric*, Int'l Arb. Rep., Nov. 1993, at 3, 4. In that case, General Electric entered into a contract to sell Renusagar equipment and power services for the erection of a thermal power plant. Under the agreement, promissory notes were to bear interest on outstanding principal, subject to certain government tax exemptions. A dispute arose over withheld taxes, and an arbitral panel ruled that Renusagar had wrongfully withheld approximately \$2.13 million. The panel determined the amount of compensatory damages owed by applying the average prime rate in the United States during the relevant period to the amounts withheld, compounded annually. The panel stated "[c]ompounding is essential in computing compensatory damages, because the Claimant would have had to pay compound interest if it had replaced the improperly withheld funds by borrowing." *Id.* at 3-4.

[151](#) See *Renusagar Power Co.*, (1993) Supp. 3 S.C.R. at 88.

[152](#) See Código Civil para el Distrito Federal [C.C.D.F.] art. 2104 (Mex.), translated in *Mexican Civil and Commercial Codes* 481 (Abraham Eckstein & Enrique Zepeda trans., 1995). Liability begins on the due date if the obligation is due at a specified date. C.C.D.F. art. 2104(I) (Mex.). However, if no due date is specified and the obligation is for the payment of money, the creditor may demand performance after giving thirty days notice. If the obligation is for the performance of an act, it must be performed on

demand, "as long as sufficient time has elapsed." C.C.D.F. art. 2080 (Mex.). "Damages and losses must be a direct and immediate consequence of the failure to comply with the obligation." C.C.D.F. art. 2110 (Mex.). "No one shall be held liable for a fortuitous event, unless caused or contributed to by him, or expressly assumed or imposed by law." C.C.D.F. art. 2111 (Mex.).

[153](#) See C.C.D.F. art. 2117 (Mex.).

[154](#) C.C.D.F. art. 2296 (Mex.).

[155](#) See Código de Comercio [Cód.Com.] art. 362 (Mex.), *translated in* Mexican Civil and Commercial Codes 773 (Abraham Eckstein & Enrique Zepeda trans., 1995).

[156](#) See Cód.Com. art. 363 (Mex.). Consequences of delay begin, in circumstances where no due date is specified, from the day the creditor demands payment. See Cód.Com. art. 85(II) (Mex.). However, the creditor may not actually pursue payment until thirty days after a demand has been made. Cód.Com. art. 360 (Mex.).

[157](#) Código Civil [Cód. Civ.] art. 513 (Arg.), *translated in* Civil Code of Argentina 83 (Julio Romanach, Jr. trans., 2001). Under Argentine law, a fortuitous event is defined as "one which could not have been foreseen, or which, having been foreseen, could not have been avoided." Cód. Civ. art. 514 (Arg.). In the absence of an agreed upon date, default commences upon the receipt of a judicial or extrajudicial demand. Cód. Civ. art. 509 (Arg.).

[158](#) Cód. Civ. art. 621 (Arg.).

[159](#) Cód. Civ. art. 622 (Arg.).

[160](#) Cód. Civ. art. 623 (Arg.).

[161](#) Cód. Civ. art. 1420 (Arg.) ("When the thing sold is a movable, and the vendor does not make tradition thereof, the purchaser, if he has already paid the price in whole or in part, or has purchased on credit, has the right ... to dissolve the contract, and demand the return of whatever he may have paid, with interest on account of the delay and indemnity for damages"), Cód. Civ. art.1429 (Arg.) ("If the purchaser does not pay the price of a movable thing sold on credit, the vendor shall ... be entitled to recover interest on account of a delay....").

[162](#) Código de Comercio [Cód. Com.], *translated in* Commercial Laws of the World: Argentina (1998).

[163](#) Cód. Com. art. 560 (Arg.).

[164](#) Cód. Com. art. 565 (Arg.).

[165](#) *Id.* The Commercial Code further provides "[w]henever local interest or current interest is spoken of in the law or in an agreement, the interest which the National Bank obtains is meant." *Id.*

[166](#) Cód. Com. art. 569 (Arg.).

[167](#) Federal Court Act, R.S.C., ch. 8, § 36(1) (1990) (Can.).

[168](#) *Id.* § 36(2).

[169](#) *Id.* § 36(4)(f).

[170](#) See Courts of Justice Act, R.S.O., ch. C.43, § 128(1) (1990) (Can.) ("A person who is entitled to an order for the payment of money is entitled to claim and have included in the order an award of interest thereon at the prejudgment interest rate, calculated from the date the cause of action arose to the date of the order."); Court Order Interest Act, R.S.B.C. ch. 79, pt. 1, § 1(1) (1996) (Can.) ("[A] court must add to a pecuniary judgment an amount of interest calculated on the amount ordered to be paid at a rate the court considers appropriate in the circumstances from the date on which the cause of action arose to the date of the order."); The Pre-judgment Interest Act, S.S., ch. P-22.2 § 5(1) (1985) (Can.) ("The court shall award interest on a judgment for damages or for the recovery of a debt calculated in accordance with this Act."); Court of Queen's Bench Act, R.S.M. ch. C280, pt. XIV, § 80(1) (1993) (Can.) ("Subject to sections 81 and 82, an order [of the court for the payment of money or an order that money is owing] shall include an award of interest at the prejudgment rate on the principle sum calculated, (a) where the order is made on a liquidated claim, from the date the cause of action arose to the date the order is made; and (b) where the order is made on an unliquidated claim, from the date the successful party gives written notice of the claim to the party liable for payment to the date the order is made."); Judgment Interest Act, R.S.A., ch. J-1, § 2(1) (2000) (Can.) ("Where a person obtains a judgment for the payment of money or a judgment that money is owing, the court shall award interest in accordance with this Part from the date the cause of action arose to the date of the judgment.").

[171](#) See, e.g., Court of Justice Act, R.S.O., ch. C.43, § 28(4)(b); Court Order Interest Act, R.S.B.C. ch. 79, § 1(2)(c); The Pre-judgment Interest Act, S.S. ch. P-22.2 § 5(2)(b); Judgment Interest Act, R.S.A., ch. J-1, § 2(2)(b). The Court of Queen's Bench Act, R.S.M. ch. C 280, pt. XIV, does not appear to prohibit interest upon interest. Although the act is silent on whether compound or simple interest can be awarded, "[t]he normal practice in the Manitoba courts is to calculate simple interest rather than compound interest." *Provincial Drywall Supply Ltd. v. Toronto Dominion Bank*, [2002] W.W.R. 74-75 (Can.).

[172](#) See, e.g., Courts of Justice Act R.S.O. ch. C.43, § 28(4)(1)(g); Prejudgment Interest Act, S.S. 1986, ch. P-22.2, § 5(2)(1); Court of Queen's Bench Act, R.S.M. ch. C280, pt. XIV, § 82(c); Judgment Interest

Act, R.S.A., ch. J-1, § 2(2)(1). The Court Order Interest Act, R.S.B.C. ch. 79, pt. 1, § 2(c), does not appear to have a similar exception.

173 See, e.g., *Bank of Am. Can. v. Mut. Trust Co.*, [2000] 184 D.L.R. (4th) 1,10 (Ont. Ct. App.) (Can.) (stating that although the Court of Justice Act did prohibit compound interest, power to award compound interest arose from court's equitable jurisdiction and was therefore "payable by right other than [§ 128 of the Act]"); *Bank of Am. Can. v. Clarica Trust Co.*, [2002] 211 D.L.R. (4th) 385, 397 (Can.) (reinstating award of compound interest under equitable principles); *Villa Verde L.M. Masonry Ltd. v. Pier One Masonry Inc.*, No. 93-CQ-38804, at *7, [2000] A.C.W.S.J. LEXIS 53970 (awarding compound interest under equitable principles).

174 See, e.g., *Bank of Am. Can. v. Mut. Trust Co.*, [2000], 184 D.L.R. (4th) 1, 13 (Can.) ("Hence I think the general equitable jurisdiction of the court to award compound interest extends to a successful claim and restitution for the return of monies from a party who has retained them knowing that to be wrongful."); *K.L.B. et. al v. The Queen in Right of British Columbia*, [2001] 197 D.L.R. (4th) 431 (Can.) (reversing award of compound interest but stating that compound interest can be awarded in cases where money is misused by executor or trustee or anyone else in fiduciary position who has misapplied money and made wrongful beneficial use of it); *Costello v. Calgary*, [1997] 152 D.L.R. (4th) 453, 496 (Can.) (awarding simple interest because claim did not meet requirements for jurisdiction to award compound interest under equitable principles).

175 See, e.g., *Clarica Trust Co.*, [2002] 211 D.L.R. (4th) at 399-400 (Can.) ("Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.") (quoting *Hadley v. Baxendale*, 156 Eng. Rep. 145, 151 (Ex. 1854)); *Costello*, 152 D.L.R. (4th) at 490 ("Compound interest is available under the common law in certain cases, including ... 'special circumstances.'"); see also *Leddicote v. Nova Scotia*, No. CA170962, 2002 A.C.W.S.J. LEXIS 1257, 63 (N.S. Ct. App.) (Can.).

176 Civil Code Quebec, ch. C.64, § 1620 (1991) (Can.), translation available at <http://www.tldb.com>.

177 See Section 1961 of Title 28 of the United States Code provides for the payment of monetary interest in civil cases brought in federal courts. See 28 U.S.C. § 1961 (2000) ("Interest shall be paid on any money judgment in a civil case recovered in a district court."); see also *Jarvis v. Johnson*, 668 F.2d 740, 741 n.1 (3d Cir. 1982) (stating that § 1961 makes no provision for prejudgment interest); *accord* *La. & Ark. Ry. Co. v. Export Drum Co.*, 359 F.2d 311, 317 (5th Cir. 1966). Federal courts, however, have generally held that district judges have broad discretion in deciding whether to award compensatory interest. See *Fort Hill Builders, Inc. v. Nat'l Grange Mut. Ins. Co.*, 866 F.2d 11, 14-15 (1st Cir. 1989); *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 752 (8th Cir. 1986); *In re Arbitration Between Waterside Ocean Navigation Co. & Int'l Navigation Ltd.*, 737 F.2d 150, 153 (2d Cir. 1984); *Nat'l Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 821 (D. Del. 1990); *In re Arbitration Between Reefer Express Lines Pty. Ltd. & Gen. Auth. for Supply Commodities*, 714 F. Supp. 699, 699 (S.D.N.Y. 1989); *Larsen v. A.C. Carpenter, Inc.*, 620 F.Supp. 1084, 1125 (E.D.N.Y. 1985), *aff'd*, 800 F.2d 1128 (2d Cir. 1986).

178 See Anthony E. Rothschild, Comment, *Prejudgment Interest: Survey and Suggestion*, 77 Nw. U. L. Rev. 192, 193 n.6 (1982) (citing state statutes providing for payment of prejudgment interest). For a discussion of the practice of awarding interest in the United States, see generally Richard T. Apel, Comment, *Interest as Damages in California*, 5 UCLA L. Rev. 262 (1958); Knoll, *supra* note 21, at 302; Sergesketter, *supra* note 22; Joel A. Williams, Comment, *Prejudgment Interest: An Element of Damages Not To Be Overlooked*, 8 Cumb. L. Rev. 521 (1977).

179 See, e.g., *Bogosian v. Woloohojian*, 158 F.3d 1,8 (1st Cir. 1998) (noting that Rhode Island law does not generally allow an award of compound interest); *Allen & O'Hara, Inc. v. Barrett Wrecking, Inc.*, 964 F.2d 694, 696 (7th Cir. 1992) (stating that prejudgment interest in diversity action should not have been calculated on a compound basis because, under Wisconsin law, simple interest is used in contract cases unless the contract specifies otherwise); *Ryan v. Tad's Enters., Inc.*, 709 A.2d 682, 705 (Del. Ch. 1996) (stating that the normal practice is to calculate prejudgment interest awarded at the statutory rate as simple interest); *Weinberger v. UOP, Inc.*, 517 A.2d 653, 657 (Del. Ch. 1986) (ruling that Section 2301 of Delaware Code, which provides for payment of interest at a rate of five percent greater than Federal Reserve discount rate, is to be calculated as simple interest); *Coggan v. Coggan*, 183 So. 2d 839, 841 (Fla. Dist. Ct. App. 1966) (holding that compound interest cannot be awarded); *Dezen v. Slatcoff*, 65 So. 2d 484, 485 (Fla. 1953) (holding that interest on twenty-year-old foreign judgment should be calculated as simple rather than yearly compound interest); *D'Annolfo v. D'Annolfo Constr. Co.*, 654 N.E.2d 82, 85 (Mass. App. Ct. 1995) (holding that prejudgment interest on a promissory note not expressly providing for compound interest bears simple interest because "[w]ithout express agreement interest is not due on overdue interest"); *Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 532-33 (Tex. 1998) (holding that, in Texas, awards of prejudgment interest not governed by statute are to be calculated as simple interest); see also *Tex. Fin. Code Ann. §§ 304.101-08* (Vernon 1998) (providing that in wrongful death, personal injury and property damage cases, prejudgment interest awards are to be calculated only as simple interest). *But see* *Stovall v. Ill. Cent. Gulf R.R. Co.*, 722 F.2d 190, 191 (5th Cir. 1984) (ruling in a diversity action that prejudgment interest accrued at the legal rate of interest, which was specified by § 75-17-1(1) of the Mississippi Code as "six percent (6%) per annum, calculated according to the actuarial method," which meant that such interest was to be compounded annually. The rate is now eight percent per Miss. Code Ann. §75-17-1(1) (2000)); *Moeller v. Am. Guar. & Liab. Ins.*, 812 So. 2d 953, 959 (Miss. 2002) (same).

[180](#) *Steein v. Kalvin-Miller Int'l, Inc.*, 139 F. Supp. 2d 469, 486 (S.D.N.Y. 2001) (“Under New York law, prejudgment interest is calculated on a simple interest basis.”); *Levine v. U.N. Cleaners*, 167 N.Y.S.2d 801, 802 (App. Div. 1957) (“The general rule is that interest should not be compounded.”); *State v. Day*, 173 P.2d 399, 410 (Cal. Dist. Ct. App. 1946) (“The general rule is that interest may not be computed on accrued interest unless by special statutory provision, or by stipulation of the parties, and in the latter event the amount may not be fixed in conflict with statutory provisions.”); *Robertson v. Dodson*, 129 P.2d 726, 728 (Cal. Dist. Ct. App. 1942) (“[T]he compounding of interest has never been looked upon with favor in this state.”).

[181](#) See *Young v. Hill*, 67 N.Y. 162, 167 (1876) (“The exacting or reserving of compound interest has not met with favor in the courts, but the right to retain it when voluntarily paid is not disputed, and a recovery of it upon express contract, made after the interest has accrued and upon a sufficient consideration, is allowed.”); *Rourke v. Fred H. Thomas Assocs.*, 627 N.Y.S.2d 831, 832 (App. Div. 1995) (“It is established law that ‘in the absence of an express agreement for either compound interest or interest on interest, or statutory authority, such interest is not recoverable.’”) (quoting 72 N.Y. Jur. 2d, *Interest and Usury* § 12 (1995)); *In re Schuster’s Will*, 3 N.Y.S.2d 702, 704 (Sur. Ct. 1938) (stating that compound interest is not allowed “in the absence of an express contract or statutory authority”).

[182](#) See *Litchfield v. Bank of N.Y.*, No. 99-97-B, 2000 WL 1449843, at *1 (D. Me. Aug. 8, 2000) (noting that under New York law, “an award of compound interest against a fiduciary is usually reserved for cases involving egregious breaches of trust.”); *Wilson v. Great Am. Indus., Inc.*, 763 F. Supp. 688, 691 (N.D.N.Y. 1991), *aff’d in part and rev’d in part on other grounds*, 979 F.2d 924 (2d Cir. 1992) (finding that under New York law, upon a determination that defendants acted in bad faith, minority shareholders were entitled to compound post-judgment interest in their successful challenge against the legality of the joint proxy and prospectus issued in connection with the merger); *Brown v. Knapp*, 79 N.Y. 136, 145 (1879) (noting that “[c]ompound interest at some rate is sometimes allowed against trustees who have been guilty of bad faith or some other wrong to the beneficiaries of the trust”); *In re Revson*, 447 N.Y.S.2d 297, 302 (App. Div. 1982) (explaining that compound interest may be awarded in a case on trust where the trustee has acted in bad faith) (citing *Brown*, 79 N.Y. at 145)).

[183](#) See *Ferrellgas v. Am. Premier Underwriters, Inc.*, 79 F. Supp. 2d 1160, 1168 (C.D. Cal. 1999) (holding that plaintiffs in a breach of contract case were entitled to simple prejudgment interest absent statutory or contractual provision to the contrary); *Day*, 173 P.2d at 410; see also *Exxon Corp. v. Crosby-Miss. Res., Ltd.*, 40 F.3d 1474 (5th Cir. 1995) (awarding compound interest where parties agreed to its payment); *Texon Energy Corp. v. Dow Chem. Co.*, 733 S.W.2d 328, 331 (Tex. App. 1987) (same).

[184](#) See Cal. Civ. Code § 3288 (West 1997) (“In an action for the breach of an obligation not arising from contract, and in every case of oppression, fraud, or malice, interest may be given in the discretion of the jury.”); see also *Michelson v. Hamada*, 36 Cal. Rptr. 2d 343, 354 (Ct. App. 1994) (“When the jury is the trier of fact, it is the jury which is vested with discretion to award prejudgment interest under section 3288, including compound interest.”). *But cf.* *Westbrook v. Fairchild*, 9 Cal. Rptr. 2d 277, 279 (Ct. App. 1992) (holding that the jury does not have discretion to compound post-judgment interest awards).

[185](#) See *Baker v. Pratt*, 222 Cal. Rptr. 253, 261 (Ct. App. 1986) (holding that a jury may award compound prejudgment interest where fiduciary is guilty of positive misconduct or willful violation of duty). The *Baker* court noted:

When a trustee wilfully [sic] converts trust property to his own use, he is liable for interest, even though it may not have been prayed for in the complaint. The circumstances of the case determine whether the interest awarded is simple or compound. In cases of mere negligence, no more than [simple] interest is ever added to the loss or damage resulting therefrom, but if the trustee is guilty of some positive misconduct or wilful [sic] violation of duty, the court may award compound interest.

Id. (citing *Katz v. Enos*, 68 Cal. App. 2d 266, 278-79 (Ct. App. 1945)); see also *Piercy v. Piercy (In re Piercy’s Estate)*, 145 P. 91, 91-92 (Cal. 1914); *Wheeler v. Bolton*, 28 P. 558, 561-62 (Cal. 1891); *McNulty v. Copp*, 271 P.2d 90, 99-100 (Cal. Dist. Ct. App. 1954); *Douglas v. Westfall*, 248 P.2d 68, 72 (Cal. Dist. Ct. App. 1952); *West v. Stainback*, 240 P.2d 366, 374 (Cal. Dist. Ct. App. 1952).

[186](#) See *Charlip v. Lear Siegler, Inc.*, No. 5178, 1985 WL 11565, at *4 (Del. Ch. July 2, 1985). The court in *Charlip* explained:

“[W]hile the compounding of interest is a fact of life with which anyone dealing today with savings banks and similar institutions has experience, nevertheless, in law, it is not usually allowed.” The rule has thus evolved that, absent either a contract or express statutory provision authorizing compounding interest prior to judgment, only simple interest may be recovered.

Id. (quoting *Fox v. Kane-Miller Corp.*, 398 F. Supp. 609, 652 (D. Md. 1975)); see also *Devex Corp. v. Gen. Motors Corp.*, 569 F. Supp. 1354, 1368 (D. Del. 1983) (“What the plaintiffs actually seek is interest on interest, i.e., compound interest, which is not permitted under Delaware law.”); *Summa Corp. v. Trans World Airlines, Inc.*, 540 A.2d 403, 410 (Del. 1988) (“The Delaware courts have traditionally disfavored the practice of compounding interest”); *Weinberger*, 517 A.2d at 657 (“Although compound interest may be the type of interest generally obtained by investors, it is not generally favored in the law.”).

[187](#) See Del. Code Ann. tit. 8, § 262(i) (2001) (“The Court shall direct the payment of the fair value of the shares, together with interest, if any, by the surviving or resulting corporation to the stockholders entitled thereto. Interest may be simple or compound, as the Court may direct.”). Prior to the

amendment of this statute in 1987, Delaware courts deciding appraisal actions awarded only simple interest. See *Charlip*, 1985 WL 11565, at *4 (“The ability to receive compounded interest, and this Court’s ability to award compound interest, must also be statutorily based. Such authority is not found in § 262(h), which merely provides for ‘interest’ and does not expressly state that such interest may be compounded.”); see also *Onti, Inc. v. Integra Bank*, 751 A.2d 904, 927 (Del. Ch. 1999) (“Before the amendment of section 262(i) in 1987 ... this Court *only* had authority to award simple interest.”); *Grimes v. Vitalink Communications Corp.*, No. 12334, 1997 WL 538676, at *13 (Del. Ch. Aug. 28, 1997) (“Prior to the 1987 amendment of section 262(i), this Court held that it did not have authority to award compound interest.”), *aff’d*, 708 A.2d 630 (Del. 1998).

[188](#) See *Brandin v. Gottlieb*, 2000 WL 1005954, at *29 (Del. Ch. July 13, 2000) (justifying its compound interest award as being consistent with “market realities”); *Onti, Inc.*, 751 A.2d at 928 (remarking on a “new pattern” or “developing trend” of decisions awarding compound interest); *Grimes*, 1997 WL 538676, at *13 (stating that interest should be compounded monthly to “reflect the interval available to the petitioners had they the use of their funds as well as, if possible, the interval actually received by the corporation”).

[189](#) 751 A.2d at 929. In *Onti, Inc.*, the surviving corporation of a cash-out merger of several companies owning cancer treatment facilities brought an action for declaratory judgment that the price paid to minority shareholders was fair. The shareholders filed a counterclaim seeking appraisal of their shares and alleging unfair dealing and breach of contract. The Delaware Court of Chancery dismissed the breach of contract claim and, considering the unfair dealing claim, ultimately appraised the shares at a value greater than that offered by the corporation. The court awarded the shareholders the difference between the appraised price and the price paid by the corporation, with interest compounded monthly accruing from the date of the merger. See *id.* at 927.

[190](#) *Id.* at 926-27; see also *Brandin*, 2000 WL 1005954, at *29 (“In view of the market realities, [plaintiff]’s financial sophistication, [defendant]’s multiple breaches of duty, and the probability that [defendant] earned more than the legal rate of interest on the moneys he owes to [plaintiff], fairness dictates that the pre-judgment interest awarded to [plaintiff] be compounded.”). By contrast, the Texas Supreme Court, in ruling that awards of prejudgment interest should be computed as simple interest, stated that compound interest awards were often greater than what the plaintiff could have received by investing himself and thus it was not an accurate valuation of damages for loss of the use of money. See *Johnson & Higgins*, 962 S.W.2d at 532-33; see also Robert H. Pemberton, *A Guide to Recent Changes and New Challenges in Texas Prejudgment Interest Law*, 30 Tex. Tech L. Rev 71, 101 (1999).

[191](#) See *Brandin*, 2000 WL 1005954, at *29; *Grimes*, 1997 WL 538676, at *13; see also *Saulpaugh v. Monroe Cmty. Hosp.*, 4 F.3d 134, 145 (2d Cir. 1993); *Lexington Ins. Co. v. Abington Co.*, 621 F.Supp. 18, 22 (E.D. Pa. 1985).

[192](#) See *Le Beau v. M.G. Bancorporation*, No. CIV. A. 13414, 1998 WL 44993, at *12 (Del. Ch. Jan. 29, 1998); *Lomberk v. Lenox*, 19 Phila. Co. Rptr. 562, 580 (1989); see also *Wilson*, 979 F.2d at 690-91; *Allen Archery, Inc. v. Browning Mfg. Co.*, 898 F.2d 787, 789 (Fed. Cir. 1990); *Fishman v. Estate of Witz*, 807 F.2d 520, 556 (7th Cir. 1986); *ETS Gustave Brunet, S.A. v. M.V. “Nedlloyd Rosario,”* 929 F. Supp. 694, 714 (S.D.N.Y. 1996); *Todd Shipyards Corp. v. Turbine Serv., Inc.*, 592 F. Supp. 380, 384-85 (E.D. La. 1984).

[193](#) This result follows from the United States Supreme Court’s decision in *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (stating that “[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the State”).

[194](#) See U.S. Const. art. III § 2 (authorizing federal court jurisdiction for suits between citizens of different states); 28 U.S.C. § 1332 (2000) (“The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of \$75,000, exclusive of interest and costs, and is between ... citizens of different States.”)

[195](#) *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941) (holding that the federal district court in Delaware hearing a case interpreting a New York contract based on diversity jurisdiction must apply Delaware choice-of-law rules to determine which law governs the payment of prejudgment interest); see also, e.g., *Bogosian*, 158 F.3d at 8 (stating that in diversity cases, federal courts look to state law to resolve prejudgment interest issues and, applying Rhode Island law, simple, rather than compound, interest should have been awarded); *Allen & O’Hara*, 964 F.2d at 696 (stating that prejudgment interest in diversity action should not have been calculated on a compound basis because, under Wisconsin law, simple interest is used in contract cases unless the contract specifies otherwise); *Stovall*, 722 F.2d at 191 (ruling in diversity action that prejudgment interest accrued at the legal rate of interest, specified by Mississippi Code of 1972, § 75-17-1(1) as “six percent (6%) per annum, calculated according to the actuarial method,” which meant such interest was to be compounded annually); *Barry v. Atkinson*, No. 96 CIV 84436 PKL, 1999 WL 605422, at *9 (S.D.N.Y. Aug. 10, 1999) (stating that “[I]n diversity actions, the awarding of prejudgment interest is considered a substantive issue and is, therefore, governed by the law of the relevant state, in this case, New York” and that “New York’s generally applicable statutory rate of interest is 9% per annum, which accrues on a simple, rather than a compound, basis” (citing N.Y. C.P.L.R. § 5001(a) (1992)); *Teate v. Mut. Life Ins. Co. of N.Y.*, 965 F. Supp. 891, 894 (E.D. Tex. 1997) (stating that “[t]o calculate the applicable prejudgment interest, the court must apply the relevant Texas law[,]” which provides for simple interest of six percent per annum on all accounts and contracts ascertaining sum payable).

[196](#) See *Towerridge, Inc. v. T.A.O., Inc.*, 111 F.3d 758, 764 (10th Cir. 1997) (noting that where federal law is silent on prejudgment interest issues, “[i]t therefore seems appropriate to look to state law ‘as a matter of convenience and practicality’”) (quoting *United States ex. rel. Ga. Elec. Supply Co. v. U.S. Fidelity & Guar. Co.*, 656 F.2d 993, 997 (5th Cir. 1981)); *Smith v. Am. Int’l Life Assurance Co. of N.Y.*,

50 F.3d 956, 957 (11th Cir. 1995) ("[A]bsent a determination of the appropriate pre-judgment interest rate under [a federal statute] is a matter of federal law, federal courts often look to state law for guidance."); *Colon Velez v. Puerto Rico Marine Mgmt., Inc.*, 957 F.2d 933, 941 (1st Cir. 1992) (holding that where federal statute "is silent as to pre-judgment interest and the granting of pre-judgment interest falls under the equitable powers of the district court, the court may look to state law in setting the pre-judgment interest rate"); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 983-84 (5th Cir. 1991) (holding that in a federal question case where the relevant federal statute is silent regarding prejudgment interest, the court may look to state law for guidance). It should be noted that, in cases where jurisdiction is based on a federal question, the federal courts have ruled that the manner of resolving prejudgment interest issues is at their discretion and that they are not compelled to consult state law. See *Ford v. Uniroyal Pension Plan*, 154 F.3d 613, 619 (6th Cir. 1998) ("Because we conclude that the federal courts need not incorporate state law as the federal common law rule for the applicable prejudgment interest rate, we reaffirm our earlier decisions leaving the determination of the prejudgment interest rate within the sound discretion of the district court."); *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 225 (1st Cir. 1996) ("Although federal courts sometimes have looked to state rates for guidance, they have done so as a matter not of compulsion, but of discretion.") (internal citations omitted).

[197](#) See *Quesinberry v. Life Ins. Co. of N. Am.*, 987 F.2d 1017, 1030 (4th Cir. 1993) ("[A]bsent a statutory mandate the award of pre-judgment interest is discretionary with the trial court."); see also *Whitfield v. Lindemann*, 853 F.2d 1298, 1306 (5th Cir. 1988); *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir. 1984); *Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988, 990 (6th Cir. 1982).

[198](#) See *In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, 954 F.2d 1279, 1332 (7th Cir. 1992) ("[C]ompound prejudgment interest is the norm in federal litigation.") (citing *Gorenstein Enters., Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431 (7th Cir. 1989)).

[199](#) See, e.g., *Mentor Ins. Co. v. Brannkasse*, 996 F.2d 506, 520 (2d Cir. 1993) (awarding prejudgment interest compounded annually); *China Union Lines, Ltd. v. Am. Marine Underwriters, Inc.*, 755 F.2d 26, 30-31 (2d Cir. 1985) (awarding prejudgment interest compounded annually); *ECDC Envtl., L.C. v. N.Y. Marine & Gen. Ins. Co.*, No. 96 Civ. 6033 (BSJ), 1999 WL 777883, at *8 n.29 (S.D.N.Y. Sept. 29, 1999) (awarding prejudgment interest compounded monthly); *ETS Gustave Brunet*, 929 F. Supp. at 714 (awarding prejudgment interest compounded annually). More than one court deciding a case in admiralty has reasoned that compound interest is appropriate because prejudgment interest "should be measured by interest on short-term risk-free obligations." *ETS Gustave Brunet*, 929 F. Supp. at 714 (quoting *Indep. Bulk Transp., Inc. v. Vessel "Morania Abaco"*, 676 F.2d 23, 27 (2d Cir. 1982)); see also *Ingersoll Milling Mach. Co. v. M/V Bodena*, 829 F.2d 293, 311 (2d Cir. 1987); *Int'l Ore & Fertilizer Corp. v. SGS Control Servs., Inc.*, 828 F. Supp. 1098, 1104-05 (S.D.N.Y. 1993), *aff'd*, 38 F.3d 1279 (2d Cir. 1994); *Nittetsu Shoji Am., Inc. v. M.V. "Crystal King"*, No. 90 Civ. 2082 (KMW) 1992 WL 116430, at *13 (S.D.N.Y. May 21, 1992); *M. Prusman Ltd. v. M/V Nathaniel*, 684 F. Supp. 372, 374 (S.D.N.Y. 1988).

[200](#) See *Sands v. Runyon*, 28 F.3d 1323, 1328 (2d Cir. 1994) (awarding compound prejudgment interest on back pay in a successful employment discrimination suit). The *Sands* court noted that prejudgment interest on back pay should be calculated as compound interest to compensate plaintiff for delay of final resolution through dilatory tactics and administrative lag. See *id.* In *Saulpaugh v. Monroe Cmty. Hospital*, the Second Circuit found that the district court's failure to award compound prejudgment interest on back pay was an abuse of discretion because without compounding interest plaintiff would not be made whole and defendant would enjoy an interest-free loan for the time it delayed paying back wages. See *Saulpaugh*, 4 F.3d at 145 ("Given that the purpose of back pay is to make the plaintiff whole, it can only be achieved if interest is compounded."). In *Merk v. Jewel Food Stores, Inc.*, the District Court for the Northern District of Illinois justified the annual compounding of prejudgment interest on back pay as being consistent with common practice in labor disputes. See *Merk v. Jewel Food Stores, Inc.*, 813 F. Supp. 1324, 1330-31 (N.D. Ill. 1992) (noting that the common practice in labor disputes is to compound interest not more often than annually).

[201](#) See *Allen Archery*, 898 F.2d at 789 (affirming an award of prejudgment interest based on the annualized yield of the three-month United States Treasury Bill, compounded quarterly, because such a bill represented the shortest term, risk-free investment available to ordinary investors); *Dynamics Corp. of Am. v. United States*, 766 F.2d 518, 520 (Fed. Cir. 1985) (reversing and remanding an award of simple prejudgment interest for the court to determine if compound interest was not more appropriate to compensate plaintiff fully); *Fromson v. W. Litho Plate & Supply Co.*, No. 82-0354C(6), 1989 WL 149268, at *9-10 (E.D. Mo. Dec. 6, 1989) ("[A]n award of compound rather than simple [prejudgment] interest assures that the patent owner is fully compensated."), *aff'd mem.*, 909 F.2d 1495 (Fed. Cir. 1990); *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 633 F. Supp. 1047, 1057 (D. Del. 1986) ("Daily compounding of prejudgment interest on a damages award for patent infringement ... will conform to commercial practice and provide the patent holder with adequate compensation for foregone royalty payments ..."); see also *Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 955 (Fed. Cir. 1997); *R.R. Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506, 1510 n.1 (Fed. Cir. 1984); *Schering Corp. v. Precision-Cosmet Co.*, 614 F. Supp. 1368, 1384 (D. Del. 1985). *But see Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1555 (Fed. Cir. 1995) (finding that the determination of whether to award simple or compound interest is within the discretion of district court and an award of simple interest was not an abuse of discretion); *Gyromat Corp. v. Champion Spark Plug Co.*, 735 F.2d 549, 557 (Fed. Cir. 1984) (recognizing the broad discretion of district court and declining to hold that prejudgment interest must be compounded as a matter of law); see also *Nickson Indus. v. Rol Mfg. Co.*, 847 F.2d 795, 801 n.2 (Fed. Cir. 1988); *Bio-Rad Labs., Inc. v. Nicolet Instrument Corp.*, 807 F.2d 964, 969 (Fed. Cir. 1986).

[202](#) See *Sun Studs, Inc. v. ATA Equip. Leasing, Inc.*, No. 78-114-RE, 1990 WL 293886, at * 4 (D. Or. Sept. 19, 1990); *Colunga v. Young*, 722 F. Supp. 1479, 1488 (W.D. Mich. 1989); *Hughes Aircraft Co. v. United States*, 31 Fed. Cl. 481, 493 (1994); *ITT Corp. v. United States*, 17 Cl. Ct. 199, 242-43 (1989).

[203](#) *Amoco Cadiz*, 954 F.2d at 1331-32. *Amoco Cadiz* involved a consolidated appeal of cases arising from an oil spill caused by the grounding of a supertanker off the coast of Brittany. Deciding numerous issues involving jurisdiction, liability, and damages in claims by and against parties of several nations, the United States Court of Appeals for the Seventh Circuit affirmed the trial court's award of compound interest on damages owed to French claimants. The court found that interest accruing on damages awarded pursuant to English law, however, was to be calculated as simple interest because English law did not allow for compound interest. See *id.*

[204](#) *Id.*

[205](#) See *McKesson Corp. v. Iran*, 116 F. Supp. 2d 13, 41 (D.D.C. 2000) (holding that compound interest should not be awarded). In this case, Iran, acting through its agents, withheld dividends during a two-year period. See *id.* at 21 (discussing plaintiff's claims and the procedural history of case). Consequently, the shareholder's interest in the dairy was expropriated. See *id.* at 38-41.

[206](#) See *id.* at 41 (finding that generally only simple interest is awarded under customary international law) (citations omitted).

[207](#) *Id.* Shortly after the district court's decision, an International Centre for Settlement of Investment Disputes (ICSID) tribunal stated that compound interest is not excluded under international law and that "[n]o uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case." *Compania del Desarrollo de Santa Elena v. Costa Rica*, 15 ICSID (W. Bank) 169, 202 ¶ 103 (2000). As a result of the ICSID tribunal's decision in *Santa Elena*, the *McKesson* plaintiff moved for reconsideration. The district court again refused to grant compound interest, finding that "even if customary international law authorizes an award of compound interest at the discretion of the awarding body, . . . the almost uniform practice of awarding only simple interest is a relevant and compelling consideration in the exercise of that discretion." *McKesson Corp.*, 116 F. Supp. 2d at 49. The district court stated that it was unclear whether the *Santa Elena* interpretation of international law was correct. See *id.* at 45.

[208](#) See *McKesson HBOC, Inc. v. Iran*, 271 F.3d 1101, 1112 (D.C. Cir. 2001) (stating that customary international law does not require simple interest awards, although it favors them).

[209](#) *Id.* (quoting James Crawford, *Third Report on State Responsibility Submitted to the International Law Commission of the United Nations*, 2 Y.B.I.L.C. 50 (2000)).

[210](#) See *McKesson HBOC*, 271 F.3d at 1112 (reviewing a motion for reconsideration under the abuse of discretion standard and finding that the district court did not abuse its discretion).

[211](#) See, e.g., *Employers Ins. of Wausau v. Banco Seguros del Estado*, 34 F. Supp. 2d 1115 (E.D. Wis. 1999) (confirming an arbitral award including compound interest); *Int'l Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera Industrial y Comercial*, 745 F. Supp. 172 (S.D.N.Y. 1990) (confirming an arbitral award including compound interest after finding that such award was not penal in nature). *But see* *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F.Supp. 1063, 1069 (N.D. Ga. 1980) (refusing to increase the interest rate by five percent two months after judgment pursuant to applicable French law because doing so would be penal rather than compensatory). For cases enforcing arbitral awards of interest under foreign law, see *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141 (4th Cir. 1993); *Sun Ship, Inc. v. Matson Navigation Co.*, 785 F.2d 59 (3d Cir. 1986); *Am. Constr. Mach. & Equip. Corp. v. Mechanised Constr. of Pak., Ltd.*, 659 F. Supp. 426 (S.D.N.Y. 1987), *aff'd* 828 F.2d 117 (2d Cir. 1987); *Brandeis Intsel Ltd. v. Calabrian Chem. Corp.*, 656 F. Supp. 160 (S.D.N.Y. 1987). Federal courts have also awarded compound post-award, prejudgment interest on foreign arbitral decisions not otherwise providing for such interest. See *Al Haddad Bros. Enter., Inc. v. M/S Agapi*, 635 F. Supp. 205, 210 (D. Del. 1986) ("Federal courts have the power to grant such post-award, pre-judgment interest when enforcement of foreign arbitral awards is sought.").

[212](#) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention] (codified at 22 U.S.C. §§ 201-209 (1998)). The New York Convention has been adopted by approximately ninety countries. For a discussion of the enforceability of arbitral awards under the Convention, see Peter D. Trooboff & Corinne A. Goldstein, *Foreign Arbitral Awards and the 1958 New York Convention: Experience to Date in U.S. Courts*, 17 Va. J. Int'l L. 469 (1977); Robert B. von Mehren, *The Enforcement of Arbitral Awards Under Conventions and United States Law*, 9 Yale J. World Pub. Ord. 343 (1983).

[213](#) New York Convention, *supra* note 212, art. V.

[214](#) See *Sun Ship*, 785 F.2d at 61-62; *Int'l Standard Elec. Corp.*, 745 F. Supp. at 182; *Gen. Elec. Co. v. Renuagar Power Co.*, Decision of Oct. 21, 1988 (Bombay H.C. 1988), 25 Y.B. Com. Arb. 465, 488-89 (1990).

[215](#) It should be noted, however, that the difference between awards of simple and compound interest may be *de minimis* if the time period in which interest accrues is of very short duration. For example, an award that accrues interest for three years at a rate of 5%, compounded yearly, will only be 0.66% greater than an award that accrues interest for the same period at a rate of 5% simple interest. The rate at which interest accrues, as well as the number of compounding periods, also could have an effect on the difference between an award of compound as opposed to simple interest. The size of the principal may also affect the significance of the difference between an award of simple and compound interest from a monetary standpoint (although it will not change the statistical difference).

[216](#) See C. civ. art. 1154 (Fr.); Minpō (Civil Code) art. 404 (Japan).

[217](#) See *ITT Corp.*, 17 Cl. Ct. at 242; *Hunter & Triebel*, *supra* note 80, at 18.

[218](#) See OR art. 314 (Switz.) translated in Simon L. Goren, The Swiss Federal Code of Obligations 69 (1987); *Hungerfords*, 84 A.L.R. at 119; *Wadsworth v. Lydall*, 1 W.L.R. 598, 602-603 (Eng. C.A., 1981); *Renusagar Power Co.* (1993) Supp. 3 S.C.R. at 88.

[219](#) See *Wallersteiner v. Moir*, [1975] Q.B. 373, 387-88 (Eng. C.A.); *Gen. Communications Ltd. v. Dev. Fin. Corp. of N.Z. Ltd.* [1990] 3 N.Z.L.R. 406.

[220](#) See Arbitration Act, 1996, c. 23, § 49 (Eng.); Arbitration Ordinance, ch. 341, § 2GH(1) (H.K.).

[221](#) See, e.g., *Anaconda-Iran Inc. v. Iran*, 18 Iran-U.S. Cl. Trib. Rep. 199, 233, 238-9 (1988) (awarding interest at the prime rate charged by Chase Manhattan National Bank plus two percent as indicated in the contract); *R.J. Reynolds Tobacco Co. v. Iran*, 7 Iran-U.S. Cl. Trib. Rep. 181, 191-92 (1984) (awarding interest at the rate stipulated in the contract, which was LIBOR plus two percent).

[222](#) See *Gotanda*, *supra* note 19, at 50. It should be noted that, in a few instances, the arbitral rules under which the parties agree to resolve their dispute may also provide the tribunal with the authority to award interest. See London Court of International Arbitration Rules, Clauses, & Costs art. 26.6 (1998) ("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 determines to be appropriate, without being bound by legal rates of interest imposed by any state court, 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."); World Intellectual Property Organization Arbitration Rules art. 60(b) (1994), *reprinted in* 20 Y.B. Com. Arb. 340, 361 (1995) ("The Tribunal may award simple or compound interest to be paid by a party on any sum awarded against that party. It shall be free to determine the interest at such rates as it considers to be appropriate, without being bound by the legal rate of interest, and shall be free to determine the period for which interest shall be paid.").

[223](#) See Gary B. Born, *International Commercial Arbitration in the United States* 905-66 (1994); Carlo Croff, *The Applicable Law in International Commercial Arbitration: Is It Still a Conflicts of Laws Problem?*, 16 Int'l Law. 613, 624-31 (1982); Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 Hastings Int'l & Comp. L. Rev. 235, 259-68 (1986); Steven J. Stein, *Drafting Effective Choice of Law Clauses*, 8 J. Int'l Arb. 69, 71-73 (Sept. 1991).

[224](#) See Andreas F. Lowenfeld, *The Two-Way Mirror: International Arbitration as Comparative Procedure*, 7 Mich. Y.B. Int'l Legal Stud. 163, 182 (1985); Stein, *supra* note 223, at 73.

[225](#) See, e.g., ARB/87/3 (AAPL v. Sri Lanka), ICSID (1990), *reprinted in* XVII Y.B. Com. Arb. 106, 141 (1992); *Phillips Petroleum Co. Iran v. Iran*, 21 Iran-U.S. Cl. Trib. Rep. 79, 161 (1989); *Parguin Private Joint Stock Co. v. United States*, 13 Iran-U.S. Cl. Trib. Rep. 262 at 268-69; Award No. 154 (322-154-3) (Iran-U.S. Cl. Trib. Oct. 28, 1987), *reprinted in* XIII Y.B. Com. Arb. 311, 314 (1988); *Am. Bell Int'l, Inc. v. Iran*, 12 Iran-U.S. Cl. Trib. Rep. 170, 229 (1986); *McCullough & Co. Inc. v. Ministry of Post*, 11 Iran-U.S. Cl. Trib. Rep. 3, 29 (1986).

[226](#) See *Whiteman*, *supra* note 4, at 1997 (citing cases); *Droit International Public V* § 242 (1983) (stating that arbitral tribunals generally do not award compound interest unless its payment has been agreed to by the parties).

[227](#) *R.J. Reynolds Tobacco Co. v. Iran*, 7 Iran-U.S. Cl. Trib. Rep. 181, 191 (1984) (quoting *Whiteman*, *supra* note 4, at 1997); see also *Starrett Hous. Corp. v. Iran*, 16 Iran-U.S. Cl. Trib. Rep. 199, 234-35 (1987) (stating that the tribunal has never awarded compound interest); *Anaconda-Iran v. Iran*, 13 Iran-U.S. Cl. Trib. Rep. 199, 234-35 (1986); *Sylvania Technical Sys., Inc. v. Iran*, 8 Iran-U.S. Cl. Trib. Rep. 298, 320 (1985) (stating that "the Tribunal has never awarded compound interest").

[228](#) See *Cargoport Transp., C.A., v. Siderurgica Del Orinoco, C.A.*, Soc'y Mar. Arb. No. 3701 at *9 (2001), *available at* LEXIS, Admiralty ("Although compounding of interest may be acceptable and practiced in certain areas, the SMA, under whose rules these proceedings were held, has not yet adopted this procedure."); *Sheridan Towing Co. Inc. v. E.C.D.C. Envtl., L.C.*, Soc'y Mar. Arb. No. 3569 at *18 (1999), *available at* LEXIS, Admiralty; *Blystad Shipping and Trading Inc. v. Global Petroleum Corp.*, Soc'y Mar. Arb. No. 3421 at *3-4 (1998), *available at* LEXIS, Admiralty; *Canpotex Shipping Servs. Ltd. v. Frit Indus. Inc.*, Soc'y Mar. Arb. No. 3282 at *7 (1996), *available at* LEXIS, Admiralty; *Ertol, S.A. v. Amoco Transp. Co.*, Soc'y Mar. Arb. No. 2985 at *4 (1993), *available at* LEXIS, Admiralty; *Atlantic Marine Agencies, Inc. v. Compagnie Marocaine de Navigation*, Soc'y Mar. Arb. No. 2736 at *5 (1990), *available at* LEXIS, Admiralty; *J. Laurutzen A/S v. Thyssen, Inc.*, Soc'y Mar. Arb. No. 2563 at *3 (1989), *available at* LEXIS, Admiralty; *Oy Nielsen Bulk Ab v. Bomar Resources Inc.*, Soc'y Mar. Arb. No. 2443 at *6 (1987), *available at* LEXIS, Admiralty; *Transocean Transp. Ltd. v. Chemoil Corp.*, Soc'y Mar. Arb. No. 2432 at *9 (1987), *available at* LEXIS, Admiralty; *Canadian Transp. Co. v. Belakis Shipping Co.*, Soc'y Mar. Arb. No. 1969 at *8 (1984), *available at* LEXIS, Admiralty; *Grand Bassa Tankers v. Tenneco, Inc.*, Soc'y Mar. Arb. No. 1656 *14 (1982), *available at* LEXIS, Admiralty ("The award of interest on Owner's damages is computed as simple interest. The Panel finds no basis for deviating from general practice in this respect."). In a few cases, the SMA panels have also ordered compound interest to accumulate when an award was not paid within thirty days. See *Pan Oceanic Mar., Inc. v. Hill Plenty and Gatewest Shipping Co.*, Soc'y Mar. Arb. No. 3678 (2001), *available at* LEXIS, Admiralty; *Asia N. Am. Eastbound Rate Agreement et al. v. Fireworks of Am.*, Soc'y Mar. Arb. No. 3511 at *3 (1999), *available at* LEXIS, Admiralty; *Ertol, S.A. v. Amoco Transp. Co.*, Soc'y Mar. Arb. No. 2985, *supra*; *Transamerican Steamship Corp. v. Riviana Int'l, Inc.*, Soc'y Mar. Arb. No. 2054 at *11 (1985), *available at* LEXIS, Admiralty.

[229](#) See *Petro Jamaica v. Ocean Logistics Co.*, Soc'y Mar. Arb., No. 3495 at *5 (1998), *available at* LEXIS, Admiralty; *August Trading Inc. v. Continental Grain Co.*, Soc'y Mar. Arb., No. 3552 at *3 (1999), *available at* LEXIS, Admiralty; *Spencer Boat Co., Inc. v. M/V One More Time*, Soc'y Mar. Arb., No. 3370 at *3-4 (1997); *Pelagos Corporation v. Ingenieria Subacuatica S.A.*, Soc'y Mar. Arb., No. 3164 at *3

(1995).

230 See *Universal Transp. Ltd. v. Republic of Angola*, Soc'y Mar. Arb. No. 3394 at *8 (1997); *Amoco Trading Int'l Ltd. v. Oswego Steamship Corp.*, Soc'y Mar. Arb. No. 1270 at *57 (1978).

231 See *Metalclad Corp. v. United Mexican States*, ARB (AF)/97/1, 26 Y.B. COM. ARB. 99, ¶ 131 (2001). This amount included interest.

232 *Id.* ¶ 128; see also North American Free Trade Agreement, Dec. 17, 1992, U.S. - Can. - Mex., art 1135(1), 32 I.L.M. 289, 646 (entered into force Jan. 1, 1994) [hereinafter "NAFTA"].

233 *Metalclad Corp.*, 26 Y.B. COM. ARB. ¶ 128.

234 See *Metalclad Corp. v. United Mexican States*, 89 B.C.L.R.3d 359, ¶¶ 136-36 (British Columbia S. Ct. 2001).

235 See ARB/97/7, 16 ICSID (W. Bank 2001) 1, available at http://www.worldbank.org/icsid/cases/emilio_AwardoftheTribunal.pdf. The claimant argued that this amounted to a breach of its obligations to protect investments under article 3(1) of the Argentine-Spain Bilateral Investment Treaty. See *id.* ¶ 83.

236 See *id.* ¶¶ 95-96.

237 *Id.*

238 See 15 ICSID (W. Bank) ¶ 96 (2000).

239 *Id.* ¶ 97.

240 See *d.* ¶¶ 100, 102 (citing Further Studies, *supra* note 8, at 380 and Gaetano Arangio-Ruiz, Special Rapporteur, *State Responsibility*, [1989] 2 Y.B. Int'l Comm'n 1, 29, U.N. Doc. A/CN.4/SER.A/1989/Add.1).

241 See *id.* ¶¶ 100-102. The tribunal cited *Fabiani's case* (Moore's Digest of International Laws 4878-4915 (1905)), the *Affaire des Chemins de Fer Zeltweg-Wolfsberg* (U.N. Reports of International Arbitral Awards, vol. 3, 1795, at 1808 (1934)) and *Kuwait v. Aminoil* (66 International Law Reports 518, 613 (1924)). *Id.* n.55. The tribunal also cited to decisions where the possibility of an award of compound interest was acknowledged but the circumstances were not appropriate in the particular situation. *Santa Elena*, 15 ICSID (W. Bank) ¶ 99. The tribunal cited Norwegian Shipowners' Claims (U.N. Reports of International Arbitral Awards, vol. 1, 307, at 341 (1922)), the observations of Max Huber in *Great Britain v. Spain* (Spanish Zone of Morocco) (U.N. Reports of International Arbitral Awards, vol. 2, 615, 650 (1924)).

242 See *Santa Elena*, 15 ICSID (W. Bank) ¶ 97.

243 See *id.*

244 See *id.* ¶¶ 105-07. The tribunal stated: "In other words, while simple interest tends to be awarded more frequently than compound, compound interest certainly is not unknown or excluded in international law. No uniform rule of law has emerged from the practice in international arbitration as regards the determination of whether compound or simple interest is appropriate in any given case. Rather, the determination of interest is a product of the exercise of judgment, taking into account all of the circumstances of the case at hand and especially considerations of fairness which must form part of the law to be applied by this Tribunal." *Id.* ¶ 103.

245 See *Wena Hotels Ltd. v. Arab Republic of Egypt*, 41 I.L.M. 896, 918-19 (2002).

246 See *id.* at 919. It appears that the tribunal based this award on the interest rates for long term government bonds in the host country during the relevant time period. See *id.* at n.289.

247 *Id.* at 919 (quoting Gotanda, *supra* note 19, at 61). The tribunal also noted that Professor F.A. Mann has written that "it is a fact of universal experience that those who have a surplus of funds normally invest them to earn compound interest. On the other hand, many are compelled to borrow from banks and therefore must pay compound interest. This applies, in particular to business people whose funds are frequently invested in brick and mortar, machinery and equipment, and whose working capital is obtained by way of loans or overdrafts from banks." *Wena Hotels Ltd.*, 41 I.L.M. at 919 n. 293 (quoting F.A. Mann, *Compound Interest as an Item of Damage in International Law*, 21 U.C. Davis L.J. 577, 585 (1988)).

248 See Case no. 1930, Final Award of Oct. 12 1999 (Hunter, arb.), 26 Y.B. Com. Arb. 181, 183 (2001).

249 See *id.* at 182-83.

250 See *supra* note 66 and accompanying text.

251 Article 119 of Book six of the Dutch Civil Code provides:

1. Compensation owed for delay in the payment of a sum of money consists of legal interest on that sum over the period that the debtor has been in default of payment.
2. At the end of every year, the amount on which legal interest is calculated is increased by the amount owed over that year.
3. Stipulated interest which is higher than that which would be owed pursuant to the preceding paragraphs applies instead of legal interest, after the debtor has come into default.

[252](#) See *Case No. 1930*, 26 Y.B. Com. Arb. at 182-83.

[253](#) See *Asian Agric. Prods., Ltd. v. Sri Lanka*, 6 ICSID (W.Bank) No. ARB/87/3 (June 27, 1990) ¶ 113; *McCullough & Co. Inc. v. Ministry of Post*, 11 Iran-U.S. Cl. Trib. Rep. 3, 26-31 (1986); see also Lillich, *supra* note 18, at 55.

[254](#) *McCullough & Co. Inc.*, 11 Iran-U.S. Cl. Trib. Rep. at 29.

[255](#) *Starrett Hous. Corp. v. Iran*, 16 Iran-U.S. Cl. Trib. Rep. 112, 252 (1987) (Holtzmann, J., dissenting); see also *Rees & Kirby Ltd. v. Swansea City Counsel*, 30 Building L.R. 1, 16 (1985) (stating in awarding compound interest that contractors, "like (I imagine) most building contracts, operated over the relevant period on the basis of a substantial overdraft at their bank, and their claim in respect of financing charges consists of a claim in respect of interest paid by them to the bank on the relevant amount during that period" and "[i]t is notorious that banks do themselves, when calculating interest on overdrafts, operate on the basis of period rests"); see also LAW COM No. 287, *supra* note 50, § 2.19, at 10-11 ("Commercial lenders usually include provisions for compound interest in their contracts. In fact, so common is this arrangement that the [English] courts have accepted that bankers are entitled to compound interest even in the absence of a specific contractual term, on the basis of an implied trade usage."). Some institutions charge only simple interest on business loans. See *Brigham & Houston*, *supra* note 32, at 675. However, loans that charge simple interest are typically short-term and of known duration. See *Knoll*, *supra* note 21, at 307; see also *supra* note 215 (noting that the difference between simple and compound interest is *de minimis* when the loan is of short duration). The problem of over-compensating a claimant in this circumstance could easily be avoided by requiring it to provide documents showing that it relied on third-party financing to operate and that such party charged compound interest. Even if the claimant cannot do so, that should not automatically preclude it from receiving compound interest for the reasons discussed *infra*.

[256](#) See Lawrence Lokken, *The Time Value of Money Rules*, 42 Tax L. Rev. 9, 10 (1986); see also *Knoll*, *supra* note 21, at 307 (noting that the payment of compound interest is consistent with common usage and commercial practices).

[257](#) See Peter Canellos & Edward Kleinbard, *The Miracle of Compound Interest: Interest Deferral and Discount After 1982*, 38 Tax L. Rev. 565 (1983).

[258](#) See *Gotanda*, *supra* note 19, at 59-61.

[259](#) See *Sergesketter*, *supra* note 22, at 255-57 (recognizing that "compounding can result in significant additional interest revenue, especially when sizeable principle is involved"). As noted, the difference between awards of simple and compound interest may be *de minimis* if the time period in which interest accrues is of very short duration. See *supra* note 215.

[260](#) See *Gov't of Kuwait v. Am. Indep. Oil Co.*, Mar. 24, 1982, 21 I.L.M 976, 1042.

[261](#) The arbitrator recognized a reasonable rate of interest to be seven and one half percent and also adjusted for inflation by adding another ten percent to the judgment. See *id.* at 1042.

[262](#) This difference equates to a fifteen percent change as compared to the total judgment and a thirty-three percent change when comparing to the difference in simple versus compound interest.

[263](#) See *Compania del Desarrollo de Santa Elena S.A. v. Costa Rica*, 15 ICSID (W.Bank) 169 (2000).

[264](#) The tribunal's decision did not provide the rate at which interest was compounded. Based on a principal of \$4.15 million, \$11.85 million in interest, a period of 22 years, and a semi-annual compounding period (as provided by Costa Rican law), the interest rate would be approximately 6.23%.

[265](#) The difference between awards of simple and compound interest is approximately \$6.1 million. Thus, the award of compound interest increased the total award by nearly 63%.

[266](#) See *Keir & Keir*, *supra* note 21, at 145 (stating that possibility of great accumulation by compounding is of some concern to courts since it will almost always result in judgments that exceed statutory rate of interest).

[267](#) *Anaconda-Iran, Inc. v. Iran*, 13 Iran-U.S. Cl. Trib. Rep. 199, 235 (1986).

[268](#) Further Studies, *supra* note 8, at 384-85.

[269](#) For example, a business engaged in transnational activities could invest the money in a short-term investment vehicle, such as a ninety-day Eurodollar deposit rate.

[270](#) See *Onti, Inc.*, 751 A.2d at 926-27 (recognizing that business persons seek to earn maximum amount of return on their money, which is usually achieved by compounding interest); Canellos & Kleinbard, *supra* note 257, at 556 (1983) (recognizing that financial accounting generally follows the compound interest model and in particular Accounting Principles Board Opinion 12, which authorizes the "interest method" for amortizing discounts and premiums on bonds).

[271](#) See Further Studies, *supra* note 8, at 384; *Onti, Inc.*, 751 A.2d at 926 (stating that only unsophisticated investors would invest at simple interest because even "passbook savings accounts" accrue compound interest daily).

[272](#) See *Brealey & Myers*, *supra* note 33, at 279.

[273](#) It is important to note that shareholders/investors have an interest in the business and, in effect, can be part of the business in this circumstance. Thus, paying the payee is effectively paying the business.

[274](#) Cf. Carl Loomis, *Warren Buffet on the Stock Market*, *Fortune*, Dec. 10, 2001, 80, 86-88 (“Well-managed industrial companies, do not as a rule, distribute to shareholders the whole of their earned profits. In good years, if not in all years, they retain a part of their profits and put them back in the business. Thus there is an element of compound interest operating in favor of a sound industrial investment.”).

[275](#) See Decision of the High Court of Bombay dated Oct. 21, 1988, *reprinted in* XV Y.B. Com. Arb. 465, 488 (1990); F.A. Mann, *On Interest, Compound Interest and Damages*, 101 L.Q. Rev. 30, 44 (1985); J. Gillis Wetter, *Interest as an Element of Damages in the Arbitral Process*, *Int'l Fin. L. Rev.*, Dec. 1986, at 22. Prohibiting awards of compound interest also would thwart one of the important goals of interest—to promote an efficient dispute resolution process. Awarding only simple interest would provide an incentive for the respondent to delay the resolution of the dispute because it likely would be unable to obtain a loan from a third party on a simple interest basis or it could place the money owed in an investment vehicle that would provide compound returns in excess of what it would have to pay in simple interest. See Keir & Keir, *supra* note 21, at 145; Knoll, *supra* note 21, at 308. Thus, if simple interest is awarded, the respondent has no incentive to pay the claim and settle the case. See Sergesketter, *supra* note 22, at 241. Compound interest would also protect expectation interests, thereby promoting efficiency. If the claimant could not receive compound interest and, thus, not be fully compensated for its losses in the event of a breach, it “might find it necessary to expend time and money to arrange other kinds of assurance, [such as] by investigating prospective contractors intensively or by securing expensive collateral, or by dealing only with persons inside the promisee’s intimate circle,” or by securing insurance. 3 Dobbs, *supra* note 11, § 12.2(1); see also Robert Cooter & Melvin Aron Eisenberg, *Damages for Breach of Contract*, 73 Cal. L. Rev. 1432, 1468 (1985) (stating that when expectation and reliance damages diverge, “expectation damages are preferable because they better assure that reliance will be compensated, better facilitate planning, provide better incentives for efficient performance, and precaution and provide no worse incentives for over-reliance); E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 Colum. L. Rev. 1145, 1147 (1970) (stating that the American legal system encourages parties to keep promises by protecting injured parties’ expectation interests—that is to put promisees in the position in which they would have been had promise been performed).

[276](#) See *McCullough & Co. Inc.*, 11 Iran-U.S. Cl. Trib. Rep. at 29. However, in order for interest to accrue, the amount in dispute generally must be liquidated or capable of being ascertained through computation of the data presented. See Whiteman, *supra* note 4, at 1991-92; Charles McCormick, *Damages* § 54, at 213-16 (1935); see also Dobbs, *supra* note 11 (“When the plaintiff’s underlying loss is liquidated or ascertainable, interest is awarded whether or not the plaintiff has realized any losses as a result of the delay in payment. For example, the plaintiff is not required to show that he had to borrow money and pay interest.”).

[277](#) See Christopher S. Gibson, *Awards & Other Decisions*, 9 Am. Rev. Int'l Arb. 181, 191 (1998) (stating that international arbitral tribunals may award compound interest when the party seeking interest shows that “[it] has actually paid compound interest to [its] bank – or would have received compound interest had [it] invested the principal amount claimed.”); see also *ITT Corp.*, 17 Cl. Ct. at 242 (stating that “compounding may only be appropriate if the record reflects facts and circumstances justifying its application”).

[278](#) See *supra* notes 36-220. In fact, in *Wena Hotels Ltd. v. Arab Republic of Egypt*, 41 I.L.M. 896, 191 (2002), the tribunal awarded interest at a rate of 9%, compounded quarterly, even though the claimant neither specified at what rate interest should be awarded nor whether the interest should be compound.

[279](#) See *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*, [1996] A.C. 669, 732 (H.L.). It also may be appropriate to award compound interest where a fiduciary acts in bad faith. See *China Everbright – IHD Pac. Ltd. v. Ch'ng Poh* [2002] HKEC 218 (H.K.); *Bank of Am. Can. v. Mut. Trust Co.*, [2000] 184 D.L.R. (4th) 1,13 (Ont. Ct. App.).

[280](#) See *Cód. Civ. art. 621 (Arg.)*; *C. civ. art. 1154 (Fr.)*; *C.c. art. 1283 (It.)*; *Minpō (Civil Code) art. 404 (Japan)*; *London, Chatham & Dover Ry. Co. v. S. E. Ry. Co.*, [1893] A.C. 429, 440 (H.L.); see also *Young v. Hill*, 67 N.Y. 162, 167 (1876).

[281](#) See, e.g., *Anaconda-Iran Inc. v. Iran*, 18 Iran-U.S. Cl. Trib. Rep. 199, 233, 238-9 (1988) (awarding interest at prime rate charged by Chase Manhattan National Bank plus two percent as indicated in the contract); *R.J. Reynolds Tobacco Co. v. Iran*, 7 Iran-U.S. Cl. Trib. Rep. 181, 192 (1984) (awarding interest at the rate stipulated in the contract of London Interbank Offered Rate (LIBOR) plus two percent) (“Under generally accepted principles of contract law, a contractually stipulated rate of interest is normally binding on the parties.”); Richard H. Kreindler, *Transnational Litigation: A Basic Primer* 292 (1998) (“When an action is based on contract, and interest at a stipulated rate has been provided for in the contract, the judgment will reflect that agreement unless it is usurious.”); Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration* 402 (3d ed. 1999) (advocating that if the terms for the payment of interest are set forth in the terms of the contract, tribunals should follow them “unless there is some provision in the law governing the arbitration (the *lex arbitri*) which forbids the award of interest”).

[282](#) Cf. Carlo Croff, *The Applicable Law in International Commercial Arbitration: Is It Still a Conflicts of Laws Problem?*, 16 Int'l Law. 613, 623 (1982); Vitek Danilowicz, *The Choice of Applicable Law in International Arbitration*, 9 Hastings Int'l & Comp. L. Rev. 235, 236-37 (1986).

[283](#) See *R.J. Reynolds Tobacco Co.*, 7 Iran-U.S. Cl. Trib. Rep. at 192 (“Under generally accepted principles of contract law, a contractually stipulated rate of interest is normally binding on the parties.”); *Transnational Litigation: A Practitioner’s Guide Intro-272* (John Fellas Gen. ed. 2002) (“Where an action is based on contract, and interest at a stipulated rate has been provided for in the contract, the judgment will reflect the agreement unless it is usurious.”); see also *supra* note 230 (citing cases).

[284](#) See *Petro Jamaica, Inc.*, Soc’y Mar. Arb., No. 3495 at *5, available at LEXIS, Admiralty.

[285](#) *Id.*

[286](#) See *id.*

[287](#) See *R.J. Reynolds Tobacco Co.*, 7 Iran-U.S. Cl. Trib. Rep. at 192 (quoting Whiteman, *supra* note 4, at 1981, 1990).

[288](#) See *Int’l Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera Industrial y Comercial*, 745 F. Supp. 172, 181 (S.D.N.Y. 1990); *Gen. Elec. Co.*, 25 Y.B. Com. Arb. at 489; Hunter & Triebel, *supra* note 84, at 19. A country adhering to *Shari’a* may refuse to enforce an award of interest, simple or compound, because it violates the country’s fundamental public policy against the payment of interest (*riba*). See Abdul Hamid El-Ahdab, *Enforcement of Arbitral Awards in the Arab Countries*, 11 Arb. Int’l 169, 173-74 (1995).

[289](#) See Further Studies, *supra* note 8, at 384 (recognizing that business people commonly have their funds “invested in brick and mortar, machinery and equipment, and whose working capital is obtained by way of loans or overdrafts from banks” and not necessarily from internal financing); see also Brigham & Houston, *supra* note 32, at 491 (stating that when business expands, it needs capital, and that capital can come from debt or equity).

[290](#) See Brigham & Houston, *supra* note 32, at 666 (stating that there are numerous sources of short term financing including accruals, accounts payable (trade credit), bank loans (lines of credit) and/or commercial paper).

[291](#) See Award of May 30, 1979 in Case Nos. 3099 and 3100, in *Collection of ICC Arbitral Awards 1974 – 1995* 67, 74 (1990); see also 1 Dobbs, *supra* note 11, § 3.6(2) n.12 (citing cases).

[292](#) See Kizer, *supra* note 21, at 1299-1300 (recognizing that some courts have awarded the plaintiff its actual borrowing cost, usually a loan or extension in corporation’s line of credit).

[293](#) See Brigham & Houston, *supra* note 32, at 491 (stating that businesses can finance with either debt or equity).

[294](#) To be entitled to such interest, claimant would need to produce the applicable loan documents or other similar financial records. See Kizer, *supra* note 21, at 1299-1300; see also R.F. Lanzillotti & A.K. Esquibel, *Measuring Damages in Commercial Litigation: Present Value of Lost Opportunities*, 5 J. Acct. Auditing & Fin. 125, 139 (1989) (recognizing that interest rate calculation should employ the claimant’s borrowing cost if it had to borrow to cover its loss).

[295](#) See Award of May 30, 1979 in ICC Case Nos. 3099 and 3100, *supra* note 291.

[296](#) See *id.* at 73.

[297](#) See *id.* at 75.

[298](#) See *id.*

[299](#) See C. civ. art. 1153 (Fr.); C.C. art. 1284 (It.); *Colunga*, 722 F. Supp. at 1488; *ITT Corp.*, 17 Cl. Ct. at 242; *Jad Int’l Pty. Ltd. v. Int’l Trucks Austl. Ltd.*, 50 F.C.R. 378, 391-92 (Austl. 1994); *Wadsworth v. Lydall*, 1 W.L.R. 598, 603 (Eng. C.A., 1981); 1 Dobbs, *supra* note 11, § 3.6(2) (“When the plaintiff has in fact incurred interest costs because of the defendant’s delay in paying the underlying obligation, the plaintiff may recover those costs as consequential damages, provided his proof meets the rules for recovery of consequential loss.”); Hunter & Triebel, *supra* note 84, at 18 (stating that in Germany, although compound interest is generally prohibited, it can be given where “claimant has actually paid compound interest to his bank”); Kreindler, *supra* note 280, at 292 (stating that “if a creditor can prove that it has actually paid a higher interest for a loan replacing the payment in dispute, then it may be able to claim such interest as damages”).

[300](#) See *Library of Cong. v. Shaw*, 478 U.S. 310, 315 n.2 (1986); McCormick, *supra* note 276, at 207-08.

[301](#) See Brealey & Myers, *supra* note 33, at 280 (stating that if a firm chooses to invest in project net, the present value of the project would have to be higher than the firm’s cost of capital or else the firm would not choose to invest in that project, and, even though it may be true that the firm might invest in a losing proposition to penetrate a market, the firm would still eventually have to exceed its opportunity cost of capital in long run or firm would not be profitable); Keir & Keir, *supra* note 21, at 147-49 (stating that opportunity costs vary from entity to entity and in each case courts should evaluate the various opportunity costs and choose from a range of rates).

[302](#) See Keir & Keir, *supra* note 21, at 146 (stating that “opportunity cost is the benefit that is forgone when resource is not used in its next best alternative”); see also Rothschild, *supra* note 178, at 192 (stating that “if a judgment, years after the fact, provides only the amount of damage sustained by the claimant at the time of the incident, the claimant will have lost the opportunity to invest the amount of the damages and to earn a return on that investment”).

[303](#) See Stephen Ross et al., *Fundamentals of Corporate Finance* 233-35, 402-12, 582-85 (1998) (recognizing that when funding a project, business will typically have to borrow capital or use its excess capital and, if it has temporary cash surpluses, it may invest the money in short term securities).

[304](#) See Brealey & Myers, *supra* note 33, at 279.

[305](#) The amount it would have received from investing the funds by either reinvesting in the company or paying the extra cash out as dividends.

[306](#) See Keir & Keir, *supra* note 21, at 48; see also Ross et al., *supra* note 303, at 62-63.

[307](#) See Ross et al., *supra* note 303, at 62-63. One commentator has argued that a claimant's opportunity cost is the same as the respondent's unsecured cost of borrowing. See Knoll, *supra* note 21, at 308-11. This commentator argues that because the lost capital was invested in the respondent's business, the return to the claimant should reflect the inherent risk of the investment in the respondent and the proper way to assess this risk is to use the respondent's cost of borrowing. See *id.* I disagree. The claimant should be awarded the amount of return adjusted for the risk it undertook by investing in the respondent's business if the claimant chose to make this investment voluntarily. However, where the respondent has breached its obligations and caused claimant to suffer a monetary loss, it seems more appropriate under the circumstances to consider that the claimant did not voluntarily agree to place its money in the respondent's business. To make the claimant whole, it should receive its lost opportunity cost, not the expected return of a forced investment.

[308](#) See generally *id.* at 350-51; see also Sergesketter, *supra* note 22, at 253 (stating that the opportunity cost method creates uncertainty and expense in settlement process because the parties must first establish past investment profiles before calculating realistic potential judgment awards).

[309](#) In general, this means that it must be proved with "reasonable certainty and meet the limitations imposed by the proximate cause and *Hadley v. Baxendale* rules." 1 Dobbs, *supra* note 11, § 3.6(2) n.11. For a discussion of how claiming interest as special damages falls within *Hadley v. Baxendale*, see *supra* notes 40-66 and accompanying text (discussing cases in England) and notes 109-24 and accompanying text (discussing the practice in Australia).

[310](#) See *supra* notes 259-65 and accompanying text (discussing cases).

[311](#) See Gotanda, *supra* note 19, at 55. My 1996 study of the approaches used to award interest found:

The various methods used by arbitral tribunals in awarding interest have led to inconsistent and arbitrary awards. In similar cases, arbitrators have reached different conclusions with respect to whether interest would be due for nonperformance. In addition, there has been no consensus as to the time from which interest is calculated. Arbitrators have awarded compensatory interest from, *inter alia*, the date of breach, the date when the debtor receives notification of default, and the date that the request for arbitration is filed. Rates at which interest accrues also have varied from 3% to 20%.

Id. One way to eliminate the unpredictability in the awarding of interest is to adopt a uniform approach. See *id.* at 55-62.

[312](#) See generally *id.* at 59-61.

[313](#) See *supra* notes 27-30 and accompanying text.

[314](#) See *supra* notes 211-215 and accompanying text.

[315](#) See V.V. Veeder, *London Court of International Arbitration, The New 1998 LCIA Rules*, art. 26.6, XXIII Y.B. Com. Arb. 366, 385 ¶ 26.6 (1998) ("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 determines to be appropriate, without being bound by legal rates of interest imposed by any state court, 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.").

[316](#) Am. Arbitration Ass'n, *International Arbitration Rules* art. 28.4 (Nov. 1, 2001), available at <http://adr.org/index2.1.jsp?JSPssid=15747> ("A monetary award shall be in the currency or currencies of the contract unless the tribunal considers another currency more appropriate, and 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.").

[317](#) Center for Public Resources Institute for Dispute Resolution Rules for Non-Administered Arbitration of International Disputes Rule 10.6, reprinted in XXVI Y.B. Com. Arb. 343, 353 (2001) ("A monetary award shall be in the currency or currencies of the contract unless the Tribunal considers another currency more appropriate, and 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.").

[318](#) World Intellectual Property Organization Arbitration Rules art. 60(b), *supra* note 222, at 361 ("The Tribunal may award simple or compound interest to be paid by a party on any sum awarded against that party. It shall be free to determine the interest at such rates as it considers to be appropriate, without being bound by legal rates of interest, and shall be free to determine the period for which the interest shall be paid.").

[319](#) See Hong Kong International Arbitration Centre, *Domestic Arbitration Rules* art. 20 (1993) ("Unless otherwise agreed by the parties, the Arbitrator may order that compound interest be paid."), available at

http://www.hkiac.org/pdf/e_domestic.pdf; Arbitration Rules of the Singapore International Arbitration Centre art. 28.5, *reprinted in* 23 Y.B. Com. Arb. 424, 437 (1998) ("The Tribunal may award simple or compound interest on any sum which is the subject of the reference at such rates as the Tribunal determines to be appropriate, in respect of any period which the Tribunal determines to be appropriate ending not later than the date upon which the award is complied with.").

320 See United Nations Commission on International Trade Law Arbitration Rules art. 32 (Apr. 28, 1976), *reprinted in* 15 I.L.M. 701, 713 (1976); See generally Int'l Chamber of Commerce, Rules of Arbitration (2d ed. 2002), *reprinted in* 22 Y.B. Com. Arb. 345 (1997), available at http://www.iccwbo.org/court/English/arbitration/pdf_documents/rules/rules_arb_English.pdf.

321 See, e.g., C. civ. art. 1154 (Fr.); BGB § 288(3), (4); C.c. art. 1224 (It.).

322 See *Hungerfords*, 84 A.L.R. at 119; *Bank of Am. Can. v. Clarica Trust Co.*, [2002] 211 D.L.R. (4th) 385, 399-400 (Can.); *Wadsworth v. Lydall*, 1 W.L.R. 598, 603 (Eng. C.A., 1981); *Trans Trust S.P.R.L. v. Danubian Trading Co.*, 2 Q.B. 297, 302-03 (Eng. C.A., 1952); *Dods v. Coopers Creek Vineyards Ltd.*, [1987] 1 N.Z.L.R. 530, 53-38.

323 See *Kreindler*, *supra* note 280, at 292; 1 *Dobbs*, *supra* note 11, § 3.6(2).

324 See *supra* notes 255-58 and accompanying text.

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