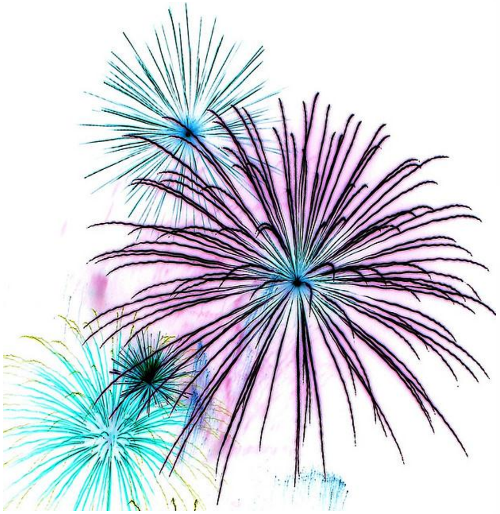
PRE- AND POST- AWARD INTEREST

INTERNATIONAL ARBITRATION'S "FORGOTTEN CHILDREN"

NOVEMBER 6, 2015

KIEV ARBITRATION DAYS 2015



PRE- AND POST- AWARD INTEREST

<u>INTERNATIONAL ARBITRATION'S FORGOTTEN CHILDREN</u>

<u>CONGRATULATIONS YOU ALMOST MADE IT!!!</u>

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V ARBITRATION DAYS 2015

PRE- AND POST - AWARD INTEREST: INTERNATIONAL ARBITRATION'S FORGOTTEN CHILDREN

Global Arbitration Review (GAR) meeting (May, 2015) it was noted that pre-award interest was considered "*a vastly under-pleaded area*".

It has been remarked during that the recent GAR discussion that the economics behind the choice of pre-award interest may not always well understood by Parties involved and The Tribunals.

LEAVING PRE-AWARD INTEREST TILL THE LAST MINUTE IS A BAD IDEA

Assumption: five years to obtain a damages award. interest is compounded annually.

- 2% pre-award interest rate on $100 million award = $110 million of damages
- 10% pre-award interest rate on $100 million award = $160 million of damages

What if the award is in the billions of Dollars?

FUNCTION OF PRE-AWARD INTEREST

- **Vivendi v. Argentina**

- "the object of an award of interest is to compensate the damage resulting from the fact that during the period of non-payment by the debtor, the creditor is deprived of the use and the disposition of that sum he was supposed to receive."

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- **LG&E v. Argentina**

- "interest is part of "full" reparation to which the claimants are entitled to assure that they are made whole."

- **Metalclad v. Mexico**:

- "interest should restore the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place."

FUNCTION OF PRE-AWARD INTEREST

- In summary, the amount of damages awarded is intended to put the claimant to the financial position it would have been in “but for” the Respondent’s actions.

- As part of damages pre-award interest also based on the notions of “appropriateness” and “fairness” and “equitable resolution”.

- Based on precedent, Tribunals are given quite a bit of leeway in deciding the appropriate rate of pre-and post award interest to apply.

QUESTION 1:

What pre-award interest rate is appropriate to apply? Is there an "ideal" methodology to apply that is the most appropriate in every case? Is there a methodology which should not be applied?

Approach #1: Pre-award interest to account for the time value of money (with a risk free rate)

Approach #2: Pre-award interest to account for the potential payment risks attached to the Respondent (and not receiving this amount from the Respondent) – "Coerced loan theory"

FOLLOW ON QUESTION

Approach #3:

- "The breach deprived the Claimant of the ability to undertake alternative investments, which would have generated returns, close to the high equity return actual achieved by the claimant on other activities. Respondents should provide compensation for such foregone investment returns."

- This is sometimes referred to as the "mirror approach" .

FOLLOW ON QUESTION

Approach #4:

- The application of Claimant’s borrowing rate as a rate of pre-award interest to compensate the Claimant for loans it had to take on because it did not have use of the award funds.

FOLLOW ON QUESTION

Approach #5:

- What about a risk free rate (LIBOR , US Treasury Bill, Euribor) + an “arbitrarily chosen” additional percentage added to the risk free rate base as a proxy for a “commercial rate of interest”?

- Is this an appropriate and/or defensible approach?

QUESTION 2

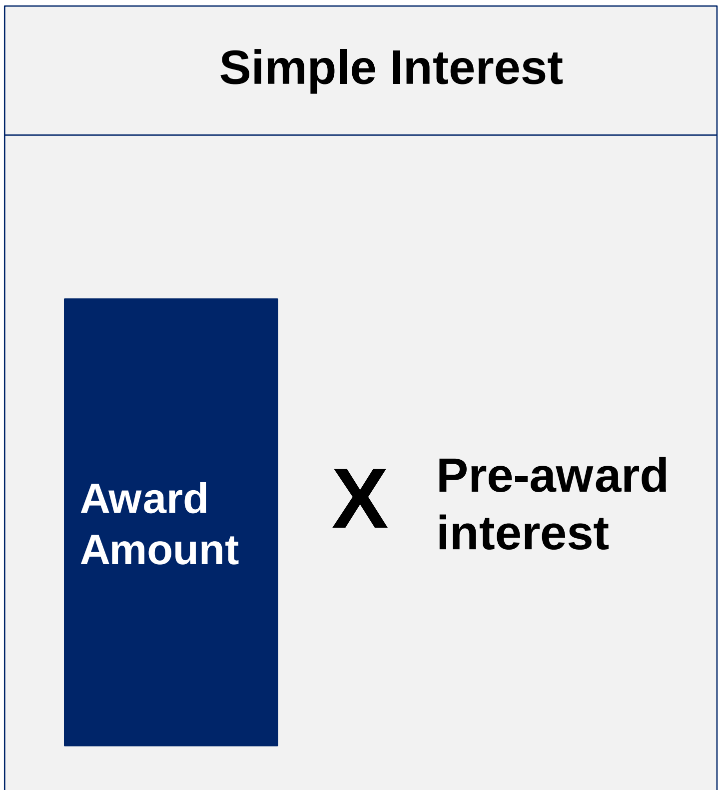
The generally agreed upon purpose of pre-award interest is to "*restore the Claimant to a reasonable approximation of the position in which it would have been if the wrongful act had not taken place*".

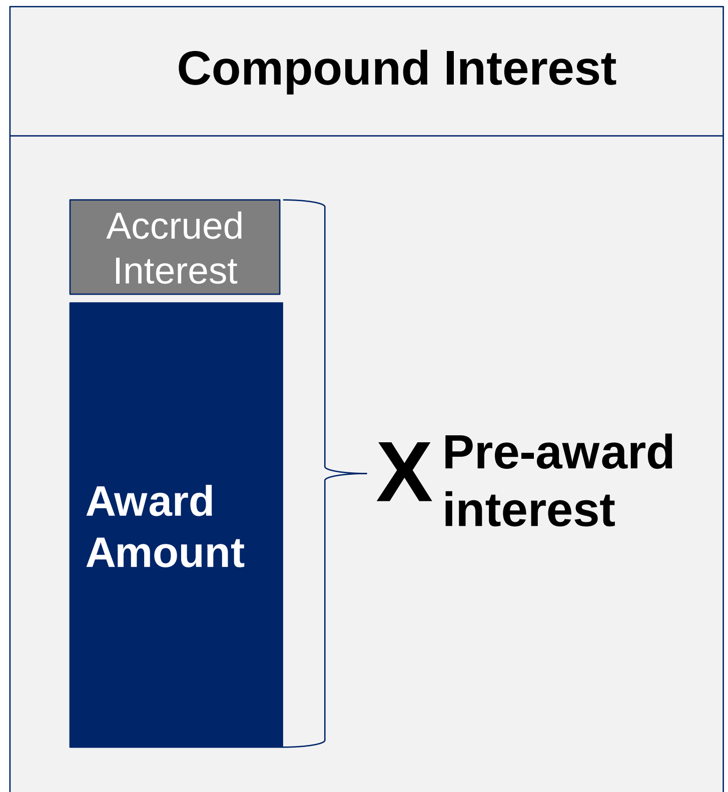
Even despite this, is there a punitive aspect of pre-award interest?

QUESTION 3

To compound or not to compound? That is the question.

Should interest be simple interest (i.e. applied only to the outstanding amount) or compound interest (applied to outstanding amount and accrued interest)?





QUESTION 4

Should the interest rate for post-award interest be different that pre-award interest?

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