CHAPTER 23

A UNIFORM, THREE-STEP APPROACH TO INTEREST RATES IN INTERNATIONAL ARBITRATION

[...]

(b) Arbitrators Can Grant a Commonly Used Commercial Rate for the Relevant Currency as Lex Mercatoria

The *lex mercatoria* is another route to a commonly used commercial rate for the relevant currency. Whatever its nature, the *lex mercatoria* seems to provide for the application of a commonly used commercial rate for the relevant currency. For example, Article 7.4.9(2) of the UNIDROIT Principles of International Commercial Contracts (2004) provides:

> The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place of payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In absence of such a rate at either place,

> the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

And Article 4.507(1) of the Lando Principles states:

> If payment of a sum of money is delayed, the aggrieved party is entitled to interest on that sum from the time when payment is due to the time of payment at the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is due.

So, if the *lex mercatoria* leads to the application of a commonly used commercial rate for the relevant currency, how do arbitrators get the *lex mercatoria*? Arbitrators can justify the application of the *lex mercatoria* to the interest rate in a number of ways.

First, the parties may agree that the *lex mercatoria* governs their agreement. Parties can and sometimes do make such a choice. In such case, the arbitrators must apply the *lex mercatoria* to the interest rate.

Second, arbitrators may choose to apply the *lex mercatoria* if the parties have not agreed on the law applicable to their agreement. Whether or not such choice is open to them depends upon the rules or national law which is applicable. For example, the ICC Rules and the French Code of Civil Procedure allow arbitrators to choose a law other than a national one.

Third, the *lex mercatoria* can be used to supplement domestic law or an international convention. The *lex mercatoria* can be applied when the arbitrators conclude that the statutory rate in the relevant applicable law is not suitable in the case at
hand. For example, Prof. Lowenfeld cites an award in which parties put forward submissions with regard to interest pursuant to New York law (the application of the New York statutory rate) and the law of a country with laws based on the shari'a (which, it was argued, did not allow interest). The tribunal granted interest at a commercial rate without making reference to the law

The *lex mercatoria* has also been used to complement the CISG with respect to the interest rate applicable (no homage to Eric Bergsten would be complete without a reference to the CISG). Article 78 of the CISG provides that 'if either party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages recoverable under Article 74.' However, the CISG does not set out the interest rate to be used. Differing political, economic and religious views made it impossible for the drafters of the CISG to reach agreement on a formula for the rate of interest.

Authors are divided as to whether the interest rate is left to the applicable national law or should be decided based on the convention's general principles. The later approach reinforces one of CISG's stated goals, uniformity. Proponents of the uniform approach point out the difficulties in applying domestic law to the point. Awards taking the general principles approach often rely on the *lex mercatoria*.

ICC award 6653, found that the rate of interest was governed by the general principles of the CISG, stating:

> the Convention is silent on the method of determining the interest rate. The arbitral tribunal considers that in international commerce, the rate that must be paid is that which corresponds to the use that the creditor could have made of the sum that must be paid to him. Consequentially, it appears logical to use a rate currently applied to the debt and in which the payment must be made. This solution, which is in the eyes of the arbitral tribunal the most logical from an economic point of view, is to use the rate that operators in international commerce apply to loans made in Eurodollars, that is to say, the rate called the Libor "one year" (London Inter-Bank Offered Rate) published each day in the Wall Street Journal.

The UNIDROIT Principles have also been used to fill this gap. The UNIDROIT Principles' preamble states that they 'may be used to interpret or supplement international uniform law instruments.' ICC award 8128, states that it is appropriate to look to the UNIDROIT Principles and, in particular, article 7.4.9 to fill the CISG's interest rate 'gap'. Article 7.4.9 has also been applied in other awards pursuant to the CISG.

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54 Authors differ as to whether the *lex mercatoria* should be approached by the 'list method' or the 'functional method' (see N. Blackaby and C. Partasides, *Redfern and Hunter on International Arbitration* 4th ed. (Oxford University Press, 2009), paras 3.174-3.175).
55 Arbitral rules and national laws generally allow such a choice (see, e.g. ICC Rules, Article 7(1) (reference to 'rules of law') and UNICITRAL Model Law, Article 28(1) (again, 'rules of law').
57 Article 7(1).
58 Article 1496.
59 Ibid
an interest rate. Article 83 of the ULIS provides: 'Where the breach of contract consists of delay in the payment of the price, the seller shall in any event be entitled to interest on such sum as is in arrear at a rate equal to the official discount rate in the country where he has his place of business or, if he has no place of business, his habitual residence, plus 1%.'

61 Ferrari, 60 above, at p. 475-476; Schlechtriem, 60 above, at p. 595-599.

62 V. Heuzé, La vente internationale de marchandises (L.G.D.J., 1992), 341. Prof. Heuzé points out that such an approach would be particulary impractical if the relevant law prohibited the granting of interest.


64 Ibid. 1046 (translation by author). See also ICC award 8908, ICC International Court of Arbitration Bulletin 10(2) (1999): 83.

65 ICC award 8817 even goes as far as to state that the general principles of the CISG are 'contained' in the UNIDROIT Principles. ICC award 8817, ICC International Court of Arbitration Bulletin 10(2) (1999): 77.


68 The award also makes reference to article 4.507 of the Principles of European Contract Law: at 1027.

69 See also ICC award 8769, ICC International Court of Arbitration Bulletin 10(2) (1999): 75. This award merits mention. The award refers to article 7.4.9(2) of the UNIDROIT Principles as applying a 'commercially reasonable interest rate'. While it could be said that in the broadest sense, this article does apply a 'commercially reasonable rate' there is no discretion granted to the arbitrator to decide whether or not the rate is 'reasonable'.

Referring Principles:

VII.6 - Duty to pay interest