§ 2.5(1)(c) Applying General Principles of Law

International tribunals avoid the problems associated with selecting a national law to resolve an interest claim by awarding interest on the basis of general principles of law. These principles consist of universally recognized rules that derive from national laws. The tribunal's decision in *Sapphire Int'l Petroleum Ltd. v. National Iranian Oil Co.* illustrates the use of general principles of law as a comprehensive legal order. In *Sapphire*, the contract did not contain a choice of law clause. It provided, however, that Iranian law should not be applied to the merits of any dispute between the parties. In view of both the absence of a choice-of-law clause and the provision that Iranian law was not to govern the dispute, the tribunal concluded that the parties intended to have all contract claims resolved under general principles of law. Applying these principles, the tribunal awarded $2.6 million in damages for breach of contract. With respect to the payment of interest, the tribunal ruled that the award "accrued interest at the usual rate of 5 percent per annum, from the date of the first step taken in the arbitration procedure." A similar result occurred in *Final Award No. 3572*. Like in *Sapphire*, the contract did not indicate the choice of any particular substantive law. The tribunal looked to the ICC Rules of Conciliation and Arbitration, which indicated that the tribunal should apply the law by selecting the choice of law rules they deemed appropriate. Because companies of various nationalities were parties to the contract, the tribunal chose "internationally accepted principles of law governing contractual relations."

§ 2.5(1)(d) Relying on Principles of Fairness and Reasonableness

Some tribunals decline to select a particular law to be applied to the interest claim, and instead base all or part of an award of interest on principles of reasonableness and fairness. This was the approach adopted by Chamber Three of Iran-U.S. Claims Tribunal in *McCollough & Co., Inc. v. Ministry of Post, Tel. & Tel.* In *McCollough & Co.*, Chamber Three surveyed the practice of awarding interest in international arbitrations, which, it determined, revealed the following two principles: (1) interest ordinarily "is allocated on the amounts awarded as damages in order to compensate for the delay with which the payment to the successful party is made [:and (2)] interest must be reasonable." Chamber Three subsequently decided that awards of interest should be based on the principles of reasonableness and fairness, taking into account surrounding circumstances including:(i) any pertinent contractual stipulations (which, when they exist, are usually followed for the determination of the rates); (ii) the rules and principles of the law applicable to the contract; (iii) the nature of the facts generating the damage; (iv) the nature or level of the compensation awarded, particularly if it extends to the lost profit or includes a profit in the costs to be reimbursed; (v) the knowledge that the defaulting party could have had of the financial consequences of its default for the other party; (vi) the rates in effect on the markets concerned; and (vii) the rates of inflation. This approach, Chamber Three explained, provides a tribunal with the flexibility needed to adequately compensate the non-breaching party in all cases.

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

[...]

Several cases illustrate the fourth method: setting the interest rate according to what is "reasonable" under the circumstances. In McCollough & Co., Inc. v. Ministry of Post, Tel. & Tel., the Iran-U.S. Claims Tribunal set forth the factors that should be considered in determining a reasonable rate of interest:

(i) any pertinent contractual stipulations (which, when they exist, are usually followed for the determination of the rates);
(ii) the rules and principles of the law applicable to the contract; (iii) the nature of the facts generating the damage; (iv) the nature or level of the compensation awarded, particularly if it extends to the lost profit or includes a profit in the costs to be reimbursed; (v) the knowledge that the defaulting party could have had of the financial consequences of its default for the other party; (vi) the rates in effect on the markets concerned; and (vii) the rates of inflation. Other tribunals award interest according to a widely used market rate, such as LIBOR. A few tribunals fix the rate of moratory interest by averaging interest rates provided by law or rates advocated by the parties. For example, in Final Award No. 6281, the tribunal sought to fix an interest rate from the date of the award until the respondent voluntarily paid the award or was ordered to do so by a court. In calculating the rate of interest, the tribunal looked to Yugoslav law. It noted that the rates ranged from 6.25% to 8.25% over the period of time from the date of default up to the date of the award. The tribunal also noted that "no prediction can be made, on how rates will develop [after the award]." It consequently awarded interest at a rate of 7.25%, which it calculated to be the mean value of the interest rates surveyed. Similarly, in Award of July 23, 1981, the tribunal simply split the difference between the rates offered by the parties. There, the plaintiff sought interest at a rate of 10%, and the defendant offered to pay interest at a rate of 8%. The tribunal awarded interest at a rate of 9%.

See Lowenfeld, supra note 149, at 182. See generally BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1953). Encompassed within this body of law is the concept of lex mercatoria or merchants' law. For discussion of lex mercatoria, see Lord Justice Mustill, The New Lex Mercatoria: The First Twentyfive Years, 4 ARB. INT'L 86, 88 (1988); Berthold Goldman, The Applicable Law: The General Principles of Law--the Lex Mercatoria, in CONTEMPORARY PROBLEMS, supra note 113, at 113. See Sapphire Intl Petroleum Ltd. v. National Iranian Oil Co. 35 I.L.R. 136 (1963). Id. at 191. See Final Award No. 3572 (ICC 1982), reprinted in 14 Y.B. COM. ARB. 111 (1989). Id. at 121. See, e.g., Final Award No. ARB/87/3 (International Centre for Settlement of Investment Disputes [ICSID], June 27, 1990), reprinted in 17 Y.B. COM. ARB. 106, 141 (1992); Sedco, Inc. v. National Iranian Oil Co., 15 Iran-U.S. Cl. Trib. Rep. 23, 184 (1987). Related to this approach is the concept of amiable compositeur, which allows the tribunal to decide the dispute based on principles of equity and fairness, rather than the strict application of a given law. Use of this option is not permitted by most institutional rules unless specifically so agreed to by the parties. BORN, supra note 148, at 135. See
CRAIG ET AL., supra note 161, at 310-12; see also REDFERN & HUNTER, supra note 151, at 36-38, 121-22.

184 Id. at 29.
185 Id. at 29-30.
186 See id. at 31. Applying this approach, the tribunal awarded the claimant interest at a rate of 11%. See id. Judge Brower expressed disappointment in the majority's decision, arguing that the award was not consistent with the commercial approach used by other Chambers and suggesting that a better approach would be to award the actual borrowing interest rate on substitute funds, or the earnings lost due to the unavailability of funds. See McCollough & Co., 11 Iran-U.S. Cl. Trib. Rep. at 42-43 (Brower, dissenting).
187 Compare Grove-Skanska, supra note 6, at 933 (refusing to apply New York statutes regarding interest even though the parties explicitly stated that New York law would govern all contract disputes) with Final Award No. 5946 (ICC 1991), reprinted in 16 Y.B. COM. ARB. 97 (1991) (holding that the parties' disputes concerning interest would be resolved under the New York statutes as provided in the agreement).
189 See, e.g., Final Award No. 7006, 18 Y.B. COM. ARB. at 66; Award No. 12783, 13 Y.B. COM. ARB. at 377; Award Nos. 2977, 2978 and 3033, 6 Y.B. COM. ARB. at 139; LIAMCO v. Libya, 20 I.L.M. 1, 116 (1981).
190 See, e.g., Final Award No. 6283, 13 Y.B. COM. ARB. at 185; Asian Agricultural Products, 17 Y.B. COM. ARB. at 141.
191 See McCollough & Co., 11 Iran-U.S. Cl. Trib. Rep. 3, 28 n.21 (1986) (citing cases); 3 WHITEMAN, supra note 7, at 1975-86 (discussing cases); RALSTON, supra note 7, at 130 (discussing cases).
194 See, e.g., McCollough & Co., Inc. v. Ministry of Post, Tel. & Tel., 11 Iran-U.S. Cl. Trib. Rep. 3, 29 (1986) (stating that "the rate of interest must be reasonable, taking due account of all pertinent circumstances"); American Bell Int'l Inc. v. Islamic Republic of Iran, 12 Iran-U.S. Cl. Trib. Rep. 170, 229 (1986) (stating that the claimant "is clearly entitled to interest at a 'reasonable' or 'fair' rate"). For cases discussing the Iran-U.S. Claims Tribunal practice of not distinguishing between moratory and compensatory interest, see supra note 128.
197 See, e.g., Final Award No. 6998 (ICC 1994), reprinted in 21 Y.B. COM. ARB. 54, 78 (1996) (awarding interest on fees and costs from the date of the award until payment at "one point above the LIBOR Rate"); Liberian Eastern Timber Corporation (LETCO) v. Government of the Republic of Liberia (ICSID), reprinted in 26 I.L.M. 647, 676 (1987) (awarding moratory interest on the award until payment "at the annual rate of LIBOR at three months"); Wintershall A.G., 28 I.L.M. at 809 (awarding moratory interest at "the generally prevailing LIBOR rate on the date of the award" until payment).

199 Id.
200 See id.

Referring Principles:

VII.6 - Duty to pay interest