Title:
VII.6 - Duty to pay interest

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(a) If the parties have not agreed otherwise, the debtor, who does not pay a sum of money when it falls due has to pay to the creditor interest on that sum from the time when payment was due.

(b) The rate of interest is to be determined on the basis of the average bank short-term lending rate to commercial borrowers prevailing for the currency of payment at the place of payment. The average bank long-term lending rate to commercial borrowers may be applied in cases in which a significant amount of time has elapsed from the date of the breach or maturity date of the debt to the date of the award.

(c) If the creditor’s actual costs of borrowing are higher, he may recover the costs which exceed the rate of interest determined pursuant to subsection (b) as damages pursuant to Principle VII.1 and Principle VII.2, provided that he has exercised reasonable efforts in securing competitively priced financing.

Commentary:
1 A claim for interest on a sum of money can be qualified either as a damage claim, because the creditor has to borrow the money he does not receive from his debtor elsewhere and has to pay interest for this money, which constitutes his damage. Alternatively, a claim for interest can be characterized as a claim for restitution because the debtor, while withholding the money and investing it, is unjustifiably enriched because it would have been the right of the creditor to invest the sum owed to him or to use it for other purposes. From a functional perspective, the first approach is to be preferred because in business life, there is a general presumption that businesses work with bank credit for money they do not have or that is due to them but that they have not yet received. With this credit-oriented perspective derived from commercial reality, the view that the damage calculation for interest claims should rather be based on lost investment opportunities of the creditor (treasury bill rates or similar reference rates) is rejected.

2 Consequently, interest for sums in arrears are regularly awarded by international arbitral tribunals to compensate for the damage resulting from the fact that the creditor is deprived for a certain period of time of the use of and disposition over the sums to which he is entitled. Based on what has been stated above in para. 1, the damages must fully compensate the creditor for its actual costs of replacing the sum owed to him.

3 The interest rate must be reasonable and must be fixed taking into account all relevant circumstances, in particular all relevant contractual stipulations, the nature of the facts which have caused the damage, the interest rates in force on the markets for the relevant currency, the inflation rate of that currency and the time that has elapsed between the breach of contract leading to the damage claim or the maturity date of a claim not honored by the debtor and the time of the award. Given that the interest rate to be paid for a loan depends to a large extent on the term of the loan and increases with the term of the loan, it could be punitive to the creditor to assume that he would have loaned the substitute funds on a short term basis if the time until the award is rendered is significant. For these reasons and depending on the time that has elapsed between the moment of breach or maturity date of the debt and the time of the award, the reasonable rate would be the average short- or long-term bank lending rate to commercial borrowers for the currency of payment at the place of payment. This means that, in order to determine the proper interest rate, a tribunal would have to determine how much time has elapsed between the moment of breach or the maturity date and the date of the award and then assess what the longest-term loan in that period would have been.

4 The creditor may of course always prove that his costs for borrowing substitute funds were higher than the costs calculated pursuant to Subsection b) of the Principle. The creditor may, however, not shift the increased economic burden arising out of the fact that he did not pursue a reasonable search for competitive interest rates to his debtor. That would mean a violation of his duty to mitigate damages pursuant to Principle VII.4.

5 In light of the significance of the duty to pay interest under this Principle, the parties’ agreement not to allow for a claim for interest must be clear and unequivocal.