

The Arbitration Newsletter

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The Arbitration Newsletter is published periodically by Whitaker Chalk Swindle & Schwartz PLLC, Fort Worth, Texas to explore the rapidly developing law and practice of commercial arbitration both in the U.S. and other countries.¹

**“JUDGMENT” VERSUS “AWARD” INTEREST
“STATE” VERSUS “FEDERAL” INTEREST RATES
and
THE MERGER DOCTRINE²**

Several interesting questions regarding “post-award” and “post-judgment” interest rates are raised by the Fifth Circuit Court of Appeals in *Tricon Energy Limited v. Vinmar International, Limited*.³ The Fifth Circuit confirmed a Southern District (Texas) Court’s confirmation of a New York Convention arbitration award⁴ that applied the federal post-judgment interest rate⁵ versus the parties’ contracted post-award interest rate of 8.5%. The arbitration panel awarded breach of contract damages, and post-award interest at 8.5%, costs, and attorney’s fees to Tricon (the seller of xylene to Vinmar).⁶ The District Court confirmed the award except that it awarded federal statutory post-judgment interest instead of the parties’ contracted 8.5% post-award interest.⁷

Federal post-judgment interest law applies “in federal cases, including diversity cases.”⁸ But parties can contract around this “mandatory language” if they do so “consistent with state usury and other applicable laws.”⁹ But to accomplish this goal, parties must “specifically

¹ Nothing in *The Arbitration Newsletter* is presented as or should be relied on as legal advice to clients or prospective clients. The sole purpose of *The Arbitration Newsletter* is to inform generally. The application of the comments in *The Arbitration Newsletter* to specific questions and cases should be discussed with the reader’s independent legal counsel.

² *Tricon Energy Limited v. Vinmar International, Limited*, 2013 WL 1859079 (5th Cir. May 3, 2013).

³ Much of the 5th Circuit opinion analyzes why the parties unsigned agreement, including the arbitration clause, was enforceable under the Texas Uniform Commercial Code. 2013 WL 1859079, *3. There is no issue in this case regarding pre-award or pre-judgment interest. 2013 WL 1859079, *1 and 7.

⁴ 2013 WL 1859079, *2.

⁵ 28 U.S.C. §1961(a)(“Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the date of the judgment.”).

⁶ 2013 WL1859079, *1 and 7.

⁷ 2013 WL 1859079, *2.

⁸ *Id.* at *6.

⁹ *Id.*; citing *Hymel v. UNC, Inc.*, 994 F.2d 260, 266 (5th Cir. 1993).

contract around the general rule that a cause of action reduced to judgment merges into the judgment and the contractual interest rate therefore disappears for post-judgment purposes.”¹⁰ There is no arbitration exception to the “general merger doctrine” and judgments confirming an arbitration award are subject to 28 U.S.C. §1961.¹¹ Furthermore, an arbitration panel “may not establish a post-judgment rate itself.”¹² But the parties can so contract for their own non-statutory post-judgment interest rate with “language clearly, unambiguously, and unequivocally stating the parties’ intent to bypass §1961.”¹³ The parties also can give the arbitrators the power to decide if the parties have agreed to a non-statutory post-judgment interest rate.¹⁴ The arbitrators’ contract interpretation regarding the parties’ agreed post-judgment interest rate “is entitled to almost absolute deference.”¹⁵

The Fifth Circuit found in this case that the parties did submit the question of post-judgment interest to the arbitration panel. Tricon asked the panel for the contractual post-judgment rate of 8.5%. The arbitration panel also “had the authority to award a non-statutory rate.”¹⁶ But, the Fifth Circuit asked, did the arbitration panel “award a non-statutory rate” by the language of its award?¹⁷

To get around the merger of the claim into the judgment, parties have to use “clear, unambiguous, and unequivocal language” and so do the arbitrators when awarding a non-statutory post-judgment interest rate.¹⁸ In this case, the arbitration panel awarded “post-award interest” at the contractual rate of 8.5% per annum from the date of the “award until paid.”¹⁹ Both the District Court and the Fifth Circuit agreed with Vinmar that the arbitration panel did not clearly, unambiguously, and unequivocally grant “post-judgment” interest at the non-statutory rate so as to overcome the merger doctrine.²⁰ The panel’s “boilerplate language does not demonstrate that the panel intended to circumvent the merger rule.”²¹

The Fifth Circuit also analyzed the arbitration panel’s grant of interest and suggested that the panel’s grant “indicates that it did not intend to award postjudgment interest.”²² The award cited the parties’ agreement for contractual interest and noted Tricon’s entitlement to “pre-award interest” in the damages section of the award.²³ But in the section of attorney’s fees for various post-award attacks and appeals nothing is said about post-judgment interest. And in a subsequent

¹⁰ *Id.*; citing *Johnson v. Riebesell*, 586 F.3d 782, 794 (10th Cir. 2009).

¹¹ *Id.*

¹² *Id.*; citing *Newmont U.S.A. Ltd. v. Ins. Co. of N. Am.*, 615 F.3d 1268, 1277 (10th Cir. 2010).

¹³ *Id.*; citing *Newmont*, 615 F.3d at 1277.

¹⁴ *Id.*

¹⁵ *Id.*; citing *Glover v. IBP, Inc.*, 334 F.3d 471, 474 (5th Cir. 2003).

¹⁶ *Id.* at *7.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*; citing *Fid. Fed. Bank, FSB v. Durga Ma Corp.* 387 F.3d 1021, 1022, and 1024 (9th Cir.2004); *Newmont*, 615 F.3d at 1273; *Westinghouse Credit Corp. v. D’Urso*, 371 F.3d 96, 102 (2^d Cir. 2004); and *Riebesell*, 586 F.3d at 794.

²¹ *Id.* at *8.

²² *Id.*

²³ *Id.*

section of the award entitled “Post-award interest,” the panel had a “brief discussion of interest.”²⁴ Although Tricon **expressly** requested “postjudgment interest,” the panel did not grant **expressly** “postjudgment interest” but only “postaward interest until paid.”²⁵ The Fifth Circuit interpreted all of this to mean that the panel did not intend to award “postjudgment” interest, especially with the award’s “residual clause” (denying all relief not **expressly** granted).²⁶

It is important, in the context of this case, that “post-award” interest be distinguished from “postjudgment interest.”²⁷ Rule 43(d)(i), the American Arbitration Association’s Commercial Arbitration Rules, grants arbitrators the discretionary authority to award “interest at such rate and from such date as the arbitrator(s) may deem appropriate.” Confusion is created if an arbitration panel is allowed to “award postjudgment interest when they write (as in this case) ‘postaward interest until paid’.” If an arbitration panel has been authorized by the parties “to award a non-statutory rate of postjudgment interest, and [the panel] wishes to do so, [the panel] must **expressly** award ‘postjudgment interest’.”²⁸

OBSERVATIONS

1. The Fifth Circuit rejected Tricon’s argument that its affirmance of the District Court’s selection of the federal statutory postjudgment rate rather than the parties’ non-statutory interest rate “elevates form over substance.”²⁹
2. The Federal Circuit distinguished **postaward** interest and **postjudgment** interest, especially when dealing with non-statutory interest rates allegedly agreed by arbitration parties.
3. When parties choose non-statutory postjudgment interest rates, that choice must be clear, unambiguous, and unequivocal both in the parties’ arbitration agreement and in the arbitrator’s award.
4. When arbitration parties choose or attempt to choose a non-statutory (state or federal) award/judgment interest rate, the merger doctrine requires careful selection of terms granting non-statutory **postjudgment** interest rates.
5. The merger doctrine creates two separate periods for consideration of interest in an arbitration award – the accrual period before the award is signed³⁰ and the period from the date the award is signed.³¹

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* (Emphasis added.).

²⁹ *Id.* at *7.

³⁰ Tex. Fin. Code §304.104 (Prejudgment Interest), as applied by common law.

³¹ Tex. Fin. Code §304.005 (Postjudgment Interest).

6. This case also requires that arbitrators determine when calculating damages which judgment interest law applies to the case – federal³² or state.³³
7. Arbitration agreement drafters should be careful with interest rate terminology (in the arbitration agreement) regardless of whether a non-statutory interest rate is chosen by the parties. This terminology concern includes: (i) what interest rate applies; (ii) what interest rate law applies; (iii) in what periods does interest accrue (with clear beginning and ending dates for these periods); (iv) what interest rate applies, if any, between signing of award and confirmation of award in form of a judgment; and (v) have all the parties intentions with award/judgment interest rates been confirmed and stated clearly in the parties' arbitration agreement.
8. What does the arbitrator do (in granting post-award/postjudgment interest) with the period between the date the award is signed and the date the award is confirmed by court judgment?

³² 28 U.S.C. §1961.

³³ E.g., Tex. Fin. Code ch. 304.