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VII. THE ENGLISH ARBITRATOR

This old English approach, as regards simple interest, was followed in London Arbitration at least up to 1889. There exists a copy of an old award made by T. Scrutton as Sole Arbitrator on 27th October 1883 in conjoined arbitrations between the shipowners of the vessel "Parthenia," Messrs Houlder Bros and Co and the Executors of the late Ralph Firbank Esq. The award is in the arbitrator's handwriting and unmotivated; but it clearly records his decision that "the Executors of the late Ralph Firbank Esq do pay to Messrs Houlder Bros & Co the sum of £260 with Interest at 5% per annum [from] 5th December 1882 to date of payment;" i.e. pre-award and post-award interest. If further evidence of this ancient arbitral power was required, it came in 1889. In that year, Lord Bramwell's Arbitration (No 2) Bill, albeit eventually defeated by Lord Halsbury in the House of Lords and replaced by a lesser Bill which became the Arbitration Act 1889, proposed a simple provision in Clause 90 to codify the arbitral power to award interest under English law. It stated: "an arbitrator may in his award direct that interest at the current rate be paid on the sum awarded." In the Bramwell Bill's notation citing the principle so codified, Lord Bramwell cited as authority In re Badger. Although there was nothing similar in the 1889 Act or the 1934 Act, Quintin Hogg (later Lord Hailsham), cited the same authority in his extra-judicial work (1936) that: "... an arbitrator ordinarily has power to award interest up to the date of the award, even though a Court of law in a like case could not have done so." This was a reference to pre-award interest; by then the power of an arbitrator to award post-award interest was already enacted by Section 11 of the 1934 Act (re-enacted as Section 20 of the 1950 Act).

More recently, Lord Denning MR sought to revive the traditional arbitral power to award interest in The Finix (1978): "For years now it has been the practice in commercial arbitrations, certainly in the City of London, for the arbitrators to award interest on the amounts found to be due without restriction. They have a complete discretion as to the amount of interest and as to the period of time. That practice goes back at least to the year 1819. See In re Badger, (1819) 2 B. and A. 691. This is so well understood that we need not inquire into its origin. It is to be taken as read into all commercial arbitrations in the City of London. To my mind there is no possible doubt of the jurisdiction of the umpire here to award interest on the amount which was eventually found to be due, the sum of £22,982.40." In this case Lord Denning was a dissenting minority because the law on interest had become muddled: an arbitrator's implied powers on preaward interest were now treated as subsidiary and dependent upon the statutory powers of the English Court. For London Arbitration, this was not satisfactory and indeed historically inaccurate. Accordingly, in 1982 a new provision was introduced into in the Arbitration Act 1950: Section 19A provided that every arbitration agreement, subject to the parties' contrary agreement, shall be deemed to contain a provision that the arbitrator may award simple interest in certain circumstances up to the date of the award. This amendment was drafted and enacted by Parliament with surprising ease, prompted also by a decision in 1979 of the Supreme Court in Victoria, Australia which demonstrated that the leading English authority on the arbitrator's implied power to award interest, by analogy to the English Court's power, was fundamentally flawed in its reasoning. Section 19A also enacted recommendations first made by the 1927 McKinnon Committee on the Law of
Arbitration. From here the legislative step to Section 49 of the 1996 Act was relatively small, albeit extending to both simple and compound interest.

For English law, the current anomaly is not that arbitrators can award compound interest when English judges cannot; it is rather that English judges cannot do it. There is no logical impediment to compound interest if a power to award simple interest is accepted under the general law. As Lord Goff concluded in Swaps, "One would expect to find, in any developed system of law, a comprehensive and reasonably simple set of principles by virtue of which the courts have power to award interest. Since there are circumstances in which the interest awarded should take the form of compound interest, those principles should specify the circumstances in which compound interest, as well as simple interest, may be awarded; and the power to award compound interest should be available both at law and in equity. Nowadays, especially since it has been established (see National Bank of Greece S.A. v. Pinios Shipping Co. No. 1 [1990] 1 A.C. 637) that banks may, by the custom of bankers, charge compound interest upon advances made by them to their customers, one would expect to find that the principal cases in which compound interest may be awarded would be commercial cases. Sadly, however, that is not the position in English law. Unfortunately, the power to award compound interest is not available at common law. The power is available in equity; but at present that power is, for historical reasons, exercised only in relation to certain specific classes of claim, in particular proceedings against trustees for an account. An important - I believe the most important - question in the present case is whether that jurisdiction should be developed to apply in a commercial context, as in the present case." For the English Court, the Law Commission's project may answer Lord Goff's inquiry; but for international commercial arbitration, that answer is already much advanced.

In his great work, A History of Money, the late Professor Davies described the centuries-long gavotte, from late medieval times to the 20th century, whereby the English Church and State allowed usury to be re-defined to allow indigenous developments in banking, divorcing traditional ethics from trade and marking new expectations driven by the exigencies of an expanding economic system. Whilst interest is still regulated for consumers and lenders are often themselves regulated, no-one would seriously consider today returning to the beginning of that strange dance for international commercial arbitrations in London or elsewhere. Outside England, for example in ICC award No 5514 (1990), the arbitration tribunal in Geneva awarded compound interest on damages in a dispute between a state and a French company, based on the application of a trade usage under Article 13 of the ICC Rules. It had no difficulty in identifying and applying a trade usage providing for compound interest in a case where the company had been forced to borrow monies at compound interest as a result of the state's failure to honour its own financing obligations to the company. Based on the facts recorded in the award, any other approach would have flouted commercial common-sense and produced rank injustice. Nevertheless, in his contemporary commentary, the French jurist Me Yves Derains queried whether such a usage had yet reached the juridical status of a regle materielle (owing partly to his own previously expressed reservations); and accordingly his approving case-note emphasised the facts of the particular case. In the subsequent decade, these qualifications have largely disappeared from the practice of international commercial arbitration: where compound interest would provide a fair and reasonable element of compensation to the innocent victim of a contract-breaker, it is increasingly awarded by international commercial arbitrators either as trade usage, regle materielle de droit international or under an expressly agreed provision, e.g. Article 26.6 of the LCIA Rules. In Switzerland and England, as with other European, countries hospitable to international arbitration, the award of such compound interest in commercial dealings is not contrary to public policy, ordre materielle de droit international or under a general provision for the English Court had just been deleted from the Administration of Justice Bill because it would have raised "a very controversial question and would
overload the Bill" (Notes on Clauses, "Memorandum", at p.48; Public Record Office, Kew; LCO 2/1789).

Hogg, *Arbitration* (1936), at p.129; but already views had been expressed to the contrary: see the 1927 MacKinnon Report, at fn. 35 below.


32 *Barlin-Scott Air Conditioning v. Robert Salzer Constructions* (26th April 1979; Sir John Young CJ, McInerney and Fullagar JJ; unreported).

33 *Chandris v. Isbrandsten-Moller* 84 Ll L 347; [1951] 1 KB 240, where the Court of Appeal (in an unreserved judgement) reversed Mr Justice Devlin and decided that an arbitrator had an implied power to award simple interest based on an analogy to the powers of a "court of record" under Section 3 of the Law Reform (Miscellaneous Provisions) Act 1934.

34 See the 1927 MacKinnon Report, *ibid*, at para. 29, where it considered that there was no English arbitral power to award pre-award interest. The same view was expressed by Devlin J, at first instance, in *Chandris v. Isbrandsten-Moller* (1950) 83 Ll L 385, at p.391, following the Divisional Court in *Podar Trading v. Francois Tagher* [1949] 2 KB 277 where *In re Badger* was summarily distinguished (see p. 289, per Lord Goddard CJ).


**Referring Principles:**

- VII.6 - Duty to pay interest
- VII.7 - Right to charge compound interest