This paper will not focus on the public policy aspects of the issue of punitive damages. Rather, it will consider whether there are transnational or supranational sources in international arbitration law regarding interest on a debt in the event that a debtor fails to pay.

We shall in turn examine this question with regard to comparative law and international arbitral practice.

I. COMPARATIVE LAW

The law on interest is not particularly well settled in various countries. There are, of course, legal systems where for religious reasons interest designed simply to compensate the creditor for any delay in payment by the debtor - i.e., intérêts moratoires - are illegal and contractual provisions providing for the payment of such interest are deemed null and void. This hostility to the granting of certain type of interest may also be invoked as a public policy rule which has ramifications on the effect recognition and enforcement of foreign arbitral awards, but we will leave this question aside. The view that intérêts moratoires are illegal is not peculiar to the islamic world. For many centuries it was considered contrary to Christianity to charge interest, as it was seen to be charging money for nothing. Even in today's secularized world the bias against unearned income of interest-pickers still can be felt¹.

There is probably still another reason why interest is unpopular: many lawyers dislike figures, and we all can imagine more lawyerly activities than figuring out simple or compound interest.

These two reasons, and perhaps others, explain why even those domestic systems that recognize the possibility to award interest deal with it in a surprisingly simplistic fashion: they provide for a set statutory interest, often at an unrealistically low rate, not running from the time of breach but from the time of some formal notification, and not compounded.

Between merchants this is sometimes corrected, but even in the commercial field one cannot say that the legal system realizes its purported aim to compensate a creditor fully for the damage suffered from delayed payment of what is due, from the time it was due to the time of payment.

With the advent of the computer age, the calculation of even the most complex interest formula will be possible for everyone. It is likely that in many industrialized countries, even in domestic cases, the trend will go towards more differentiation with respect to interest rates, applying different interest rates to different currencies at different times, and also compounding interest.

What is the legal rationale for providing for statutory interest? I believe, three quite different reasons can be identified². The reasons also have a bearing on the calculation of interest rates and on the determination of the period during which interest is charged.
One theory is based on the idea of "damnum emergens": "Because you did not pay on time I had to go out into the financial market and borrow money in replacement." What the borrower charged is the damage. This is the idea behind "intérêts compensatoires" which in some systems, is the only type of interest that can be claimed on a concrete factual basis that must be specifically pleaded. In certain laws, no specific pleading of circumstances is required, but the rules concerning "intérêts compensatoires" relate to the law of torts: compensation may be received only if the defaulting party was in bad faith, or at fault.

This interest runs only from the time the money is felt missing and not automatically from the time it was originally due. Interest may thus be due from the "mise en demeure".

The interest rate will differ depending on the creditor's financial standing: if he is rich, a bank will lend him the money more cheaply than if he is a credit risk. On ne prête qu'aux riches. In the event that the debtor is a large commercial company; it may be difficult to identify the substitute transaction, necessary to determine the damages, because many loans may be taken out and granted at any given time. If only intérêts compensatoires are granted, a large company may have difficulty receiving any such interest. For a small creditor, the difficulty may be quite the opposite: if the contract on which the debtor defaulted was large, the default may have seriously impaired the creditor's ability to borrow. Providing for a statutory interest rate or an interest rate provided by court practice on a flat basis such as that generally provided by the English commercial court does away with all these difficulties in the less-than-perfect world in which we live, to echo Judge Brower's expression.

Another approach is based on the idea of "lucrum cessans": "If you had paid on time I would or could have invested the money." However, it is hard to tell ex post facto what the creditor would have done with the money. Perhaps the obligee would have become a lender himself. How much interest he would have obtained would then of course have nothing to do with his own credit standing. It would, however, have something to do with the borrower's standing. Hence there is a tendency to base the calculations on the interest rate charged to low-risk debtors, for instance the interest rate on government bonds. If one seeks to justify the application of the same interest rate to all cases it would be simpler to justify it on a "lucrum cessans" approach. Interest could then run from the time the money was due. Unlike the damnum emergens method, the lucrum cessans concept is much further away from tort law.

A third approach should not be overlooked: the "negotiorum gestio" or unjust enrichment approach: "That's my money which you invested instead of giving it back to me." The defaulting debtor may be considered a constructive trustee or a "negotiorum gestor" of the creditor. The creditor may then be deemed to have

ratified the "negotiorum gestio" or be the beneficiary of the constructive trustee and thus have a claim against the debtor for the "lucrum emergens" of the debtor. According to this approach, it is irrelevant how good or bad a credit risk the creditor was or has become, and indeed, how bad or good a credit risk the debtor was or has become.

II. INTERNATIONAL ARBITRAL PRACTICE

In international arbitral practice one can understand easily that debtors, normally respondents, are not particularly eager to argue the interest point extensively from a factual and legal point of view.

It is less understandable that many lawyers acting for creditors, normally claimants, neglect interest claims. In some cases, the issue is even omitted completely, in which case awarding interest may well be ultra petita. Depending on the time length of the period between the time when a claim arises and the time a favorable award is enforced and depending on the applicable interest rate or interest rates the claim for interest may be substantial or even exceed the principal. The greater the time lag, the more difference it makes whether interest is available at all, and if so, at what rate, from when onwards, and whether the interest charged is simple or compound.

In the ordinary courts plaintiffs have a tendency to treat the interest question lightly by simply claiming interest at the highest possible rate from the earliest possible date onwards. This puts a certain burden on the court system, and it results frequently in judgements for interest at a lower rate and from a later date onwards than claimed. The reason for this is economical. Since the amount in litigation is usually based on the principal amount only and not on the interest claimed, and since the extent to which a party wins or loses in ordinary litigation is usually also based on the principal amount only, there is no effective penalty on overclaiming interest and having the courts work out at the taxpayers' expense what lawyers might have done at their clients' expense.
Arbitral tribunals tend to consider the question of a liability long before it reaches the question of the quantum. Both questions are frequently briefed simultaneously, and the quantum receives relatively little attention. One reason is also that the parties and the arbitral tribunal hope that a settlement can be reached somewhere along the way. If, however, a decision is required on the quantum, the interest question arises at last. It then may turn out that it was insufficiently argued by the parties. Yet, calling in additional briefs is likely to result in nothing but delay. Under such circumstances, the arbitral tribunal is led to take a decision, cutting through legal niceties.

If the interest point has not been pleaded well by a creditor/claimant it may fall prey to the tendency lurking in some arbitral tribunals to find a compromise solution whereby none of the parties appears to have won completely. Thus arbitral tribunals have a tendency to undercompensate winning parties, particularly with regard to interest claims. We shall now examine the law as applied by international arbitral tribunals.

The first question that arises is whether a claim for interest should be characterized as a substantive or procedural issue. The traditional common law approach (now observed more in English-speaking countries other than England) is to characterize as procedural rather than as substantive certain points which appear to be of a more technical nature and which one wishes to decide uniformly, in particular statutes of limitations and issues relating to interest.

Once an interest claim is considered to be procedural it is difficult not to limit it to the period between the time when the arbitration became pending and the time when the award was rendered. Thus, no pre-arbitral interest would be awarded. Post-award interest would not be granted either. Post-award interest can be granted following a separate policy in another way, i.e., that of furthering enforcement of judgements and awards by setting high interest rates and also granting interest on the interest portion of the award, in other words compounding the award.

If characterized as procedural, post-award interest becomes subject to yet another lex fori, i.e., the law of the place of enforcement of the award. Because of this Martin Hunter and Volker Triebel have recommended that arbitral tribunals distinguish clearly between pre-award and post-award interest so that at the enforcement stage the line between post-award and pre-award interest can be easily drawn if it is deemed to be relevant.

The case for characterizing interest claims as substantive has often been made and numerous arbitral awards have adopted it. Let me simply repeat the main reasons: the impact on the outcome is substantial, particularly in large international cases which take a long time before reaching their conclusion.

Once the interest question has been characterized as substantive arbitral tribunals have little difficulty in applying a contractual interest rate if one was provided in the contract (or the contract referred to a standard form covering the point such as the Fidic forms) applying the principle that the intent of the parties should be respected. If this method is applied, there is no need then to ask oneself whether the rate is reasonable, except perhaps where a currency which was originally quite stable suddenly collapsed, but that is then perhaps a matter for clausula rebus sic stantibus.

We will not address in this paper the difficult question of stipulated interest rates which exceed a statutory maximum, or, which appear contrary to public policy.

It remains to determine what happens where the parties remain silent on interest and have only designated the applicable law, or have remained silent on that point as well and the arbitral tribunal has to determine which law applies to the substance of the dispute. Many arbitral tribunals are reluctant to apply the statutory interest rates of the applicable law or some other law. This reluctance is based on the very nature of interest rates. The actual interest rate for a particular currency reflects the public’s confidence, or lack of it, in the stability of that particular currency vis-à-vis other currencies. In other words,
interest rates often anticipate inflation apart from the mere time, or deferred-consumption-element. Consequently, actual interest rates differ considerably from currency to currency. It is therefore not sensible to apply a statutory interest rate designed for one particular currency to another currency. In addition, some of the statutory rates were enacted by the legislator years, even decades ago, when there still was a gold standard.

On the other hand, the application of statutory interest rates of the country of the currency would not appear to be justified either, since the conditions prevailing in that country may have little to do with either of the parties.

Occasionally, the statutory interest of the creditor’s country has been applied as the place of the tort.

As statutory interest rates are at odds with the commercial approach that the parties expect from international commercial arbitration, many arbitral tribunals award reasonable commercial interest for the currency in question. Obviously, that is what they will do where the parties have declared lex mercatoria applicable. This does not mean that the arbitrators are ruling as amiables compositeurs.

We shall now consider the legal basis for such decisions.

By resorting to the law applicable to the contract it will be difficult to justify an interest rate other than statutory interest rate without going through a gap-filling exercise in the applicable law. One does not see such gap-filling exercises in practice. Why? Perhaps because they are particularly difficult to carry out for international arbitrators who frequently are not particularly familiar with the applicable law, let alone with the spirit of that law.

The arbitral tribunals frequently base their decisions on what they know well, and simply say that this or that rate is commercially reasonable, without stating any legal basis for the proposition that that is the test. Some say that this or that rate is equitable. What such formulas exactly mean remains unclear since arbitral tribunals are in the habit of saying that what they are doing is equitable, perhaps to persuade themselves, perhaps to persuade the readers.

I have only come across a few decisions which expressly refer to transnational law as the source of a rule which would say that commercially reasonable interest rates must be applied with reference to the currency in question. Nonetheless that is what they do in practice.

From when is interest to be charged? We have already alluded to this problem when we discussed the characterization between substance and procedure, but we have not considered what happens when the procedure is over. Interest characterized as procedural can hardly run before the procedure is pending. Interest characterized as substantive runs in accordance with the applicable law. Only in those legal systems where dies interpellat pro homine or fur semper in mora does interest run from the time performance of payment was due. In many legal systems, delay interest starts running only upon the giving of official notice (mise en demeure). Since in practice a mise en demeure is hard to establish in international arbitrations, which do not usually deal with one-time deliveries of fungible goods but with complex long-term contracts, the mise en demeure is frequently seen only in the request for arbitration. Since this is a time when the arbitration becomes pending, the result is that frequently no pre-arbitral interest is awarded.

Where no statutory interest is awarded, the post-award interest rate can only be a reasonably foreseen rate.

Where does all this leave us with respect to the question whether there are transnational legal rules with respect to interest? I would answer with a small yes and a big no.

Yes, arbitral tribunals frequently apply a transnational standard to characterize a question relating to interest as substantive rather than procedural. But this can hardly be distinguished from autonomous characterization within a given system of conflict of laws. Yes, arbitral tribunals not unfrequently apply an arguably transnational standard to determine the applicable interest rate to be a commercially reasonable interest rate with respect to the currency in question. But this may simply be gap-filling in the applicable law. Where arbitral tribunals refer to equity this may simply be a rhetorical flourish.
No, there does not appear to be a transnational standard concerning the date from which pre-arbitration interest runs. No, awarding post-arbitration interest is not based on a transnational legal rule. No, there is little evidence in arbitral practice of a transnational rule according to which interest should be awarded from an early date onward, namely the date when the damage occurred, to the date of payment,

and that such interest should be compounded in order to fully indemnify the party who has suffered damage.  

While there is much to be said in favor of the proposition that a party should be compensated for the damage suffered as fully as possible, much is to be said also for the proposition that a party which subjects its contractual claims to a specific law has only itself to blame if that law is applied and it recovers less than the total loss suffered. The law of international contracts and the law of international arbitration is, I would submit, written for parties who are quite capable of assessing their chances and their risks. If they engage in international business, they must be aware of the legal, cultural and religious differences which prevail in the world of international business.

1 Others may speculate as to whether this is a remnant of religion or the effect of envy.
2 These are reflected in the present discussion within the US-Iran Claims Tribunal.
3 That is the idea of Judge Brower.
4 E.g., Algeria. The tendency to be fair to the individual case often goes hand in hand with the tendency to be fair to debtors.
5 E.g., French law.
6 The desire for a uniform and predictable, that is manageable, solution is particularly noticeable in Judge Charles Brower's dissenting opinion, ICCA Yearbook, 12, (1987), p.316 et seq).
7 It is not surprising that Chamber I of the US-Iran Claims Tribunal found this attractive as a way to a simple solution.
9 See the Aminoil award.
10 Hunter/Triebel, p. 7.
11 An example of such chiselling may be seen in the Sylvania case, ICCA Yearbook 12 (1987) point 102 at the end.
12 Hunter/Triebel, p. 13.
13 Ibidem, p. 23.
15 See Article 187 Swiss Private International Law Statute.
18 I am leaving aside decisions in disputes of public international law or the law of nations which are sometimes about money and have no other standard to resort. I am also leaving aside decisions of the US-Iran Claims Tribunal which can award interest only on the basis of general usages of trade which constitute principles of commercial and international law within the meaning of article V of the Algiers Declaration.
19 The arguments by Derains Op.cit. p. 111 against this are not convincing and overly influenced by the French substantive law. They run counter to Derains' own general tendency which favors full compensation of the aggrieved party.
20 This can hardly be a rule in itself contrary to Derains, Op.cit. p. 110.
21 An example of this may be found in the Liamco Decision, Revue de l'Arbitrage 1980, p. 132.
22 Derains, op.cit. p. 112.
23 I also see no evidence that the failure to award interest, say because the applicable law does not provide for interest or because the law at the place of arbitration prohibits awarding interest, is in itself contrary to transnational public policy.

Referring Principles:

VII.6 - Duty to pay interest