Some Observations Based on a Comparative Study of the Laws of England and Germany

Money accumulating interest at 10% per annum doubles itself in 10 years. If the interest is compounded, with yearly rests, it doubles in 7.3 years. Some construction contracts include a provision for interest to be paid at 1% per month on late payments. Given the length of time an international arbitration may take from start to finish, and given that arbitrations are often only started after a lengthy period of negotiation after the dispute arises, it is easy to appreciate that the question of the award of interest in an arbitration can be a very significant element in the monetary aspect of the case.

In domestic arbitrations the position is normally clear. The relevant national law will govern the procedure to be followed, the powers of the tribunal, the merits of the dispute and enforcement of the award. In England, for example, there are statutory provisions and much case law on the powers of the court or an arbitral tribunal to award interest, and the extent to which a discretion may be exercised in applying those powers. In Germany there are provisions of the Civil and Commercial Codes which must be applied by both judges and arbitral tribunals.

Conflict of laws

However, various complex conflict of laws questions may arise in the context of international arbitration. There appear to be rather fundamental differences of approach to the question of the powers and duties of arbitral tribunals as between common law and civil law systems, in particular in differentiating between those matters which are considered to be procedural and those considered to be substantive.

Three different systems of law may be involved: 1. The law governing the arbitration. 2. The law applicable to...
the substance of the dispute. 3. The law of the place of enforcement.

Taking a brief overview of the impact of these laws, in reverse order, it is clear that public policy considerations of the law of the place of enforcement may affect the question of whether or not an award in respect of interest will be enforced. In some countries it may be that awards in respect of interest will not be enforced at all. In other countries high rates of interest may be considered extortionate. In yet others, there could be limitations in respect of the period over which interest may be awarded. There is little that arbitral tribunals can do about this in preparing their awards — unless the parties have made specific submissions on the question, specifying the countries and the rules of law which they wish to be taken into account. If the parties have made such submissions, then it follows that the arbitral tribunal should pay heed to them.

It is equally clear that, in principle, the law applicable to the substance of the dispute is potentially the most important element in determining the arbitral tribunal's approach to awarding interest. If that law lays down the periods in respect of which, and the rates at which, interest may be awarded, then the instinct of an arbitral tribunal may well be to apply those provisions without further consideration. In a contractual dispute this will be the "proper law" of the contract (to adopt Dicey's celebrated phrase) which - if not chosen by the parties - must be determined by the arbitral tribunal applying the appropriate conflict of laws rules.

So far so good. But the question is not as simple as this. It is also necessary for an arbitral tribunal to consider the provisions of the lex arbitri, because in some laws the question of the power to award interest may be related to the question of the remedies an arbitral tribunal is able to grant under that law. In some legal systems it may be considered to be analogous to, for example, the question of whether an arbitral tribunal has the power to order "specific performance", "rectification", "restitution" or to grant an injunction, all of which would be matters to be considered at least initially in the context of the lex arbitri. An award is generally capable of being set aside in the courts of the place of arbitration if the arbitral tribunal has exceeded its powers under the law of that place. Furthermore, the arbitral tribunal needs to look to the conflict of laws rules of the lex arbitri for guidance as to the extent to which it should apply a "foreign" law applicable to the substance of the dispute insofar as questions arise in relation to its power to award interest.

It may also be necessary to consider conflict of laws questions in relation to the different categories of interest which may be the subject of an award. First, there is what may be described as "contractual interest"—that is, where the parties have expressly agreed on the period and rate of interest to be applied, as for example in the standard form FIDIC contract; there is also the question of interest on a liquidated sum that is held to have been payable on a certain date, as in the case of refusal by a buyer to pay the fixed purchase price of goods delivered; and then there is the question of interest as one element of damages for delay in respect of an unliquidated damages claim. This commentary is directed primarily at the second of these categories, although the other two are accorded brief mention where appropriate.

Before considering the practical problems that may arise from the conflict of laws questions involved, the authors first give examples of the provisions relating to interest from the common law system and the civil law system respectively.

**English law**

The relevant provisions of English statute law are to be found in the Arbitration Act 1950, which states as follows:

"Power of arbitrator to award interest 19A (1) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the reference, be deemed to contain a provision that the arbitrator or umpire may, if he thinks fit, award simple interest at such rate as he thinks fit:

(a) on any sum which is the subject of the reference but which is paid before the award, for such period ending
not later than the date of the payment as he thinks fit; and (b) on any sum which he awards, for such period not later than the date of the award as he thinks fit.

(2) The power to award interest conferred on an arbitrator or umpire by subsection (1) above is without prejudice to any other power of an arbitrator or umpire to award interest.

Interest on awards 20. A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt."

Power to award interest

Thus, in an arbitration held in England, unless the parties have agreed otherwise, an arbitral tribunal has wide power to exercise a discretion to award interest up to the date of the award (s.19A (1)(b)). In addition to deciding whether an award should or should not carry interest, an arbitral tribunal may choose the period, and it may choose the rate of interest, provided it does not award compound interest and provided it acts "judicially" in the exercise of its discretion. After the award, however, the position is governed by s.20 of the 1950 Act. Interest is payable as if the award is a court judgment. It has been held by the English courts that an arbitral tribunal's discretion under s.20 is to direct only whether an award should or should not carry interest and not to determine at what rate it should do so; such rate can only be that applicable to a judgment debt. The intention is that an arbitration award should be treated in precisely the same manner as a judgment of the court. In 1988 the rate of interest applicable to judgment debts was 15% per annum.

It should be noted that the distinction between "pre-award" and "post-award" interest in fact gives rise to a "compounding effect", since post-award interest will apply to sums awarded in respect of interest in the award itself.

Period

When an arbitration takes place in England, and the law applicable to the substance of the dispute is English law, the award will usually contain a direction that interest shall be paid from the date on which payment of the liquidated sum claimed is held to have been due up to the date of the award. Where the claim is for an unliquidated sum, or where there is no obvious date on which the sum held to be due became payable, the arbitral tribunal usually chooses an appropriate starting date, or sometimes it may incorporate a lump sum in the award to take account of losses suffered by the winning party due to late payment. But it is to be emphasised that, where there is no express agreement between the parties, the date from which interest is to run is at the arbitral tribunal's discretion. It is not a wholly untextured discretion, however, since the arbitral tribunal must act judicially (i.e. not arbitrarily) and the basic principle is that interest is awarded from the date of loss. The date of loss marks the inception of the period over which the claimant has been deprived of his money.

The award would be silent on the question of post-award interest, or it would simply note that interest will run on the amount awarded as if it were an English judgment debt.

Rate of interest

Equally, but again subject to any contrary agreement of the parties, the rate of interest to be applied in the pre-award period is discretionary. English arbitral tribunals will normally award interest at a "commercial rate", which is determined on the basis of evidence or argument submitted by the parties. This may be two or perhaps three percentage points above the clearing banks' base rate, which is of course likely to vary over the relevant period. Some arbitral tribunals tend to take a rough average rate and apply it over the whole of the period; others approach the question more scientifically and apply specific rates to specified periods within the Overall delay period.
The English Commercial Court has developed a practical and consistent approach to the question of determining the rate of interest to be applied. The Court will not embark on an examination of what the defendant actually did with the money which was wrongly withheld; nor will it allow an enquiry into the claimant's actual loss, in terms of loss of use of the money. Instead, the approach of the Court is that it will award interest at a rate at which a hypothetical Person in the claimant's Position, with the same general attributes, would have had to pay to borrow a sum of money equivalent to that withheld. The Court does not, therefore, hear evidence on the rate of interest actually paid by the claimant on his borrowings in the case in hand. However, as a guide to the appropriate rate of interest, the Court will take account of the rate at which a company or Person of the same standing, size or with the market advantage of the claimant will generally be able to borrow money. Thus first class banks and large public companies will be assumed to be able to borrow money on more favourable terms than smaller companies or most individuals.\textsuperscript{8}

In the Commercial Court the current practice is for the Parties to submit a schedule setting out, for example, short-term Investment rates and Clearing banks' Base rates over the relevant period.\textsuperscript{9}

\textbf{"Foreign" law}

The Position in an arbitration held in England is more complex where the law applicable to the substance of the dispute is not English law.

It appears that this makes no difference to the Position with regard to post-award interest, since interest payable on an English judgment debt is treated as a procedural matter, governed by English law.\textsuperscript{10} An arbitral tribunal may exercise only the limited discretion allowed under s.20 of the 1950 Act.\textsuperscript{11}

As to pre-award interest, where there is an agreement between the parties that provides for "contractual interest", both the question of the liability to pay interest and the amount to be paid (including the period and the rate) are to be determined by the proper law of the contract under which the debt is incurred.\textsuperscript{12} However, where the agreement between the parties does not provide for contractual interest - and thus the arbitral tribunal is making its award in accordance with its general powers under Section 19A(1) of the Arbitration Act 1950 - it appears that, although the question of the liability to pay interest is determined by the proper law of the contract under which the obligation arises, the amount of such interest (i.e. the period and the rate) is to be determined by English law.\textsuperscript{13}

Thus, save where dealing with contractual interest, for the pre-award period an arbitral tribunal sitting in England should use the proper law of the contract only to determine the question of the debtor's liability to pay interest. Provided that the proper law of the contract does not preclude an arbitral tribunal from awarding interest, the period and the rate to be applied are determined by English law and are a matter for an arbitral tribunal's discretion.

It should be noted that, even where English law, as the \textit{lex arbitri}, determines the rate of interest, it does not necessarily follow that the applicable rate will be determined by the interest rates in force in England throughout the relevant period. Where an award is in a foreign currency, the rate of interest should \textit{prima facie} be the rate applicable to that currency.\textsuperscript{14} Where the loss is in one currency, but as a consequence of non-payment it is foreseeable that the claimant would have had to borrow in another currency, the rate applicable to the latter currency should be applied.\textsuperscript{15}

\textbf{Enforcement in England of foreign awards in respect of interest}

There should be no difficulties in enforcing in England the provisions of a foreign arbitration award as to interest, even if that award provides for compound interest or determines the rate at which interest is to be paid after the date of the award - provided, of course, that in making the award the arbitral tribunal was acting within its powers as determined by the law applicable thereto (which itself may be dependent on the conflict of laws principles of the place of arbitration). There is no public policy rule in England that a foreign award in respect of interest, even though it might be considered to be excessive by English standards, should be unenforceable; the provisions of English law relating to interest on judgment debts and arbitration awards are solely applicable to proceedings that are held in England.\textsuperscript{16}
Other matters

Other questions arise in relation to an arbitral tribunal's power to award interest under English law; for example, how compound interest may sometimes effectively be awarded where the cost to the plaintiff of being out of funds may be identified and claimed as a head of "special damage", and the limitation on the arbitral tribunal's power to award interest on sums which are paid by the debtor before the award. These questions have not been examined for the present purpose of considering the conflict of laws issues that might arise.

German law

Turning now to German law, the position is substantially different. The main provisions of the Civil Code are as follows:\(^\text{17}\)

"Legal Interest Rate 246 If by law or legal transaction a debt bears interest, four per cent per annum shall be paid, unless some other rate is specified.

*Interest on Interest* 248 (1) An agreement made in advance to the effect that arrears of interest shall again bear interest is void.

(2) Savings banks, credit institutions and bankers may agree in advance that uncollected interest on deposits shall be considered as a new interest bearing deposit. Credit institutions, which have been authorised to issue interest bearing bearer bonds in the amount of loans made by them, may demand in advance on such loans payment of interest or arrears of interest.

*Default by Debtor* 284 (1) If after his obligation is due, the debtor does not perform after a warning from the creditor, he is in default because of the warning. Bringing an action for performance and service of a judicial order for payment are equivalent to a warning. (2) If a time is fixed by the calendar for the performance, the debtor is in default without warning if he does not perform in the fixed time. The same rule applies if a notice is required to precede the performance, and the time is fixed in such manner that it may be reckoned by the calendar from the time of notice.

*Compensation for Default* 286 (1) The debtor shall compensate the creditor for any damage arising from this default.

*Interest during Default* 288 (1) A money debt bears interest during default at four per cent per annum. If the creditor can demand higher interest on any other lawful ground, this shall continue to be paid. (2) A claim for further damage is not excluded.

*No Interest on Interest* 289 Interest shall not be paid upon interest in default. The right of the creditor to compensation for any damage arising from the default remains unaffected.

*Interest During Legal Action* 291 A debtor shall pay interest on a money obligation from the date legal action is initiated, even if he is not in default; if the debt does not fall due until after that date it bears interest from the date it is due. The provisions of Section 288(1) and Section 289, sentence 1, apply mutatis mutandis."

And the relevant provisions of the Commercial Code are as follows:\(^\text{18}\)
"Statutory Rate of Interest 352 (1) The legal rate of interest, including default interest, is in cases of mutual commercial transactions five per cent per year. The same applies when interest is promised in respect of a debt arising from such a commercial transaction, but the rate of interest has not been fixed. (2) Where this Code imposes an obligation to pay interest without fixing the rate, an interest of five per cent per year is to be understood.

Interest After Due Date 353 Merchants are entitled among themselves to demand interest for claims arising from mutual commercial transactions from the date they fall due. Compound interest may not be demanded by virtue of this provision.

Storage Fees, Commission, etc. 354 (1) A person who, in the course of carrying on his commercial enterprise, procures business or performs services for another, may, even in the absence of an agreement, demand a commission and, if it is a matter of storage, demand storage fees at the rate usual in the locality. (2) He may charge interest on loans, advances, outlays, and other expenses from the day of disbursement.

Current Account 355 (1) If someone stands in such business relations to a merchant, that the mutual claims and performances together with interest are put into one account and balanced at regular intervals by setting them off, and determining the resulting surplus in favour of one party or the other (current account, account current), the person who is entitled to a surplus when such account is closed, may demand interest on the surplus from the day of closing the account, even in so far as the account includes interest."

Power to award interest

As is well known, the tendency of the civil law systems is not to grant discretionary remedies to judges or arbitral tribunals. In Germany, the question of an award in respect of interest is more a matter of duty than power.

An arbitral tribunal -like a judge- must award interest according to a set of defined rules. These rules determine the liability to pay interest, the period it must cover and the rate to be applied. If an arbitral tribunal does not observe the German substantive rules in relation to interest, then the award will be bad in law. However, an award will not necessarily be appealable merely because the arbitral tribunal did not apply the law correctly. A mere error of law is not one of the grounds upon which an award can be set aside.19

Period

No distinction is drawn between the award of interest in the pre-award period and in the post-award period. Interest is payable up to the date of payment as a matter of course. There is no discretion for the judge or the arbitral tribunal to exercise. The question of the date up to which interest is payable would never be mentioned in judgments of German courts, or in arbitration awards (at least in domestic disputes). As to the beginning of the period, unless the parties have otherwise agreed, interest is generally payable as from the date of "delay" (Verzug)-in effect, where the parties have agreed a specific date, from such date, otherwise upon receipt of a demand (Mahnung) by the Defendant.20 Where there is no "delay", the right to interest runs from the commencement of the court or arbitration proceedings21 (but not, of course, before the due date for payment). In almost all international arbitrations the dispute is between businessmen or companies in respect of commercial transactions and in such cases the creditor may claim interest from the date on which payment is due (Faelligkeit).22

Rate of interest

In determining the rate of interest to be awarded, the judge or arbitrator must apply the substantive law. Again, there is no element of discretion. Under German law, the following order of priorities applies:
(a) Agreed rate of interest Where the parties have agreed a rate of interest, then this must be awarded.23

(b) Actual rate of interest Where the parties have not agreed upon a rate of interest, the claimant is entitled to prove and recover his actual damage—for example, the actual cost of borrowing.24 Where the claimant has not actually borrowed the money, then he may prove damage by showing the loss of interest he would have earned had he invested the money.25

(c) Fixed rate Where there is no agreed rate of interest, and the claimant does not claim or prove actual damage in relation to loss of interest, a statutory rate of simple interest is applied. This rate is 5% as between companies or businessmen in respect of commercial transactions, otherwise 4%.26 This fixed rate of interest has remained unchanged for nearly a century, and it has often been criticised as it bears no relation to commercial reality.

Other than banks, parties to a contract may not agree on the payment of compound interest. Any such agreement would be void.27 The fixed rate of interest may not be increased by compounding interest.28 However, if the claimant has actually paid compound interest to his bank—or would have received compound interest had he invested the principal sum claimed—such compound interest may be claimed by the claimant as a head of actual damage.29 By contrast with the position in England, the rule against compound interest may also be seen in practice by the fact that there is no distinction between pre-award and post-award interest. If pre-award interest were to be expressed as a sum of money in the award, and if payment of interest were to be ordered as from the date of the award, the rule against compound interest would be infringed.

"Foreign" law

So much for the position in arbitrations held in Germany where German law is the law applicable to the substance of the dispute. Turning now to the German conflict of laws rules, the question of the liability to pay interest, the period and the rate of interest to be applied are all classified as questions of substantive law and not questions of procedure. This classification is supported by undisputed case law.30 These issues are, therefore, governed by the proper law of the contract under German rules of conflict.31 There is thus a striking contrast in this context with English law, which classifies the question of liability to pay interest as a matter of substance, and the calculation of the amount of interest as a matter of procedure.32

If, therefore, an arbitral tribunal sitting in Germany came to the conclusion that the proper law of the contract in question is English law, it would apply English law exclusively to the issue of interest. It would not only look at those rules of English law regarding interest which under English conflict of laws rules would be classified as substantive law, but also at those which would be regarded as procedural—because a court or arbitral tribunal in Germany would classify such procedural rules as being of a substantive nature for this purpose.

A German court or arbitral tribunal would not normally apply a rule of foreign law if it infringes German public policy. There are two old cases of the German Reichsgericht of 1880 and 1881,33 which held that the rule against compound interest formed part of German public policy. But German law itself provides exceptions to the rule against awarding compound interest (such as Section 248, paragraph 2, of the German Civil Code); and it would be going too far to say that a foreign law which provided for the award of compound interest would contravene fundamental principles of German law. The better view today is that a German court or arbitral tribunal is empowered to order payment of compound interest if the relevant foreign proper law so provides, and would not be restrained by German public policy. That view is supported by academic writers,34 whose authority, in the absence of recent court decisions, weighs heavily in Germany. Therefore, although

the English rules as to interest give rise to a "compounding effect" in relation to post-award interest, it appears that German courts would now give effect to those rules without qualification, if English law was the proper law of the contract and thus the applicable law.35
There remains the question of whether or not the award of a very high rate of interest under a foreign proper law would bring the German rules of public policy into play. There are no reported cases on this point. It is possible that an analogy may be drawn to the rules relating to the award of excessively high penalties. In contrast to English law penalties are enforceable under German law. If the penalty is excessively high, however, a German court may reduce it to a reasonable amount. However, it is not yet settled whether the courts' power to reduce penalties forms part of German public policy. Moreover it must be even more doubtful whether, if this were the case, the same principle could by analogy be applied to excessively high rates of interest.

Enforcement in Germany of foreign awards in respect of interest

A foreign award in respect of interest will be enforceable in Germany. Even though the situation in respect of compound and excessively high interest is not yet settled by recent court judgments, the prevailing view is that German public policy does not prevent enforcement.

Practical problems

When English and German law are compared, it is clear that there may be very great variations in the rules relating to the award of interest between different systems of law. Therefore, an arbitral tribunal sitting in one country and applying the law of another country to the substance of the dispute may have to address potentially difficult questions of conflict of laws. For example, where English law is the applicable law should an arbitral tribunal sitting in a "foreign" country use the guidelines adopted by the English Commercial Court in exercising its discretion to determine the period and the rate? The law of the place of arbitration may answer differently the question of which matters are procedural and which substantive. In any event, such a distinction might be irrelevant under that law. In addition, what should it do about "post-award" interest, given that s.20 of the 1950 Act gives an arbitral tribunal very limited discretion. Could the arbitral tribunal vary the rate of interest from that applicable to English judgment debts? At 15% per annum, the rate of interest on English judgment debts might be thought excessive by the courts of the place of arbitration.

If, in the above example, the place of arbitration is Germany the answers to these questions are clear, in that English law, as the proper law of the contract would be applied exclusively to the determination of the award of interest. But the position may not always be so clear. Indeed, if the situation were to be reversed and the place of arbitration is England and the proper law German, the arbitral tribunal's likely instinctive approach, to apply only the rules of the proper law concerning interest, would be wrong; but this approach would only be recognised as being wrong if the arbitral tribunal considered the English conflict of laws rules. However, even when those rules are applied, there may still be difficult questions for the arbitral tribunal to address, arising from the importance given to the distinction between "liability for" and "amount of" interest. There may, for example, be argument as to whether a rule of the foreign proper law determining the date from which interest is to run, as under German law, goes to the arbitral tribunal's power to award interest or to its assessment of the amount of the interest to be awarded. The authors' view is that generally it goes to the latter, but the particular wording of the rule would have to be considered in each case.

Ideally, the German law approach of applying the law applicable to the substance of the dispute would provide the neatest and most consistent solution. However, so long as there are differences between countries as to the laws relating to the award of interest, and as to the approach adopted to the conflict of laws questions, it will be important for arbitral tribunals to focus on the particular conflict of laws rules to be applied.

Conflict of laws rules and institutional arbitration

In the absence of express agreement between the parties an arbitral tribunal will usually apply the conflict of laws rules of the place of arbitration to choose the applicable law on any particular question. However, the rules of some arbitral institutions deliberately provide the arbitral tribunal with a wider basis for this choice. Article 13(3) of the ICC Rules provides an example:

"The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by
the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rules of conflict which he deems appropriate."

The rationale underlying this provision is that where, in the absence of agreement between the parties, the ICC's Court of Arbitration fixes the place of arbitration, it should not necessarily follow that the arbitral tribunal ought to adopt the conflict of laws rules applicable at that place, which may have no particular connection with the parties or the subject-matter of the dispute. It can be readily appreciated, however, that an arbitral tribunal could be entering a minefield if it adopts a liberal approach to this provision, particularly in relation to the award of interest, which may be of such financial significance.

**Conclusion**

The question of how arbitral tribunals should award interest in international arbitrations gives rise to classical conflict of laws problems, which are often ignored by parties when making their submissions to the arbitral tribunal in relation to their claims in respect of interest. If the arbitral tribunal makes an inappropriate award, perhaps as a result of inadequate submissions being presented by the parties, very significant sums of money could be lost by the successful party.

The authors suggest that an arbitral tribunal, in considering the question of interest, should focus first on the conflict of laws rules of the place of arbitration to determine whether the law applicable to the substance of the dispute or the law of the place of arbitration should be applied in its determination of the interest element. As is clear from English law, the answer may be that both laws are relevant. It may also be necessary to examine the relevant provisions of the agreement between the parties to assess whether that agreement contains any contractual restrictions on the power of the arbitral tribunal to award interest. If the applicable law is the proper law of the contract it might further be necessary to refer back to the law of the place of arbitration to check that the provisions of the proper law can be enforced without reservation; or whether those provisions should be accorded restricted application, for instance because of public policy considerations in the place of arbitration.

Finally, any submissions by the parties as to the law of the likely place or places of enforcement should also be taken into account. In this context, the authors suggest that it can do no harm-and may do much to save the award,

in respect of interest, from annulment or unenforceability in certain circumstances - if the award itself distinguishes clearly between interest in the "pre-award" period and the "post-award" period. When this is done, if the award in respect of one or other period turns out to be unenforceable in a country in which enforcement is sought, the validity of the other part of the award may survive intact.

There is some risk of over-generalising in drawing distinctions between the so-called "common law" and "civil law" systems. Each system can have many variations. The rules of procedure in the USA are quite different from those in England, just as there is a substantial difference between the German and French rules. Nonetheless, it is suggested that there is sufficient uniformity in the general approach to justify using the expression "civil law countries" by way of contrast to the "common law countries" in discussing matters such as the powers of arbitrators. (See, e.g., Sandifer, *Evidence before International Tribunals* (Revised ed., 1975) at pp. 2 and 3).


Normally the law of the place of arbitration, often called the *lex fori*. The law governing the arbitration is sometimes described by English authorities as the "curial law", because the law governing the arbitration is not necessarily the law of the place of arbitration. However the origins of the expression "curial law" are obscure. It may have been invented by Lord Guest, who used it in *James Miller & Partners Ltd v. Whitworth Ertater (Manchester) Ltd* (1970) A.C.583, 608. It was subsequently adopted by Mustill & Boyd, *Commercial Arbitration* (see, e.g., p. 62) as a convenient shorthand to describe the law governing arbitration agreement, the arbitration itself and the award. The alternative expression *lex arbitri* may be preferred.

In Saudi Arabia, for example, it is said that even a mention of interest in the arbitration agreement will render it invalid, see Bond, *How to draft an Arbitration Clause*, text of an address given in Beijing, June 1988. For discussion on Shari'a and the concept of riba or "usury" in a commercial context see Ballantyne, *Commercial Law in the Arab Middle East: The
Gulf States.

5 London & Overseas Freighters Ltd. v. Timber Shipping Co SA 1972 AC 1.; confirmed by Kerr J. in Dalmia Dairy Industries Ltd v. National Bank of Pakistan (1978) 2 LLR 223, 273. “It was there held that if an arbitrator awards interest pursuant to the Arbitration Act 1950 then interest will accrue at the same rate as on a judgment debt, because under s.20 of the Act an arbitrator has no power to fix any rate of interest beyond the date of his award.”

6 This rate was fixed by the judgment Debts (Rate of Interest) Order 1985 (S.1. 1985 No 437). Set out below are the changes in this rate since April 1971: Date Rate (%) Date Rate (%) Pre-April 1971 4 June 1980 15 April 1971 7 1/2 June 1982 14 March 1977 10 November 1982 12 December 1979 12 1/2 22 April 1985 15 .


8 See Tate & Lyde Food and Distribution Ltd v. Greater London Council (1982) 1 WLR 149; Banque Keyser Ullman S.A. v. Skandia (UK) Insurance Co. Limited & Others, ibid where it was held that market leaders in the Banking sector, such as Chemical Bank, have a well established advantage over other banks when they borrow money.

9 Set out below are the changes in the Base rate of the Westminster Bank PLC since January 1986 (Effective Date/Rate %): 09.01.86/12.5; 11.05.87/9; 03.06.88/8, 19.03.86/11.5; 07.08.87/10; 07.06.88/8.5; 08.04.86/11; 26.10.87/9.5; 22.06.88/9; 21.04.86/10.5; 05.11.87/9; 28.06.88/9.5; 23.05.86/10; 04.12.87/8.5; 04.07.88/10; 15.10.86/11; 02.02.88/9; 18.07.88/10.5; 10.03.87/10.5, 17.03.88/8.5; 08.08.88/11; 19.03.87/10; 11.04.88/8; 25.08.88/12; 29.04.87/9.5; 18.05.88/7.5.

10 Judgments Act 1838, ss.17, 18 as amended by Administration of Justice Act 1970, s.44. See Dicey and Morris, The Conflict of Laws, 11th Edition, p. 1336 (cited hereafter as “Dicey”). The plain intention of s.20 of the Arbitration Act 1950 is that, so far as interest is concerned, an award should be treated exactly as a judgment.


12 Dicey, ibid, Rule 199(1), see p. 1331.

13 Miliangos v. George Frank (Textiles) Limited (No 2) (1977) QB 489, 497. However, this proposition was doubted obiter by Kerr J. in Helmsing Schiffahrts GmbH v. Malta Dry Docks Corporation (1977) 2 LLR 444, 449-450. See Dicey, ibid, Rule 199(2) and pp. 1332-1335.

14 Miliangos v. George Frank (Textiles) Ltd (No 2), ibid. See Dicey, ibid Rule 199(3) and pp. 1336-B. In this context, English law is consistent with the principles which it has been said should apply to the computation and award of interest in international arbitral jurisprudence, see Wetter, “Interest as an element of damages in the arbitral process” in International Financial Law Review, December 1986.

15 Helmsing Schiffahrts GmbH v. Malta Dry Docks Corporation ibid.

16 Dalmia Dairy Industries v. National Bank of Pakistan ibid; at 302 Megaw L. J. “In this international arbitration award, the governing law of which, in general, is Indian law, an English Court, even if it had a discretion so to do, ought not do something which, in effect, would be altering the arbitrator’s decision on a matter which, for good or for ill, the parties by their arbitral agreement have left for him to decide.”


19 German Code of Civil Procedure (30 January 1877), Section 1041, limits the grounds upon which an arbitral award may be quashed to: (a) lack of valid arbitration agreement; (b) violation of public policy; (c) incorrect statutory representation of the parties; (d) infringement of the duty to give a fair hearing; (e) lack of reasons in the award; (f) other grounds which would justify the vindication of an unappealable judgment.

20 German Civil Code, Section 284.

21 German Civil Code, Section 291, with Sections 261(1), 253(1) of the German Code of Civil Procedure.

22 German Commercial Code, Section 353.

23 However, if the agreed rate is unreasonable it will not be given effect to as only a reasonable rate of interest may be recovered under German public policy.

24 German Civil Code, Sections 286(1), 288(2).

25 For example in an interest bearing account or in bonds. See judgment of the Federal Supreme Court, 29 November 1982, in Neue Juristische Wochenschrift 1983, 758.

26 German Commercial Code, Section 352, and German Civil Code Section 288(1).

27 German Civil Code, Section 248.

28 German Civil Code, Section 289.

29 German Civil Code, Section 284, 286(1), 289 second sentence.

30 See judgment of the Federal Supreme Court, 30 June 1964 in Wertpapiermitteilungen 1964, 879, 881.


32 See Staudinger-Löwisch, Kommentar Zum Bürgerlichen Gesetzbuch, 12th Edition, Section 291 Rn.1: “Sektion 291 legt eine materielle Wirkung der Rechtshängigkeit fest”; District Court of Göttingen in: Gutachten zum internationalen und ausländischen Privatrecht 1978, No. 4; only the District Court of Aschaffenburg has in an old judgment of 7 July 1953 in:
Die deutsche Rechtsprechung auf dem Gebiet des Internationalen Privatrechts 1952/3 No. 38, classified this kind of interest as procedural.

33 Reichsgericht Zivilsachen Vol. 1, pp. 51 et seq. and Vol. 5 pp. 254 et seq.
34 See Staudinger-Raape, Commentary to the Civil Code, 12th Edition, Note Q II (i) to Article 30.
36 German Civil Code, Section 343.
38 See Triebel/Petzold, Grenzen der lex mercatoria in der internationalen, Schiedsgerichtsbarkeit, RIW, Heft 4/April 1988, 245, footnote 5.

Referring Principles:

VII.7 - Right to charge compound interest