

AWARD OF INTEREST UNDER THE ARBITRATION ACT 2005

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1.0 INTRODUCTION

The payment of interest on monies paid later than it should is a normal feature of modern contractual relationships. It is highly probable that a party would suffer financial loss resulting from late payment of principal sums which could lead to a claim in arbitration either as a debt or damages. Such loss is recovered as interest.

The award of interest in arbitration has become routine. In fact, it is now rare for interest not to be awarded where an award provides for payment of monies due. The availability and rate of interest in arbitration can have substantial practical importance. Such interest can be significant where the amount in dispute is large and the time periods involved are lengthy. At times, the ultimate interest award can exceed the principal sum in dispute.

The basis upon which interest is awarded does vary. The presumption is that an arbitral tribunal has the power to award interest just like its power to make an award in respect of any other claims submitted to it. The right to interest flows from either a contractual provision for the levying of late interest payment, or by virtue of the applicable law.

The Arbitration Act 2005 provides a legal right for a successful claimant in arbitration proceedings (including a respondent who succeeds in a counterclaim) to have post-award interest to be included in the award in respect of interest on the principal sum awarded in its favour. Such interests may accumulate on the award itself until the date of payment.

As it stands, interest from the date of the award until the date of payment is purely statutory whereas the arbitral tribunal's power to award pre-award interest generally is based on common law, contract or claim by way of proof of special damages.

2.0 ANTECEDENTS

The House of Lords in *London, Chaltam & Dover Railway Co. v South Eastern Railway Co.* [1893] A.C. 104 held that:

“At common law, in the absence of any agreement or statutory provisions for the payment of interest, a court has no power to award interest, simple or compound, by way of damages for the detention (that is, the late payment) of a debt.”

Based on this *ratio decidendi*, there is no right of action to recover interest, as damages or otherwise, upon any monies (whether debts or damages) for any period in which such monies are wrongfully withheld.

While the House of Lords in *President of India v La Pintada Cia Navigacion SA* [1985] 1 A.C. 104 recognized the injustice inherent in the rule, it nevertheless affirmed that the rule was too well settled to be departed from other than by legislation. The court explained that the principle applied only to claims for interest by way of general damages, and did not extend to claims for special damages. The rule in *London, Chaltam & Dover Railway Co. v South Eastern Railway Co.* [1893] A.C. 104 has, therefore, survived. It is, however, subject to a number of exceptions.

On the other hand, the general rule at common law established in *Page v Newman* (1829) 9 B & C 378 was that an arbitral tribunal had no inherent jurisdiction to award interest, nor had he any such jurisdiction arising from statute. It derived such jurisdiction from an implied term by a submission to arbitration that the arbitral tribunal should have power to decide the issues on the subject of the reference according to the law which would be applied in the courts: see *Chandris v Isbrandtsen-Moller Co. Inc.* [1951] 1 KB 240; *Techno-Implex v Gebr van Weelde BV* [1981] 2 WLR 821; *President of India v La Pintada Cia Navigacion SA* [1985] 1 A.C. 104.

3.0 THE STATUTORY PROVISIONS

Section 33(6) of Part II of *the Arbitration Act 2005* contains the statutory basis for the power of an arbitral tribunal to award interest under an arbitration award:

“(6) Unless otherwise provided in the arbitration agreement, the arbitral tribunal may:

(a) award interest on any sum of money ordered to be paid by the award from the date of the award to the date of realization; and

(b) determine the rate of interest.”

Therefore, section 33(6) of *the Arbitration Act 2005* deals only with awards of interest from the date of the award to the date of realization. It must be noted that the section 33(6) being in Part III of the Arbitration Act 2005 will not apply to international arbitrations unless opted in.

Order 42 rule 12 of the *Rules of the High Court (1980)* provides:

“Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied”.

There is a similar provision in the *Subordinate Court Rules 1980*: see Order 29 rule 12.

3.0 THE ARBITRAL TRIBUNAL'S DISCRETION

The arbitral tribunal is given discretion under section 33(6) of the Arbitration Act 2005 whether to award interest. In exercising this discretion, the arbitral tribunal will usually invite parties to make submissions and provide evidence on the issue of interest in the same way as it would in respect of any other request for relief.

The parties will have the opportunity to set out their respective positions on the rate of interest to be applied, the period for which it should be applied and whether a different rate should be applied for the period following the rendering of an award up to until payment: see Redfern, Hunter, Blackaby and Partasides, *Law and Practice of International Commercial Arbitration*, 4th edition, 2004, Sweet & Maxwell, p. 467.

It is usual to interpret an arbitration agreement applicable to an underlying claim to encompass claims for interest in connection with that claim. As such, while the arbitral tribunal is given discretion under section 33(6) of the Arbitration Act 2005 whether to award interest, it normally ought to determine the rate of interest and award interest. In practice, the arbitral tribunal looks at the substantive law governing the parties underlying claims when deciding on interest.

The arbitral tribunal should normally exercise its power to award interest in the absence of a good reason not to: see *Wildhandel N.V. v Tucker and Cross* [1976] 1 Lloyd's Rep. 341; *Panchaud Freres SA v Pagnan and Fratelli* [1974] 1 Lloyd's Rep. 394. If the arbitral tribunal decides not to award interest, it should explain its reasons for doing so in his award. Its power to award interest is discretionary, and it has to exercise his discretion judicially: see *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [1995] 1 SLR 548.

In the words of Oliver LJ in *Techno-Impex v Gebr Van Weelde Scheepvaartkantoor BV* [1981] 2 All ER 669, the exercise of the arbitral tribunal's discretion involves,

“...what is regarded as a basic implied term that the arbitrator shall decide in accordance with the rights of the parties under English law... the arbitrator’s power to award interest... is a matter of substantive law and not merely a rule of practice which the arbitrator can disregard at his discretion.”

There is no rule that interest can be awarded only if it is claimed in the pleading. Interest can only be awarded if the arbitral tribunal awards a principal sum: see *Allison v Kiteley* [1995] CILL 1016. The entitlement to interest under section 33(6) of the Arbitration Act 2005 is not dependent on proof of loss. It may be awarded, for example, on damages for the loss of goods even where there is no evidence of loss of use or loss of profits: see *Metal Box Ltd v Curry Ltd* [1988] 1 All E.R. 341.

4.0 ACCRUAL OF INTEREST

Based on the *Arbitration Act 2005*, it would seem that an arbitral tribunal has no power to grant interest effective from a date earlier than the award date. Section 33(6) only provides for interest on from the date of the award on any sum that is directed to be paid by the award.

As such, there appears to be a lacuna in the statute as regard to the right of a successful party in a reference to arbitration to receive interest in respect of the period before the arbitral tribunal makes his award. This anomaly is detrimental to the construction, shipping and insurance industries using arbitration for the resolution of their disputes.

In modern arbitral practice, arbitral tribunals usually award interest to run from either the date of the breach, or the date on which the loss was suffered up to the date of payment of the award: see Redfern, Hunter, Blackaby and Partasides, *Law and Practice of International Commercial Arbitration*, 4th edition, 2004, Sweet & Maxwell, p. 469. This is consistent with court practice as section

11 of *the Civil Law Act 1956* allows the courts to grant interest on a judgment debt beginning from the date of the cause of action,

“In any proceedings tried in any court for the recovery of debt or damages the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest as such rate as it thinks on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of judgment:

Provided that nothing in this section - (a) shall authorise the giving of interest upon interest; (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or (c) shall affect the damages recoverable for the dishonour of a bill of exchange”.

Earlier, Mustill, MJ and Boyd, SC, in *The Law and Practice of Commercial Arbitration in England* (1st edition, 1982) at p. 345-346 had drawn an analogy with the powers of the High Court that the arbitral tribunal has implied power to award interest up to the date of award as such rate as it thinks fit on any award ordering the payment of a sum of money. Such power can be exercised provided a *prima facie* case has been made out on the entitlement to such an award.

Similarly, Walton, A., in *Russell on the Law of Arbitration* (19th edition, 1979) at p. 356 speaking of an arbitral tribunal’s power to award interest up to the date of the award,

“It was always considered that he had power to do so, by virtue of his implied authority to follow the ordinary rules of law.”

Lord Wilberforce in *General Tyre and Rubber Co. v Firestone Tyre and Rubber Co. Ltd* [1975] 2 All ER 173 at 192 explained the basic principle of why interest is awarded,

“Interest is not awarded as punishment against a wrongdoer for withholding payments which should have been made. It is awarded because it is only just that the person who has been deprived of the use of the money due to him should be paid interest on that money for the period during which he was deprived of its enjoyment.”

The object of such an award is not penalize the losing party but to compensate the successful party for not having had the benefit of the money between the date when it ought to have been paid and the date of the award or earlier payment: see also *Kemp v Tolland* [1956] 2 Lloyd's Rep 681 at 691.

This approach is consonant with the position taken by Lord Denning in *Panchaud Freres SA v Pagnan and Fratelli* [1974] 1 Lloyd's Rep. 394 when he remitted the award back for the arbitral tribunal to reconsider interest as they erred on a matter of principle.

He explained at p. 411 that,

“In a commercial transaction if the plaintiff has been out of his money for a period, the usual order is that the defendant should pay interest for the time for which the sum has been outstanding. No exception should be made except for good reason”.

Therefore, the arbitral tribunal ought ordinarily to award interest; if it does not do so, it should give his reasons for doing so in the award. Unless the award contains a sufficient explanation for not awarding interest it will be remitted back to the arbitral tribunal for the question of interest to be reconsidered: see section 42(4) of the *Arbitration Act 2005*; *Raja Lope & Tan Co. v Malayan Flour Mills Bhd* [2000] 6 MLJ 228; *Ahong Construction (S) Pte Ltd v United Boulevard Pte Ltd* [1995] 1 SLR 548; *Government Insurance Office (NSW) v Atkinson-Leighton Joint Venture* (1980) 55 ALJR 212; *PJ Van Der Zijden Wildhandel NV v Tucker and Corss Ltd* [1976] 1 Lloyd's Rep 341; *Thos P Gonzalez Corp v FR Waring*

(International) (Pty) Ltd [1978] 1 Lloyd's Rep 494 at 505; *Warinco AG v Andre & Cie SA* [1979] 2 Lloyd's Rep 298.

The court in *Lian Hup Manufacturing Co. Sdn Bhd v Unitata Bhd* [1994] 2 MLJ 51 adopted the above position of empowering the arbitral tribunal to award pre-award interest (that is, interest on amounts awarded from the date of the cause of action to the date of the award). The arbitral tribunal's power, the court held is derived from the submission to it, which impliedly gave it the power to decide all matters in difference according to the existing law of contract, exercising every right and discretionary remedy given to a court of law. The court relied on the case of *Chandris v Isbrandtsen-Moller Co. Inc.* [1951 1 KB 240 which the English Court of Appeal held that independent of statute, the arbitral tribunal had inherent procedural powers derived from the common law analogous to those possessed by a judge when trying an action in the High Court.

The court explained at p. 54,

"Under Section 11 of the Civil Law Act 1956, the court has the discretionary power to award interest for the recovery of any debt or damages. See Evergrip Prestressing Sdn Bhd v Ken Construction & Trading Sdn Bhd. In my view, the arbitrator in the present case has the same power as that of the court to award interest at such rate as he thinks fit. Since it was within the discretionary power of the arbitrator to award interest in this case, the court would not interfere with the exercise of his discretionary power".

The court in *Raja Lope & Tan Co. v Malayan Flour Mills Bhd* [2000] 6 MLJ 228 at 239 followed the above approach when he held that the act of submission to arbitration confers upon the arbitral tribunal the implied power to award interest. The court went on to rule that that arbitral tribunal erred in law when he said that the arbitration clause was not wide enough to confer power to direct pre-award interest to be paid. The award was remitted back to the arbitral tribunal with direction to award interest at 8% on damages from the date when such payment represented by damages ought to have been made to the date of payment.

It may be viewed that the positions of a judge and an arbitral tribunal are distinguishable and that any analogy to equate the two is misleading. Mustill, MJ and Boyd, SC, in *The Law and Practice of Commercial Arbitration in England* (2nd edition, 1989) at p. 292 explains why this position is misconceived. The court has certain supervisory powers over the reference to arbitration and the award. These are exercised from outside the reference, whereas the arbitral tribunal's own powers are exercised within the framework of the reference. Those powers are derived from an entirely different source from that of the judge. The position of the arbitral tribunal is therefore, different from that of the court. Therefore, the submission to arbitration cannot be construed as conferring upon the arbitral tribunal the same or similar powers to those of a judge.

However, the debate is now settled. In line with commercial reality, the Court of Appeal in *Leong Kum Whay v QBE Insurance (M) Sdn Bhd* [2006] 1 AMR 668 at 687 also confirmed not only that the arbitral tribunal has the power to award pre-award interest but also that it should in normal circumstances do so following established court practices. In the said case, the arbitrator had failed to order pre-award interest and the Court of Appeal amended the award to add interest at 8% from the date of the accident to the date of the award. There is no reason why these principles should not continue to apply under the Act.

6.0 COMPOUND INTEREST

Compound interest is the capitalization of interest and accruing further interest on such capitalised interest. Section 11 of *the Civil Law Act 1956* provides that nothing in it shall authorize the giving of interest upon interest (i.e. compound interest). Section 11, however, goes on to add that it shall not apply in relation to any debt upon which interest is payable as of right by virtue of any agreement or otherwise.

Section 33(6) of *the Arbitration Act 2005* does not put any limit on the quantum of interest nor does it specifically outlaw compound interest. In that sense, it is wider than Order 42 rule 12 of the *Rules of the High Court (1980)*.

Thus, if section 33(6) of the *Arbitration Act 2005* were to be read together with Order 42 rule 12 of *the Rules of the High Court 1980* and Order 29 rule 42 of *the Subordinate Court Rules 1980* relating to judgment interest, the arbitral tribunal now has statutory power to give compound interest on an arbitration award.

This will arise in the situation where the contract in issue contains a term to the effect that either party is entitled to be paid compound interest as full reparation of loss suffered in respect of any action for the recovery of damages against each other, arising from the breach of contract.

Awards of compound interest are becoming less rare. There is a suggestion that an award of compound interest is generally appropriate in modern commercial arbitration: see Redfern, Hunter, Blackaby and Partasides, *Law and Practice of International Commercial Arbitration*, 4th edition, 2004, Sweet & Maxwell, p. 468.

7.0 INTEREST UNDER CONTRACT

Generally the law relating to contractual interest is unaffected by *the Arbitration Act 2005*. Where a contract provides for interest to be paid on any monies outstanding the interest may be claimed and awarded as liquidated sum.

For example, PAM (Pertubuhan Atekt Malaysia) 2006 Form of Contract provides for interest to run if payment by the employer is not made in due time to the contractor: see Clause 30.17 which fixes the interest rate based on the Maybank Base Lending Rate plus 1% be payable by the employer on the outstanding amount until the date payment is made.

Clause 34.8(f) of the PAM 2006 Form also provides that the arbitral tribunal is given express powers to award pre-award and post-award interest at whatever rates and whatever rests it considers just.

Under such a circumstance, interest under section 33(6) of the Arbitration Act 2005 cannot be awarded for a period during which interest on the principal sum is due under a contract term: see *Secretary of State for Transport v Birse-Farr* (1993) 9 Const. L.J. 213; *Royal Borough of Kingston-upon-Thames v Amec Civil Engineering Ltd* (1994) 10 Const. L.J. 225.

8.0 INTEREST AS LOSS AND EXPENSE UNDER BUILDING CONTRACTS AND AS SPECIAL DAMAGES

The arbitral tribunal is allowed to award interest as “*loss and expense*” under building contracts and interest as special damages. The two types of interest are distinct.

Interest as “*loss and expense*” under building contracts arise as entitlements in contract while interest as special damages arise as entitlements for damages for breach of contract. Both types are considered together because they have each derived support from the other in the course of their development, and raise similar considerations.

It was decisively held in the English case of *FG Minter Ltd v Welsh Health Technical Services Organisation* (1980) 13 BLR 1 that, provided the requisite notices under the contract have been given, a contractor can recover as “*direct loss and/or expense*” under Clause 24(1) of the JCT Form, 1963 (similar to Clause 24(1) of the PAM/ISM 1969 Form), the interest cost of financing the execution of variations and late instructions issued by the architect under the contract.

Messrs FG Minter Ltd was the main contractors for the construction of a teaching hospital for the employer, Welsh Health Technical Services Organisation, using a contract based on JCT Form, 1963 (similar to the PAM/ISM 1969 Form). The mechanical and electrical sub-contractors made certain claims for direct loss and/or expense arising from variations ordered by the employer. The sub-contractors claimed that these sums were insufficient

since they had not been certified and paid until long after the loss and/or expense had been incurred. Messrs FG Minter Ltd took the same point as against the employer.

The arbitrator and the High Court at first instance held that no sums to cover interest or finance charges could be included in a loss and/or expense claim but, on appeal, the Court of Appeal held that the words 'direct loss and/or expense' should be interpreted as including lost interest (if the contractor finances the work) or finance charges (if it involves him in increased borrowing). Ackner LJ explained,

“... where a variation requires the expenditure of capital, not only is the primary expense – the money actually expended by reason of the variation – the direct loss or expense but so also is the secondary expenditure, the amount paid for or lost by the obtaining or the use of such capital.”

Therefore, the loss of interest was a direct result of the defendant's breach of contract and was recoverable. The term *“direct loss and/or expense”* was treated as having the same meaning as *“damage which flows naturally from the breach”*. Therefore, the claim for finance charges can be pursued based on s. 74 of *the Contracts Act 1950* which is essentially similar to the English common law rule on damages as laid down by *Hadley v Baxendale* (1854) 9 Ex 341.

The decision in *FG Minter* turned essentially on the construction of the contract. The real question was whether or not the architect was required to take finance costs into account in ascertaining adjustments to the contract sum. The *FG Minter* decision is not a true exception to the rule in *London, Chaltam & Dover Railway Company*. It is an illustration of the principle that parties are free to contract in whatever terms they choose, and the courts will enforce their bargain.

The *FG Minter* decision was further applied in *Rees & Kirby Ltd v Swansea City Council* (1985) 30 BLR 1 where the facts were similar but more complicated.

Messrs Rees & Kirby Ltd were contractors who entered into a contract based on JCT Form, 1963 (similar to the PAM/ISM 1969 Form) in 1972 with the employer, Swansea City Council. The works were due to be completed by July 1973. However, the contractors applied for extension of time based on various reasons including variations and late instructions. The contractors also gave notice for a claim for reimbursement of direct loss and expense under the terms of the contract.

The works were only practically completed in July 1974. The parties entered into negotiations between 1974 and February 1977. Eventually in 1977, the architect certified the amount which was due to the contractors as being properly reimbursable direct losses or expenses. The employer paid the full sum by September 1979.

The contractors then pursued claims for interest from the date of practical completion until September 1979 and interest on that accrued interest from September 1979 until the date of judgment. The contractors' interest claim was framed as financing charges rising out of the direct loss and expense under the contract.

The English Court of Appeal applied the principles established in *FG Minter* and held that the contractors were entitled to financing charges in respect of the period from February 1977 until the date of the contractors' final written application in August 1979. However, the court further held that the financing charges incurred between practical completion in July 1974 and February 1977 was not recoverable under the terms of the contract as the particular delay was an independent cause attributable to the negotiations between the parties.

Robert Goff LJ explained that those financing charges should be calculated on a compound interest basis instead of simple interest if it could be shown that the actual costs to the contractor was interest on his overdraft which could be compounded.

He explained at p. 23,

“Now here, it seems to me, we must adopt a realistic approach. We must bear in mind, moreover, that what we are here considering is a debt due under a contract; this is not a claim to interest under the Law Reform Act, but a claim in respect of loss or expense in which a contractor has been involved by reason of certain specific events. The respondents, like (I imagine) most building contractors, operated over the relevant period on the basis of a substantial overdraft at their bank, and their claim in respect of financing charges consists of a claim in respect of interest paid by them to the bank on the relevant amount during that period. It is notorious that banks do themselves, when calculating interest on overdrafts, operate on the basis of periodic rests; on the basis of the principle stated by the Court of Appeal in Minter’s case, which we here have to apply, I for my part can see no reason why that fact should not be taken into account when calculating the respondent’s claim for loss or expense in the present case”.

The court then left it to the parties to agree the rates at which interest was to be calculated but directed that regard be had to the rates charged by the contractor’s bank upon its overdraft, and to the periodic rests applicable to the account. The contractor was contending for quarterly rests which the court did not rule out.

The court in *Holbeach Plant Hire Ltd v Anglian Water Authority* (1988) 14 Con LR 101 had to consider the contractor’s claim in an arbitration for interest on certified sums paid late. The issue before the court was whether a contractor could establish loss in terms of the interest or financing charges as claimed; whether such loss was caused by the employer’s default; whether the employer had knowledge of facts or circumstances which made such loss a not unlikely consequence of such default; and whether the contractor was entitled to recover such losses as special damages.

The court held that the arbitrator was entitled to take into account the terms and the surrounding circumstances of a contract and to draw inferences as to the

parties' actual or imputed knowledge that damage would flow naturally from a delay in payment.

A claim for finance charges can be also supported by the case of *Woon Hoe Kan & Sons Sdn Bhd v Bandar Raya Development Bhd* [1973] 1 MLJ 60. The main issue in this case was what rate of interest should apply where there was an agreement to pay interest. Harun J (as he then was) held that interest was, in any event, payable under s. 74 of *the Contracts Act 1950* if there was a breach of contract. In particular, the court referred to illustration (n) to s. 74 of *the Contracts Act 1950* which is as follows,

"A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day. B, in consequence of not receiving the money on that day, is unable to pay his debts and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment".

The English Court of Appeal in *Wadsworth v Lydall* [1981] 2 All ER 401 held that the actual interest charges incurred by the plaintiff were recoverable from the defendant as special damage. Here the defendant as owner of a dairy farm had entered into an informal partnership agreement with the plaintiff. The partnership agreement allowed the plaintiff to live in the farm house and run the farm. On dissolution of the partnership, the plaintiff was to give up possession of the farm on or before 15th May 1976 and on so doing be paid £10,000 by the defendant.

The plaintiff contracted to purchase another property for £10,000 on 10th May 1976. On 15th May 1976, the plaintiff gave up possession of the farm. However, the defendant refused to pay the £10,000 as agreed earlier. The plaintiff had to complete the purchase of the new property in October 1976 which he had difficulty of doing as a result of the default of the defendant. The defendant finally paid £7,200 to the plaintiff. As a result, the defendant raised a mortgage on the balance sum due to the vendor for which he had to pay legal costs. The plaintiff brought an action for £2,800 and another £246.33 as an additional

amount outstanding on the partnership account, special damages of £335 in respect of interest charges arising from the late completion of the purchase of the new property and £16.20 for the legal costs of the mortgage.

As first instance, the court held for the plaintiff and awarded him the first two amounts of the damages claimed. However, the court did not allow recovery of any of the special damages on the basis that it was too remote. The plaintiff appealed.

The English Court of Appeal held that the special damages claimed by plaintiff was not too remote since the defendant had wrongfully delayed payment £10,000 to the plaintiff. In the circumstances, the court held that it was foreseeable that the plaintiff would be forced in consequence to borrow money in order to complete a transaction. The actual interest charges incurred by the plaintiff on his borrowing were recoverable from the defendant as special damages.

The rule in *London, Chatham & Dover Railway Company* was distinguished on the ground that it precluded only the recovery of interest for late payment as general not special damages. Lord Brandon in *President of India v La Pintada Cia Navigacion SA* [1985] 1 A.C. 104 approved the decision in *Wadsworth v Lydall* that the rule applied only to claims for interest by way of general damages, and did not extend to claims for special damages.

There is a distinction between general damages and special damages. Special damages must be specifically pleaded and proved. General damages need not be. Neill LJ in *President of India v Lips Maritime Corporation* [1987] 1 Lloyd's Rep 131 considered the distinction more fully in the following words,

“In the case of a claim for damages for the late payment of money the court will not determine in favour of the plaintiff [if the] damages flow from such delay “naturally, that is, according to the usual course of things”. But a plaintiff will be able to recover damages in respect of a special loss if it is proved that the parties had knowledge of facts or circumstances from

which it was reasonable to infer that delay in payment would lead to that loss”.

So if the Claimant pleads and can prove that he has suffered special damages as a result of the Respondent’s failure to perform his obligation under a contract, such damages can be claimed provided it is not too remote as covered under section 74(1) of the Malaysian Contracts Act 1950. It is open for the Claimant to expressly plead his claim for interest as special damages and go on to prove it.

For example, the contractor in *Department Of Environment for Northern Ireland v Farrans (Construction) Ltd* (1981) 19 BLR 8 was awarded special damages interest paid on borrowings he was obliged to make in consequence of the employer’s wrongful deduction from interim payments of liquidated damages. The deductions were later released to the contractor before the proceedings were commenced. The editors of the Building Law Reports in their commentary at p. 6-7, have doubts on the correctness of this decision,

“Such losses are ones which are difficult to estimate accurately and for that reason might also be regarded as falling within the category of “general damages” rather than “special damages”... On that basis they would appear to be caught by the common law rule against the recovery of interest as damages for breach of contract to pay a sum of money. Interest would only be awarded by a court or arbitrator if and when there was a judgment or award for the principal sum and not where the principal sum had already been paid to the plaintiff or claimant”.

The Scottish case of *Farrens (Construction) Ltd v Dunfermline District Council* (1988) SLT 466; (1988) SCLR considered the question of whether, under the JCT 1963 Building Contract Form (similar to the PAM/ISM 1969 Form and the PAM 1998 Form), the contractor is entitled to interest as damages upon amounts due under the contract as “loss and expense” for the period between the date upon which they should have been certified by the architect and the date they were actually agreed by the employer. The arbitrator had held that the

sums had been wrongfully withheld from the date the architect should have certified them for payment, and that interest should run from that date.

However, the court held that, as the architect had not certified these sums for payment, there was no obligation upon the employer to pay them until the agreement was reached. Accordingly, there had been no wrongful withholding by the employer. The court rejected the claim for interest. This case is persuasive authority for the proposition that, under contracts which have similar payment arrangements, there is no wrongful withholding of any amount by the employer until the amount is certified by the architect or awarded by the arbitrator.

This principle was applied in *B.P. Chemicals Ltd v Kingdom Engineering* [1994] 69 BLR 113. The editors of the Building Law Reports criticise the principle as being “*unappealing to the commercial mind.*” The solution, they propose, is to treat as the cause of action, the entitlement of the claimant to a review by the arbitrator of the certifier’s decision.

9.0 SHOWING INTEREST IN THE AWARD

Where interest is awarded, the award should expressly state the interest awarded under that head. If a successful party had claimed statutory interest but the arbitral tribunal has for some reason taken the unusual step of exercising its discretion not to award interest, it should state the reasons for doing so.

If an arbitral tribunal overlooks to award interest in making its award, the error may be pointed out to it. Thereafter, it is open to the arbitral tribunal to make an additional award in relation to the interest as in section 35 of *the Arbitration Act 2005*: see *Pancommerce SA v Veecheema BV* [1983] 2 Lloyd’s Rep. 304.

10.0 CONCLUSION

The way to enforce an arbitration award is to enter judgment in terms of the award, with leave of the High Court under section 38 of *the Arbitration Act 2005* whereupon it may be enforced as a judgment of the court. The interest element within the award will be enforced as part of the whole award.

This is best illustrated by the case of *Coastal States Trading (UK) Ltd v Mebro Mineraloel-Handelsgesellschaft GmbH* [1986] 1 Lloyd's Rep. 465 where the defendant eventually paid the amount of the award, but not the interest upon it which had accumulated prior to payment. The court held that in granting leave to enter judgment in terms of the award, it could award interest upon the interest which had accumulated up to the date of payment of the principle sum awarded by the arbitrator. The defendant objected on the basis that it amounted to interest upon interest. The court rejected the argument. It held that the accumulated interest was treated as a debt, irrespective of how it arose.