

**JUDGMENT : Mr Justice Beatson :** Commercial Court. 21<sup>st</sup> May 2008

1. This matter comes before me by way of a reference from Master Miller following a hearing on 8 April 2008. The issue is whether interest under s17 of the Judgments Act 1838 is or should be payable in respect of a judgment entered pursuant to section 101(3) of the Arbitration Act 1996 in respect of an arbitration award made by the International Commercial Arbitration Court of Moscow where the award did not order that post award interest should be paid.
2. The award was made on 31 May 2000. The defendant was ordered to pay to Monégasque de Réassurances s.a.m. ('Monde Re'), a Monégasque reinsurance company, US\$88,256,704.49, and US\$117,697.00 in compensation of the charges for the payment of the arbitration fee. Applications by the defendant to set aside the award were rejected by the Moscow City Court and the Russian Supreme Court on 21 March and 24 April 2001.
3. On 3 May 2006, Monde Re, by then in liquidation, assigned the benefit of the award to the claimant. On 23 May the claimant applied *ex parte* to Colman J for an order permitting it to enforce the award in the same manner as a judgment. Colman J made an order entering judgment in terms of the award and permitting the claimant to serve the claim form and any freezing order out of the jurisdiction.
4. On 4 December 2006 the defendant applied to set aside Colman J's orders, *inter alia* on the ground that the award had been procured by fraud. Tomlinson J dismissed the application on 15 February 2008: 2008 EWHC 237 (Com). An appeal against Tomlinson J's decision is pending. The question whether interest was payable under the 1838 Act was not raised before Tomlinson J.
5. After Tomlinson J's decision the claimant took further steps to enforce Colman J's order. On 6 March it applied for a charging order over shares held by the defendant in JKX Oil and Gas plc and for a third party debt order against JKX Oil and Gas plc which held various dividend payments for the defendant. These applications stated the total amount owing was US\$ 101,003,466.55, made up of the judgment debt and interest at 8% from the date of Colman J's order. At that time, the interest amounted to some US\$ 12.6 million. Interim orders were granted on 7 March 2008.
6. It appears that the defendant was served with the interim charging order on 12 March and with the third party debt order on 26 March. In a letter dated 26 March White & Case, the defendant's solicitors, asked Clyde & Co, the claimant's solicitors, to explain the basis of the claim to recover interest for the period from the date of Colman J's order. The letter states that the award had not provided for post award interest to be payable and that no interest had been claimed in the arbitral claim form. Clyde & Co replied that the claimant was entitled to interest in accordance with the 1838 Act and, on 3 April, White & Case stated that the claim for post judgment interest would be contested.
7. At the hearing before Master Miller on 8 April the charging order and the third party debt order were made final subject to the issue of interest. Paragraph 2 of Master Miller's order referred the following issue to a Commercial Court judge for determination:  
*"whether interest under the Judgments Act 1838 as amended is or should be payable on the judgment of Colman J dated 23 May 2006 and if so from what date."*
8. Section 17 of the Judgments Act 1838 as amended provides:  
*"(1) Every judgment debt shall carry interest at the rate of [8] percent per annum from such time as shall be prescribed by rules of court until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment.*  
*(2) Rules of court may provide for the court to disallow all or part of any interest otherwise payable under subsection (1)."*
9. CPR 40.8(1) provides that, where interest is payable pursuant to section 17, the interest shall begin to run from the date that judgment is given unless *inter alia* the court orders otherwise.
10. Section 49 of the Arbitration Act 1996 governs interest. It provides:  
*"(1) The parties are free to agree on the powers of the tribunal as regard to the award of interest.*  
*(2) Unless otherwise agreed by the parties the following provisions apply. ...*  
*(4) The tribunal may award simple or compound interest from the date of the award (or any later date) until payment, at such rates and with such rests as it considers meets the justice of the case... ...*  
*(6) The above provisions do not affect any other power of the tribunal to award interest."*
11. Section 101 governs the recognition and enforcement of New York Convention awards. Section 101(2) provides that such an award may, *"by leave of the court, be enforced in the same manner as a judgment or order of the court or to the same effect"*. Subsection (3) provides that *"where leave is so given, judgment may be entered in terms of the award"*.
12. Section 66 deals with the enforcement of domestic awards. Sections 66(1) and (2) substantially re-enact section 26 of the Arbitration Act 1950. Section 66(1) is in substantially the same terms as section 101(1) in providing that, with the leave of the court, an award may *"be enforced in the same manner as a judgment or order of the court to the same effect"*. Section 66(2) is in the same terms as section 101(3).
13. By section 104, nothing in sections 99-103 of the Act, i.e. including section 101, *"affects any right to rely upon or enforce a New York Convention award at common law or under section 66"*.

14. The defendant raises three issues. The first is that section 17 of the 1838 Act is inapplicable to the award because, since the 1996 Act, the court is required not to intervene in an arbitration where the arbitrators did not award post-award interest. There are four components to Mr Higham QC's submissions on this issue. The first is that the court's duty in both domestic and New York Convention arbitrations is to enter judgment "in terms of the award": sections 66(2) and 101(3) of the 1996 Act. Secondly, he relied on section 49 of the 1996 Act which gives domestic arbitrators a statutory power to award post award interest. This was a major change from the position under the Arbitration Act 1950. Pursuant to section 20 of the 1950 Act, operating as a term of the award implied by statute, *Continental Grain Co. v Bremer* [1984] 2 Lloyd's Rep 121, 124 approving *Mustill and Boyd on Commercial Arbitration*, 371, English domestic arbitrations carried interest from the date of the award at the same rate as a judgment debt unless the arbitral tribunal ordered otherwise.
15. Mr Higham submitted that the consequence of this change is that, in domestic arbitrations, the court may not make an award of post award interest where the arbitrators have not awarded such interest pursuant to their powers under section 49 of the 1996 Act because to do so would be to act otherwise than "in the terms of the award" and would thus be contrary to section 1(c) of the 1996 Act. In *Walker v Rowe* [2000] 1 Lloyd's Rep. 116 Aikens J stated that "because an award has to be entered in terms of the award", ...if an award has been made for a certain sum of money... and there is no award of "post award" interest, the judgment must be entered in those terms. His Lordship stated that any attempt to add interest under section 35A to an award which had not granted "post award" interest would amount to an alteration by the court of the arbitrators' Award. He stated (at [17(5)]) that Parliament intended that, once arbitrators had decided whether "post award" interest should be granted: "... that was the end of the matter. If they decided it should not, then any judgment entered by the Court must reflect that fact. Any contrary decision by the Court would be intervention by the Court that is not warranted by any provision in Part I of the 1996 Act."
16. Thirdly Mr Higham submitted that it follows that, where "post award" interest is granted, since it is, by section 49(4) payable "until payment", it would be contrary to the 1996 Act for the Court to substitute interest at the rate specified in the Judgments Act for any such award. Accordingly, section 17 of the Judgments Act is inapplicable to domestic arbitrations both where arbitrators have not granted post award interest and where they have granted such interest.
17. The final component of Mr Higham's submissions on this issue is that the same reasoning must apply to judgments entered under section 101 of the 1996 Act in relation to New York Convention awards. This is (see paragraph 30 of his skeleton argument) because section 101 is in similar terms to section 66 and there is no reason why a different regime should apply in relation to New York Convention awards under section 101. It is said that this is particularly so because, as a result of sections 2(2)(b) and 104 of the 1996 Act, a New York Convention award can be enforced under section 66 as well as section 101 of the 1996 Act. It was argued that it could not have been intended that the regime that would apply in relation to post award interest on New York Convention awards would depend on whether the application to enforce was brought under section 66 or section 101.
18. Mr Higham's submissions, if accepted, would have the unattractive result that a person against whom an award is made would be able to delay without penalty, paying that sum even after judgment has been entered to reduce the real value of the award. I have concluded that Mr Dougherty's submissions on behalf of the claimant on the first issue are compelling.
19. The natural interpretation of s101(3) is that, where leave is given and judgment is entered, there is a judgment of the courts of this country which has the same effect as other judgments. Section 17 of the 1838 Act applies to "every judgment debt" and CPR 40.8 provides that, unless the court orders otherwise, interest begins to run from the date that judgment is given. In the case of a foreign judgment, once it is registered in the country it takes effect as an English judgment: Foreign Judgments (Reciprocal Enforcement) Act 1933, section 2(6). In the case of both registered foreign judgments and New York Convention awards where judgment has been entered pursuant to s101(3), once there is an English judgment, English procedural rules, including those relating to interest payable, apply: see Dicey, Morris & Collins, *The Conflict of Laws* 14<sup>th</sup> ed., para 33-400.
20. Mr Higham's submissions rely on three assumptions. The first is that the need in sections 66(2) and 101(3) for the judgment to be entered "in terms of the award" means that, where the arbitrators did not award interest, to do so would amount to an alteration by the court of the arbitrators' award. The second is that the change as to the interest position in domestic arbitrations effected by section 49 of the 1996 Act affected New York Convention awards. The third is that the fact that judgment is entered in the terms of the award does not change the position.
21. As far as the first of these assumptions is concerned, it is to be remembered that section 66(2) substantially re-enacts the relevant part of section 26 of the 1950 Act. Prior to the coming into force of the 1996 Act, section 26 did not preclude the court awarding interest. The change in the position under the 1996 Act is the result of the operation of section 49 not section 66. Accordingly, section 101(3) of the 1996 Act, which is in the same terms as section 66(2) and thus also in the same terms as section 26 of the 1950 Act, cannot have the effect attributed to it by Mr Higham. Mr Higham did not concede that before the 1996 Act came into force the Judgment Act applied to New York Convention awards. He was, however, unable positively to submit that it did not apply or to point to any authority or commentary in his favour. The overall position in relation to interest before 1996 is a pointer to the Judgments Act applying. So is the fact that section 3(1) of the 1975 Act provided that a New York Convention award was to be enforceable "either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act 1950".

22. I turn to the second assumption. There are no indications in the 1996 Act of an intention to change the position in respect of interest when New York Convention awards are enforced in this country. Section 49 of the 1996 Act only concerns domestic arbitrations. Moreover, even in relation to domestic arbitrations, section 49(6) states that section 49 does not affect any other power of the tribunal to award interest, such as the power to award special damages for the late payment of money and other common law powers: *Mustill and Boyd on Commercial Arbitration*, p. 393.
23. With regard to the third assumption, an award may either be enforced "in the same manner as a judgment" (see sections 66(1) and 101(2) of the 1996 Act) or "judgment may be entered in terms of the award" (sections 66(2) and 101(3)). The leave of the court to enforce "in the same manner as a judgment" is a prerequisite of the power to enter judgment in terms of the award, but the two are separate. The essential difference is that the obligation to honour an award arises by virtue of the agreement of the parties, whereas in the case of a judgment it follows from the power of the court. This difference is reflected in the approach of Aikens J in two cases. He proceeded on the basis that the entering of a judgment changes the position. *Walker v Rowe* [2000] 1 Lloyd's R. 116 at [13]-[14], relied on by Mr Higham, in fact concerned the post award but pre-judgment phase and it appears (see [14]) that Aikens J considered that the position would be different once judgment was entered. In *Pirtek v Deanswood* [2005] 2 Lloyd's R. 728 his Lordship stated (at [47]) that the difficulty that arose in that case, where the award had not included interest and the arbitrator sought to do so by a retrospective order, "could have been avoided by a much earlier application to make the award a judgment. Judgment Act interest would then have run on the sum awarded".
24. In *Walker v Rowe* Aikens J said he was driven to his conclusion by the wording of the 1996 Act. He stated [at 17(6)] that it was the combined effect of sections 1(c), 49 and 66 which had this effect but it is clear that the key provision was section 49: see [17(1) and (4)]. There is no equivalent of section 49 applicable to New York Convention awards. Moreover, here unlike *Walker v Rowe* the award has been entered as a judgment. Accordingly, I am not driven to a result which would have the effect of enabling a judgment debtor to delay without financial penalty paying his judgment debt and reduce the real value of the judgment.
25. The other two issues raised on behalf of the defendant are: first, the court should exercise its discretion under CPR 40.8(1)(b) to disallow interest under section 17 of the 1838 Act; and secondly, and alternatively, that it should exercise its power pursuant to section 44A of the Administration of Justice Act 1970 to direct an alternative rate of interest to that which would otherwise be applicable under section 17. In its written submissions the defendant argued that the appropriate rate was the post judgment interest rate for US dollar judgments in US Federal Courts which, for the week proceeding Colman J's order, was 4.98%.
26. Mr Higham's submissions as to why the court should exercise its discretion to disallow interest under section 17 are essentially the same as those he made in support of his contention that section 17 does not apply. He argued that, where arbitrators have chosen not to award post award interest, the court by entering judgment pursuant to section 101 should not interfere with the decision of the arbitrators as to post award interest. He argued that, as a matter of principle, the court should always exercise its discretion to disallow such interest when entering judgment. Moreover, he relied on evidence from a Russian lawyer, Mr Monastyrsky, which suggests that no interest is payable on awards under Russian law.
27. I reject these submissions. The issue is whether interest should be awarded from the date of the judgment, not the date of the award. Whether interest is payable on an English judgment debt is a matter for English law as the *lex fori*. Not awarding interest from the date of the judgment means that the judgment debtor can take advantage of his own delay, and the time taken in its, to date, unsuccessful challenge to the judgment of Colman J to reduce the real value of the award. Secondly, it is too late to raise this point. It was not raised in December 2006 when the defendant applied to set aside the orders of Colman J. It was not raised for over a month after Tomlinson J dismissed that application in February 2008. It was first raised on 26 March after the defendant received notice of the application for a third party debtor order. This was some two weeks after the defendant received notice of the application for a charging order. The issue was canvassed before Master Miller who referred it to this court. The defendant's own application to this court, was made on 7 May, a month later.
28. I also reject the submission that interest should be awarded at 4.98% pursuant to section 44A of the Administration of Justice Act. The defendant originally made its submission on the basis that the 8% fixed by section 17 of the 1838 Act did not reflect the commercially appropriate rates for US dollar borrowings. In the light of the approach used in this country, for example, by Langley J in *Kuwait Airways Corp. v Kuwait Insurance Co.* [2000] 1 Lloyd's Rep. 678 at 692-3 that, if a comparison is to be made with US rates, the appropriate rate is US prime, Mr Higham did not pursue that submission. On the day of the judgment of Colman J the US prime rate was 8%, and the average rate between then and now is 7.69%. Mr Higham's alternative submission was that the claimant was a shell company and this arbitration award is its only asset. Mr Higham submitted that the appropriate rate of interest for what he described as a speculative debt trader would not be what he would have had to borrow but the investment rate he would have obtained had he had the money earlier. He submitted that that was the 4.98% US Treasury one year rate. I reject this unattractive submission. First, the reason given does not justify a departure from the general approach. Moreover, this was not one of the questions remitted to the court by Master Miller. Finally, as with the argument based on CPR 40.8(1)(b), it is now too late to argue this.

29. Accordingly, the answer to the question referred to the court by Master Miller is that interest under the Judgments Act 1838 as amended is payable on the judgment of Colman J dated 23 May 2006 and is payable at the specified rate of 8% from that date.

MR. CHARLES DOUGHERTY (instructed by Clyde & Co LLP) for the Claimant  
MR. JOHN HIGHAM QC (instructed by White & Case LLP) for the Defendant