

INTL
Circuit

48 VI (1981)
USA no. 32

"inactive duty training" entails actual participation in that "duty" which has been scheduled in advance. Henry Nowinski was assigned to "inactive duty." Section 765(3)(A) defines a person on "inactive duty training." In denying any significance to the word "training," in the term "inactive duty training," plaintiff's proposed interpretation is untenable.

Plaintiff points out that subsection (4) of § 765 explicitly excludes "duty performed as a temporary member of the Coast Guard Reserve," from the categories of "active duty for training" and "inactive duty training," and argues that if duty performed as a temporary member of the Naval Reserve were also meant to be excluded, the statute would so specify. It is, however, of no consequence here that certain Coast Guard Reserve duty is ineligible for insurance coverage. It is not that Henry Nowinski was a temporary member of the Naval Reserve that defeats plaintiff's claim, it is the fact that he was not performing "duty," as that term is understood in the statute, that compels the conclusion that he was not covered by the insurance policy. Indeed, the further specification in that subsection that the term inactive duty training does not include (i) work or study performed in connection with correspondence courses, or (ii) attendance at an educational institution in an "inactive status," only reinforces the interpretation of "inactive duty training" as requiring participation in some undertaking beyond that associated with "inactive duty."

Defendant's motion for summary judgment will thus be granted. Plaintiff's motion for summary judgment will be denied.

In the Matter of the Arbitration Between
LAMINOIRS - TREFILIERIES - CABLERIES de LENS, S. A., Petitioner,

v.

SOUTHWIRE COMPANY and Southwire International Corporation,
Respondents.

SOUTHWIRE COMPANY and Southwire International Corp., Plaintiffs,

v.

LAMINOIRS-TREFILIERIES-CABLERIES de LENS, S. A., Defendant.

Civ. A. Nos. C79-43N, C79-44N.

United States District Court,
N. D. Georgia,
Newnan Division.

Jan. 18, 1980.

Supplemental Opinion Feb. 18, 1980.

French manufacturer seller made motion for confirmation of arbitral awards entered by international arbitration tribunal with respect to purchase agreement entered into with Georgia corporation buyer. Georgia corporation buyer opposed motion. The District Court, Tidwell, J., held that: (1) award was not subject to vacation even though not made within six months from date of signing of terms of reference for arbitration as required by rules of International Chamber of Commerce; (2) evidentiary decisions made by arbitration tribunal were not clearly an abuse of discretion; (3) adoption of French legal rate of interest on amounts due, without introduction of any evidence on French law was not erroneous; (4) Georgia public policy did not bar adoption of French legal rate of interest on amounts due, although award of additional five percent interest if payment was delayed was in nature of penalty and would not be enforced; and (5) there was no error with decision of tribunal to award postaward interest. In a supplemental opinion, the District Court, held that: (1) principal amount due from Georgia corporation to French manufacturer and interest would be



converted into dollars at exchange rate existing on business day preceding entry of judgment as published in *Wall Street Journal*; (2) no further amount was owed by Georgia corporation on "flaking claim," and (3) post-judgment interest would accrue at rate of eight percent per annum.

Order accordingly.

1. Arbitration ⇐46

In order to preserve one's rights, it is essential to protest against continuance of arbitration proceedings after stipulated time has elapsed.

2. Arbitration ⇐82.5

Where partial arbitral award, which dealt with major substantive issues under submittal, was rendered three weeks after initial six month limit had elapsed, award made by international arbitration tribunal with respect to purchase agreement between Georgia buyer and French seller was not subject to vacation on ground that it was not made within six months from date of signing of terms of reference for arbitration as required by rules of International Chamber of Commerce.

3. Arbitration ⇐61

Evidentiary decisions made by international arbitration tribunal with respect to purchase agreement between Georgia buyer and French seller were not clearly an abuse of discretion. 9 U.S.C.A. § 10(c).

4. Arbitration ⇐56

In making award with respect to purchase agreement between Georgia buyer and French seller, international arbitration tribunal did not erroneously adopt French legal rate of interest on amounts due, without introduction of any evidence on French law or notice being given to Georgia buyer that French law would be invoked. 9 U.S.C.A. § 10(c, d).

5. Arbitration ⇐82.5

Enforcement of foreign arbitral awards may be denied on basis that enforcement would be contrary to public policy of country where enforcement is sought only where enforcement would violate foreign coun-

try's most basic notions of morality and justice. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, subd. 2(b), 9 U.S.C.A. § 201 note.

6. Arbitration ⇐56, 82.5

With respect to arbitration award involving purchase agreement between French seller and Georgia buyer, Georgia public policy did not bar adoption of French legal rate of interest on amounts due, which was between nine and one-half and ten and one-half percent, where arbitration provision of purchase agreement called for contract to be interpreted according to the laws of Georgia to the extent they were in accordance with the law of France; however, award of additional five percent interest if payment was delayed by more than two months was in the nature of a penalty and was not enforced. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V, subd. 2(b), 9 U.S.C.A. § 201 note; Code Ga., §§ 57-101, 57-102, 57-118, 57-119.

7. Damages ⇐74

Interest ⇐12

An award of "interest" is made so that a person wrongfully deprived of the use of his money should be made whole for his loss; on the other hand, a "penalty" is a sum of money which law exacts by way of punishment for doing something that is prohibited or omitting to do something that is required to be done.

See publication Words and Phrases for other judicial constructions and definitions.

8. Courts ⇐9

Foreign law will not be enforced if it is penal only and relates to punishment of public wrongs as contradistinguished from redressing of private injuries.

9. Damages ⇐80(1)

Agreements to pay fixed sums as damages plainly without reasonable relation to probable damage which may follow will not be enforced.

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10. Interest ⇒ 39(1)

Absent more specifically expressed limitation on award of postaward interest, there was no error with respect to decision of international arbitration tribunal in awarding postaward interest in proceeding involving purchase agreement between Georgia buyer and French seller.

In Supplemental Opinion

11. Payment ⇒ 12(5)

When a debt is payable in foreign currency in foreign country, proper date of conversion is judgment date, and not date on which obligation arose.

12. Arbitration ⇒ 80

With respect to arbitral award made to French manufacturer against Georgia corporation, Georgia corporation owed nothing on "flaking claim."

13. Federal Courts ⇒ 415**Interest** ⇒ 39(1)

Interest on a federal judgment is calculated from date of entry at rate allowed by state law. 28 U.S.C.A. § 1961.

14. Interest ⇒ 38(1, 2)

Generally, interest on a Georgia judgment is to be calculated at 7% per annum, unless contract or note upon which action is based specifies a different rate; however, such different contract rate must be within Georgia legal limit. Code Ga. §§ 57-101, 57-108.

15. Interest ⇒ 38(1), 60

With respect to confirmation of arbitral award against Georgia corporation in favor of French manufacturer, postjudgment interest accrued at rate of 8% per annum; postjudgment interest on portion of judgment amount which represented pre-judgment interest was not awarded. 28 U.S.C.A. § 1961; Code Ga. §§ 57-101, 110-304.

Gary W. Hatch, Hansell, Post, Brandon & Dorsey, Atlanta, Ga., Alexander & Green, New York City, for Laminoirs-Trefileries-Cableries de Lens, S. A.

Van C. Wilks, William V. Hearnburg, C. David Mecklin, Jr., Carrollton, Ga., Gambrell, Russell & Forbes, Atlanta, Ga., for Southwire Co. and Southwire Intern. Corp.

ORDER

TIDWELL, District Judge.

The above-styled matter is before the Court pursuant to Laminoirs-Trefileries-Cableries de Lens' ("LTCL") motion for confirmation of arbitral awards, and Southwire Company's and Southwire International Corporation's ("Southwire") opposition thereto.

Background

Southwire, a Georgia corporation which manufactures cable products, and LTCL, a French *société anonyme* which manufactures steel wire and rope, entered into a purchase agreement in 1974, whereby LTCL agreed to manufacture and sell, and Southwire agreed to buy, galvanized steel wire during the period from September 1, 1974, through December 31, 1980. The price to be paid by Southwire was to be determined and adjusted according to a formula based on the world market price of steel wire ("world market price adjustment clause"). Said purchase agreement contained an arbitration clause, and also contained a governing law clause, stating that the agreement would be governed by the laws of Georgia insofar as these laws are in accordance with French laws.

Disputes arose as to the interpretation of the world market price adjustment clause, alleged corrosion of the goods supplied by LTCL ("corrosion claim"), and alleged flaking of the zinc coating on the wire ("flaking claim").

Pursuant to the arbitration clause in the contract, LTCL demanded arbitration before an international tribunal in accordance with the rules of the International Chamber of Commerce ("ICC"). The Terms of Reference for such arbitration were signed by the parties and arbitrators on July 17, 1979.

On February 8, 1979, the arbitrators made a partial arbitral award, which accepted LTCL's interpretation of the world market price adjustment clause; ordered Southwire to pay LTCL the aggregate amount of underpayments caused by Southwire's interpretation of the clause (plus interest at the French legal rate); found in favor of Southwire on the corrosion claim (so that the amount of damage would be withheld from funds due LTCL); reserved judgment on the flaking claim and the costs of arbitration.

The parties thereafter settled the flaking claim, and on April 12, 1979, the tribunal entered a further arbitral award, confirming settlement of the flaking claim and allocating costs.

Southwire filed a state court action in Georgia, seeking vacation of the awards, which was removed to this court by LTCL. LTCL also filed a separate suit seeking confirmation of the awards. These actions have been consolidated.

Southwire has three basic objections to confirmation of the arbitral awards. These are:

- (1) that the award was not made within six months from the date of the signing of the Terms of Reference for arbitration (as required by the rules of the ICC);
- (2) that the arbitrators refused to entertain certain evidence deemed by Southwire to be material to its presentation of the case;
- (3) that the arbitrators erroneously adopted the French legal rate of interest on the amounts due, without the introduction of any evidence on the French law or notice being given to Southwire that French law would be invoked; that the French rate applied violates the enforcing forum's public policy and is usurious; that the interest award is inconsistent with the Terms of Reference insofar as it awards post-award interest.

Timeliness

With respect to the fact that the award was not made within six months after the

Terms of Reference were signed, the Rules of the ICC Court of Arbitration provide that the court may, "if need be on its own initiative extend this time limit if it decides that it is necessary to do so." Art. 18, par. 2, ICC Rules. It appears from the record that when the date for the session of the court was moved from January 8, 1979 (before the six-month time period had elapsed) to January 19, 1979 (after the six-month limit), the court on its own motion extended the time in which a final award was to be rendered to April 30, 1979, and again on its own motion on April 11, 1979, further extended this date to July 21, 1979.

[1, 2] The above-cited rule for extension does not call for advance notice to the parties, should the court grant such an extension on its own motion. Further, there is nothing to indicate that Southwire lodged any protest once the initial six-month period had elapsed. In order to preserve one's rights, it is essential to protest against continuance of the arbitration proceedings after the stipulated time has elapsed. *Lodge No. 725, International Assoc. of Machinists v. Mooney Aircraft, Inc.*, 410 F.2d 681, 683 (5th Cir. 1969). A partial arbitral award, which dealt with the major substantive issues under submittal, was rendered three weeks after the initial six-month limit had elapsed. Southwire has not shown that any prejudice or actual harm was caused by the delay. See *Hotel, Motel, Restaurant and Hi-Rise Employees and Bartenders Union, Local 355 v. Fontainebleau Hotel Corp.*, 423 F.Supp. 83 (S.D.Fla.1976). For these reasons, the Court declines to vacate the awards on the ground of untimeliness.

Exclusion of Evidence

Southwire contends that it was prevented from offering certain pertinent evidence at the arbitral hearing. In particular, it is argued that Southwire's attorney was prevented from fully cross-examining LTCL's international projects manager with regard to a renegotiation clause in the contract, and that allowance of such questioning would have been pertinent in showing an

intent on the part of LTCL to anticipatorily repudiate the contract.

The record reveals that the chairman of the arbitral tribunal expressed his willingness to allow Southwire to introduce facts relating to the renegotiation clause as having potential bearing on the intent of the parties at the time of the signing of the contract (T. 90). The arbitrators, however, were concerned that Southwire's questioning was aimed at eliciting admissions from the witness as to future course of conduct which would have no bearing on the matter before the tribunal (T. 85). Therefore, the chairman limited the questioning to "matters of fact albeit recent matters of fact which might conceivably have some bearing on what was the intent of the parties several years ago" (T. 85) (see also TT. 90, 99). Southwire was allowed to introduce documentary evidence on the parties' alleged intent as to future course of action, and allowed to make "argumentative interpretation" of such evidence in its summation to the tribunal (T. 104).

In its argument on improper exclusion of evidence, Southwire relies upon 9 U.S.C. § 10(c), which provides in pertinent part that a district court may vacate the award "where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy." It has been held, however, that arbitrators are charged with the duty of determining what evidence is relevant and what is irrelevant, and that barring a clear showing of abuse of discretion, the court will not vacate an award based on improper evidence or the lack of proper evidence. *Petroleum Transport Ltd. v. Yacimientos Petroliferos Fiscales*, 439 F.Supp. 1233, 1235 (S.D.N.Y.1975); see also *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama*, 312 F.2d 299, 300 (2d Cir. 1963), cert. den., 373 U.S. 949, 83 S.Ct. 1679, 10 L.Ed.2d 705.

[3] The Court concludes that the evidentiary decisions made by the tribunal were not clearly an abuse of discretion; nor did they deny Southwire a fair hearing. Cf. *Harvey Aluminum, Inc. v. United Steel*

workers of America, 263 F.Supp. 488 (C.D. Cal.1967). Therefore, vacation of the awards on this ground is denied.

Interest

The arbitral award of interest is attacked on several grounds. The arbitrators concluded, in response to LTCL's argument, that the French legal rate of interest (on judgments) should apply. The French statute relied upon by the tribunal was not specifically pleaded nor formally introduced into evidence, however. In their award, the tribunal merely states what the French law is and applies it. LTCL argues that the arbitrators took judicial notice of the French statute; Southwire argues that absent notice to it that French law would be relied upon, judicial notice was inappropriate.

The Court disagrees with Southwire's assertions. First of all, the contract's governing law clause contained a provision that the contract would be governed by Georgia law to the extent that it was in accordance with French law. The fact that this clause was cited by the Terms of Reference for arbitration should have, in and of itself, put Southwire on notice that French law had a potential bearing on the outcome of the case, thus precluding any issue of "unfair surprise". See Rule 44.1, Fed.R.Civ.P., Notes of Advisory Committee. While Southwire now contends that the tribunal misconstrued the governing law clause as applicable to interest rate determination, Southwire argued before the arbitrators that interest "should be assessed in accordance with Georgia law", and in support of such contention itself referred the arbitrators to its pleadings, "concerning the application of Georgia law to the entire interpretation of the contract" (T. 540) (emphasis supplied).

It was provided in the Terms of Reference for arbitration that the "arbitrators shall proceed and decide on the record." However, it has been held that arbitrators may draw on their own personal knowledge in making an award. See *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 n.4, 76

S.Ct. 273, 100 L.Ed. 199 (1955), citing *American Almond Products Co. v. Consolidated Pecan Sales*, 144 F.2d 448 (2d Cir. 1944). In *American Almond Products Co.*, *supra*, Judge Learned Hand addressed the issue of whether it was "misbehavior" under 9 U.S.C. § 10(c) (grounds for vacating award) "to make an award in money without any evidence of market price." Judge Hand concluded that:

[I]t was not 'misbehavior' to settle a controversy meant to be finally disposed of, by the only means open to the arbitrators, as the case stood. Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid.

Id. at 451.

[4] Here, LTCL argued at the hearing that "the applicable legal interest rate is that in effect in France" (T. 538), and was quizzed by the tribunal as to the applicable French rate during the relevant period (T. 538), at which point the discussion continued off the record (T. 539). The arbitrators, in making the award, chose to rely on what they perceived to be, according to their own knowledge and investigation, the most appropriate French statute, rather than on the export discount rates introduced into evidence by LTCL (T. 534-5).¹ Such, the arbitrators relied on the only means available to them—their own ascertainment of the appropriate French legal rate of interest for the period in question—in order to settle the controversy and finally dispose of it. *American Almond Products Co. v. Consolidated Pecan Sales*, *supra*, 144 F.2d at 451. The Court therefore concludes that the manner in which the amount of interest payable was determined by the arbitrators is not grounds for vacation under 9 U.S.C. §§ 10(c) or (d).

It is also contended that the award of interest should not be enforced as being usurious and against public policy. In mak-

ing their award, the arbitrators determined that under the French law, the applicable annual rate for the time periods in question should be 10½% and 9½% (depending upon the date of maturity of the underpaid invoice), "increasing to fifteen and a half percent and fourteen and a half percent respectively after two months from the date of notification of the award

[5] Article V, par. 2(b) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C.A. § 201 *et seq.*, provides that enforcement of an award may be refused if such enforcement would be contrary to the public policy of the country where enforcement is sought. However, enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum country's most basic notions of morality and justice. *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974). See also *Gulf States Telephone Co. v. Local 1692, International Brotherhood of Electrical Workers*, 416 F.2d 198, 201 (5th Cir. 1969).

[6] While the exaction of usury ("[taking] a greater sum for the use of money than the lawful interest." Ga.Code Ann. § 57-102) has been characterized by the Georgia Supreme Court as "odious, illegal, and immoral," *First Federal Savings & Loan Assoc. of Atlanta v. Norwood Realty Co.*, 212 Ga. 524, 527, 93 S.E.2d 763 (1956), the arbitrators concluded that the Georgia legal rate (7% per annum where the rate is not named in the contract, see Ga.Code Ann. § 57-101 (1979)) was not applicable under the governing law clause. In Georgia, rates of interest of 9½% and 10½% are not prohibited *per se*—the legal rate may be as high as 10½% per annum where the parties agree to such in writing, Ga.Code Ann. § 57-101 (1979); the rate of interest on a principal sum exceeding \$3,000 loaned to a profit corporation may be set without limit by the parties in writing, Ga. Code Ann. § 57-118 (1979); interest rates on loans of \$100,000 or more are limited

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only by the agreement of the parties in writing. *Ga.Cole Ann.* § 57-119. The existence of these statutes sufficiently convinces the Court that the exaction of interest rates of 9½% and 10½% per annum are not such as would violate this country's or this state's most basic notions of morality and justice. See *Parsons & Whittemore Overseas Co. v. (RAKTA)*, *supra*, 508 F.2d at 974. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts. *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 519, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1973).

In applying the French law, however, the arbitrators held that the interest rates assessed should rise 5% per annum after two months from the date of the award, to rates of 14½% and 15½% per annum, respectively. (The French statute relied upon provides: "In the case of a judgment, the rate of legal interest shall be increased by 5 points upon the expiration of a period of two months from the day on which the court decision has become enforceable, even if only provisionally." French Law No. 75-619, July 11, 1975.)

[7-9] An award of interest is made so that a person wrongfully deprived of the use of his money should be made whole for his loss. *Miller v. Robertson*, 266 U.S. 241, 257-8, 45 S.Ct. 73, 69 L.Ed. 265 (1924); *Samincorp v. S. S. Rivadeluna*, 277 F.Supp. 943, 944 (D.Del.1967). A penalty, on the other hand, is a sum of money which the law exacts by way of punishment for doing something that is prohibited or omitting to do something that is required to be done. *In re Denver & B. G. W. R. Co.*, 27 F.Supp. 983 (D.Colo.1938). The law does not lightly impose penalties. *United States v. Murphy*, 326 F.2d 121 (2nd Cir. 1963). A foreign law will not be enforced if it is penal only and relates to the punishing of public wrongs as contradistinguished from the redressing of private injuries. *Southern Railway Co. v. Decker*, 5 Ga.App. 21, 25, 62 S.E. 678 (1908); see also *Sherman & Sons Co. v. Bitting*, 26 Ga.App. 299(2), 105 S.E. 848 (1921). Agreements to pay fixed sums as damages plainly

without reasonable relation to any probable damage which may follow will not be enforced. *Kothe v. R. C. Taylor Trust*, 280 U.S. 224, 226, 50 S.Ct. 142, 74 L.Ed. 382 (1930); see also *Jones v. Clark*, 147 Ga.App. 657, 659, 249 S.E.2d 619 (1978).

The Court concludes that the imposition of an additional 5% interest by the arbitrators in accordance with the French statute is penal rather than compensatory, and bears no reasonable relation to any damage resulting from delay in recovery of the sums awarded. Therefore, that portion of the award which purports to assess the rates of interest at 14½% and 15½% will not be enforced or recognized by this Court. 9 U.S.C.A. § 201, Art. V, par. 2(b), Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The rates of 9½% and 10½%, as imposed by the arbitrators, will continue to accrue until the date of Judgment.

[10] Finally, Southwire has argued that the Terms of Reference for arbitration contemplated only imposition of pre-award interest, based on the following language contained therein:

Should such aggregate difference in the purchase price bear interest, and if so, from what date or dates should it be calculated, at what rate and what is the aggregate amount of interest thus determined? (emphasis supplied)

This language does not on its face limit the interest award to pre-award interest. Absent a more specifically expressed limitation on the award of post-award interest, the Court sees no error with the decision of the tribunal; the proceedings herein have caused LTCL the loss of use of its money award, for which post-award interest should compensate. See generally *Perkins v. Standard Oil Co. of California*, 487 F.2d 672, 676 (9th Cir. 1973); *Louisiana & Arkansas Railway Co. v. Export Drum Co.*, 359 F.2d 311, 315 (5th Cir. 1966) (post-judgment interest).

Inasmuch as the parties have expressed no objection to deferring certain unresolved questions with respect to the Court's entry of judgment (the actual amounts due, the exchange rates applicable, etc.), the Court

at this time makes only the following rulings with respect to the outstanding motions:

LTCL's motion for confirmation of the arbitral awards (Civil Action No. C79-43N) is hereby granted and sustained to the extent outlined above.

Southwire's counter-motion to vacate and set aside the arbitral awards (Civil Action No. C79-43N) and motion to vacate and set aside the arbitral awards (Civil Action No. C79-44N) are hereby overruled and denied.

The parties are ordered to submit to the Court a form of judgment agreed upon by them, or in the alternative, forms of judgment and supporting memoranda from each of them, within fifteen (15) days from the date of this order.

SUPPLEMENTAL OPINION

By Order of January 18, 1980, the Court granted confirmation of certain arbitral awards in favor of Laminoirs-Trefileries-Cableries De Lens, S.A. ("LTCL") (Civil Action No. C79-43N) to the extent outlined in said Order, and overruled and denied the counter-motion of Southwire Company and Southwire International Corporation ("Southwire") to vacate and set aside the arbitral awards (Civil Action C79-43N) and their motion to vacate and set aside the arbitral awards (Civil Action No. C79-44N).

The parties have stipulated all amounts of French francs due under the Order, but the following issues remain in dispute:

(1) What rate of exchange should be applied to convert the French francs due into United States dollars?

(2) Whether there is due and owing by Southwire to LTCL any amount pursuant to a settlement agreement as to the "flaking claim," which agreement was adopted by the arbitration tribunal?

(3) What is the rate of post-judgment interest?

The Court will deal with each of the issues individually.

Exchange Rate

LTCL argues that the applicable exchange rate is that prevailing on the date of entry of this Court's judgment since payments by Southwire to LTCL were due and payable in France in French francs. See *Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517, 47 S.Ct. 166, 71 L.Ed. 383 (1926). Southwire contends that the rate of exchange prevailing on the respective dates that Southwire's liability to LTCL matured would be the appropriate exchange rate. See *Hicks v. Guinness*, 369 U.S. 71, 46 S.Ct. 46, 70 L.Ed. 168 (1925).

[11] When a debt is payable in foreign currency in a foreign country, the proper date of conversion is the judgment date, and not the date on which the obligation arose. See *Deutsche Bank Filiale Nurnberg v. Humphrey*, *supra*; *Gutor International AG v. Raymond Packer Co.*, 493 F.2d 938, 943 (1st Cir. 1974). In the present case, the LTCL invoices directed that payment was to be made by cable transfer to LTCL's bank in France; Southwire paid the invoices periodically by cabling French francs to the Royal Bank of Canada, Paris (a French bank where Southwire maintained an account) and transferring French francs to LTCL's bank. It can therefore be said that Southwire's obligation to LTCL was performable in France, in French francs, and that the "judgment day" rule of exchange rate computation should apply. See *Paris v. Central Chicleria S. de R. L.*, 193 F.2d 960, 962 (5th Cir. 1952). "Judgment day" for purposes of the exchange rate computation would ordinarily be the date of this Court's judgment, see *Island Territory of Curacao v. Solitron Devices, Inc.*, 356 F.Supp. 1, 14 (S.D.N.Y.1973), *aff'd* 489 F.2d 1313 (2d Cir. 1973), *cert. den.* 416 U.S. 986, 94 S.Ct. 2389, 40 L.Ed.2d 763; counsel for LTCL, in deference to the Court, has stated that it will be "content to have the court use the foreign exchange rate for the preceding business day as published in the *Wall Street Journal* on the date of entry of judgment."

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Amount Due on Settled "Flaking Claim"

In their final award of April 25, 1979, the arbitrators ratified, confirmed, and adopted the settlement agreement between the parties dated February 16, 1979, in which it was specifically agreed that:

Southwire shall pay to LTCL Four Hundred Sixty-Two Thousand Six Hundred Thirty Seven French Francs (FF 462,637.00), that is the French francs equivalent, converted at the rate of 4.60 French francs per U.S. dollar, of One Hundred Thousand Five Hundred and Seventy Three U.S. Dollars and Twenty-Six Cents (U.S. Dollars 100,573.26).

[12] It appears to the Court that the parties intended that payment pursuant to the settlement be made in dollars; unlike the payment of invoices by Southwire, which involved the transfer of French Francs in France, the settlement agreement was executed by Southwire's transfer of U.S. dollars. Southwire's obligations, in terms of dollars, have been fully satisfied. No further award on said claim is therefore justified.

Post-Judgment Interest

[13, 14] Interest on a federal judgment is calculated from the date of entry at the rate allowed by state law. See *Garley v. Lindsley*, 466 F.2d 498, 499 (5th Cir. 1972); 28 U.S.C. § 1961. Generally, interest on a Georgia judgment is to be calculated at 7% per annum, unless the contract or note upon which an action is based specifies a different rate. See *Chilivis v. Rogers Oil Co.*, 135 Ga.App. 176, 177, 217 S.E.2d 179(3) (1975); Ga.Code Ann. §§ 57-101, 57-108. Such different contract rates, however, must be within the Georgia legal limit. See *Daniel v. Gibson*, 72 Ga. 367, 369 (1884).

[15] In its order partially confirming the arbitral award of interest, this Court noted that the application of the French legal rate of interest was not so offensive to Georgia's most basic notions of morality and justice as to warrant refusal of enforcement. In fixing post-judgment interest however, the Court must apply state law under 28 U.S.C. § 1961. *Garley v. Lindsley*,

supra. At the time the contract in question was entered into, the highest lawful rate for which the parties could contract was 8%. See *Daniel v. Gibson, supra*, 72 Ga. at 368; Ga.Code Ann. § 57-101, ed. note. Accepting LTCL's argument that the "contract rate" should be applied to post-judgment interest, because the parties agreed to submit the determination of pre-judgment interest to the arbitrators, the laws of Georgia (as opposed to the public policy of the State) would allow a lawful rate of up to 8%, and this Court is bound by that figure. (LTCL is not claiming, and the Court does not award, post-judgment interest on that portion of the judgment amount which represents pre-judgment interest. See Ga. Code Ann. §§ 110-304.)

Summary

In summary, the Court has made the following conclusions:

- (1) The principal amounts due from Southwire to LTCL and interest, as per the Order of January 18, 1980, will be converted into dollars at the exchange rate existing on Tuesday, February 19, 1980, as published in the *Wall Street Journal* on February 20, 1980. (LTCL has agreed that the exchange rate on the business day preceding entry of judgment, as published in the *Wall Street Journal* may be employed by the Court in its calculations.)
- (2) No further amount is owed by Southwire on the "flaking claim".
- (3) Post-judgment interest will accrue at the rate of 8% per annum.

Judgment

The Clerk is hereby directed to enter judgment on Wednesday, February 20, 1980, in favor of Laminoirs-Trefileries-Cableries De Lens, S.A. against Southwire Company and Southwire International Corporation, jointly and severally for the following sums:

<p>Computation of Principal and Interest (French Francs)</p>	<p>U.S. Dollars (conversion based on exchange rate of — French Francs to one U.S. Dollar, <i>Wall Street Journal</i>, February 20, 1980)</p>
<p>_____</p>	<p>_____</p>

Item 1. Principal amount Due on Invoices Maturing on or prior to March 11, 1977	French Francs 2,190,090.29	\$ _____
Item 2. Interest on Item 1 Above From March 11, 1977 to December 31, 1977 at 10.5 Percent Per Annum	French Francs 168,490.63	\$ _____
Item 3. Principal Amount Due on Invoices Maturing Between March 11, 1977 and December 31, 1977	French Francs 5,299,618.14	\$ _____
Item 4. Interest on Item 3 Above (Invoices Maturing Between March 11, 1977 and December 31, 1977) From Their Respective Maturity Dates to December 31, 1977 at 10.5 Percent Per Annum	French Francs 214,280.29	\$ _____
Item 5. Interest on Items 1 and 3 above For the Period January 1, 1978 to February 20, 1980 at 9.5 Percent Per Annum	French Francs 1,543,027.40	\$ _____
Item 6. Principal Amount Due on Invoices Maturing Between January 1, 1978 and February 8, 1979	French Francs 6,358,050.26	\$ _____
Item 7. Interest on Item 6 Above (Invoices Maturing Between January 1, 1978 and February 8, 1979) From Their Respective Maturity Dates to February 20, 1980 at 9.5 Percent Per Annum	French Francs 960,482.09	\$ _____
Item 8. Principal Amount Due From Southwire on Amounts Withheld for Invoices Maturing Subsequent to February 8, 1979	French Francs 473,080.06	\$ _____
Total	French Francs 17,227,700	Total U. S. Dollars: \$ _____

Interest at the rate of 9.5% per annum on the principal amounts of Items 1, 3 and 6 above, _____ United States dollars (the equivalent of 13,848,358.69 French francs), continues to run in the amount of

_____ United States dollars (the equivalent of 3,653.19 French francs) per day from January 25, 1980, until the date of entry of this Judgment. Interest after such date shall accrue at the rate of 8% per annum on _____ United States dollars (the equivalent of 14,321,438.75 French francs).

The arbitral awards direct that payment be made to LTCB in French francs; in converting French francs to U.S. dollars, the Court has utilized the exchange rate for converting French francs to U.S. dollars as of the business day preceding the entry of this judgment, the parties having agreed that the Court may obtain the applicable exchange rate from the *Wall Street Journal*.

Costs of Court are taxed against Southwire Company and Southwire International Corporation.



Robert WILKINSON et al.

v.

John ELLIS et al.

Civ. A. No. 77-869.

United States District Court,
E. D. Pennsylvania.

Jan. 21, 1980.

Plaintiff who was convicted in Philadelphia Court of Common Pleas of murdering in connection with firebombing, but who was subsequently, after serving 436 days in prison, cleared of any involvement in crime, brought civil rights action alleging the Philadelphia police officers and other assaulted him, falsely arrested him, and maliciously prosecuted him all in violation of Civil Rights Act. The District Court, Edward R. Becker, J., held that: (1) assault and battery, malicious prosecution, abuse of

William Nash Leigh, Digest of United States Practice in Int'l Law 1980 (Dec '86).

INTERNATIONAL COMMERCIAL ARBITRATION 1081

The Hague Convention Concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors, adopted Oct. 5, 1961, may be found at Conférence de La Haye de Droit International Privé, *Recueil des Conventions de La Haye* (1973), p. 42.

On Oct. 30, 1985, President Ronald Reagan transmitted to the Senate for advice and consent to ratification the Hague Convention on the Civil Aspects of International Child Abduction, that 29 member states of the Hague Conference on Private International Law had unanimously adopted on Oct. 24, 1980.

See, also, S. Ex. Rept. 99-25, 99th Cong., 2d sess. (1986).

On Oct. 9, 1986, by a vote of 98 yeas to no nays, with two Senators absent and not voting, the Senate voted its advice and consent to the Hague Convention on the Civil Aspects of International Child Abduction, subject to two reservations recommended by the Dept. of State and endorsed by the Sen. Comm. on Foreign Relations, *Cong. Rep.* Vol. 132, No. 139, pp. S15773-S15774.

TIAS

§3 International Commercial Arbitration

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Foreign Penal Provision Denied

In the Matter of the Arbitration between Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Company, 484 F.Supp. 1063 (N.D. Ga. 1980), concerned a motion to confirm an arbitral award by an "international tribunal" in accordance with the rules of the International Chamber of Commerce, which was convened pursuant to a contractual arbitration clause. The defendant opposed confirmation on the grounds, among others, that the arbitrators had erroneously adopted the French legal rate of interest on the amounts due, without introducing evidence on the French law and without notice having been given to it that French law would be invoked. The defendant also contended that the French rate applied violated the enforcing forum's public policy and was usurious, and that the interest award was inconsistent with the terms of reference for the arbitration signed by the parties and the arbitrator, insofar as it awarded post-award interest.

In an order and opinion dated January 18, 1980, as supplemented, February 18, 1980, that partially confirmed the arbitral award, District Judge G. Ernest Tidwell rejected these arguments, except the challenge to post-award interest, on which he ruled in favor of the defendant.

Judge Tidwell rejected the defendant's contention that the award of interest should not be enforced as being usurious and against

public policy. He noted that the arbitrators' determination of interest rates of 9½% and 10½% on the unpaid invoices (depending upon their maturity) were not such as would violate the United States' or Georgia's most basic notions of morality and justice.

The Court found that the arbitrators had taken judicial notice of the French law governing the legal rate of interest on judgments, even though it had not been specifically pleaded, nor introduced into evidence. The Court noted, further, that the governing law clause of the contract had provided that the contract was to be governed by Georgia law to the extent that it accorded with French law, and that the provision in question had been cited in the terms of reference for the arbitration. (This fact, the Court said, should have put the defendant on notice as to the potential bearing of French law on the case.) The Court approved the manner in which the arbitrators had arrived at the amount of interest payable; namely, through their own ascertainment of the appropriate French legal rate of interest applicable to the underpaid invoices for the period in question, rather than through the application of export discount rates, for which the plaintiff had argued at the arbitral hearing.

Judge Tidwell did not, however, approve the portion of the arbitrators' award that, applying French law further, increased the interest payable by five points after the expiration of two months from the date on which the decision became enforceable, even if only provisionally. The Court concluded that the interest increase provision was "penal rather than compensatory, and . . . [bore] no reasonable relation to any damage resulting from delay in recovering the sums awarded." In refusing to enforce or recognize that portion of the award that purported to assess the additional five points in interest after a 60-day period, the Court relied on the public policy exception to enforcement of an arbitral award, set out in Article V, par. 2(b) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (see, *post*).

The Court disposed of the issue of post-judgment interest in its supplemental opinion. Applying the rule in 28 U.S.C. 1961, Judge Tidwell held himself bound by the laws of Georgia (as opposed to its public policy) and awarded post-judgment interest at the maximum Georgia-allowable rate of 8%. He noted that Laminoirs had not claimed, and that he did not award, post-judgment interest on that portion of the judgment amount representing pre-judgment interest.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958, may be found at TIAS 6997; 21 UST 2517; entered into force, June 7, 1959, for the United States, Dec. 29, 1970.

UNCITRAL Conciliation Rules

In a telegram to the Department of State through the United States Mission to the United Nations, Peter H. Pfund, Assistant Legal Adviser for Private International Law, and Howard M. Holtzman, Chairman of the International Arbitration Committee of the American Arbitration Association, who served as the United States Representatives, reported on the thirteenth session of the United Nations Commission on International Trade Law (UNCITRAL), that took place July 14-25, 1980.

During the first week of the UNCITRAL plenary, the United States delegation reported, the major agenda item was review of the rules of conciliation prepared by the UNCITRAL Secretariat with the help of Professor Pieter Sanders of the Netherlands in consultation with the International Council for Commercial Arbitration and a working party of the Commission on International Arbitration of the International Chamber of Commerce. Few, and then only minor, changes of substance, the Delegation stated, had been made to the draft rules.

USUN telegram 3035 to Dept. of State, Aug. 4, 1980.

The UNCITRAL Conciliation Rules follow:
(footnotes numbered consecutively)

UNCITRAL CONCILIATION RULES

APPLICATION OF THE RULES

Article 1

(1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

(2) The parties may agree to exclude or vary any of these Rules at any time.

(3) Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails.

COMMENCEMENT OF CONCILIATION PROCEEDINGS

Article 2

(1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.

(2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.

(3) If the other party rejects the invitation, there will be no conciliation proceedings.

(4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation,

or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.

NUMBER OF CONCILIATORS

Article 3

There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

APPOINTMENT OF CONCILIATORS

Article 4

(1) (a) In conciliation proceedings with one conciliator, the parties shall endeavor to reach agreement on the name of a sole conciliator:

(b) In conciliation proceedings with two conciliators, each party appoints one conciliator:

(c) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavor to reach agreement on the name of the third conciliator.

(2) Parties may enlist the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular:

(a) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator or

(b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

SUBMISSION OF STATEMENTS TO CONCILIATOR

Article 5

(1) The conciliator, upon his appointment, requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party sends a copy of his statement to the other party.

(3) At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate.

REPRESENTATION AND ASSISTANCE

Article 6

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

ROLE OF CONCILIATOR

Article 7

(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

ADMINISTRATIVE ASSISTANCE

Article 8

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

COMMUNICATION BETWEEN CONCILIATOR AND PARTIES

Article 9

(1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

DISCLOSURE OF INFORMATION

Article 10

When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that infor-

mation to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party.

COOPERATION OF PARTIES WITH CONCILIATOR

Article 11

The parties will in good faith cooperate with the conciliator and, in particular, will endeavor to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE

Article 12

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

SETTLEMENT AGREEMENT

Article 13

(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement. ^(a) If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

CONFIDENTIALITY

Article 14

The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

TERMINATION OF CONCILIATION PROCEEDINGS

Article 15

The conciliation proceedings are terminated:

(a) By the signing of the settlement agreement by the parties, on the date of the agreement; or

(b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or

(c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or

(d) By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

Article 16

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

COSTS

Article 17

(1) Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. The term "costs" includes only:

(a) The fee of the conciliator which shall be reasonable in amount;

(b) The travel and other expenses of the conciliator;

(c) The travel and other expenses of witnesses requested by the conciliator with the consent of the parties;

(d) The cost of any expert advice requested by the conciliator with the consent of the parties;

(e) The cost of any assistance provided pursuant to articles 4, paragraph (2) (b), and 8 of these Rules.

(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

DEPOSITS

Article 18

(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1) which he expects will be incurred.

(2) During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.

(3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.

ROLE OF CONCILIATOR IN OTHER PROCEEDINGS

Article 19

The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

Article 20

The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:

- (a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
- (b) Admissions made by the other party in the course of the conciliation proceedings;
- (c) Proposals made by the conciliator;
- (d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

MODEL CONCILIATION CLAUSE

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force. (The parties may agree on other conciliation clauses.)

⁽¹⁾ In this and all following articles, the term "conciliator" applies to a sole conciliator, two or three conciliators, as the case may be.

⁽²⁾ The parties may wish to consider including in the settlement agreement a clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration.

United Nations Commission on International Trade Law, *YEARBOOK*, Vol. XI, 1980 (1982), pp. 21-23; United Nations, *UNCITRAL Conciliation Rules* (1981).

On Dec. 10, 1980, the U.N.G.A. adopted G.A. Res. 35/52, in which it recommended the use of the Conciliation Rules of the United Nations Commission on International Trade Law "in cases where a dispute arises in the context of international commercial relations and the parties seek an amicable settlement of that dispute by recourse to conciliation," *Doc.*, p. 32; U.N.G.A. Off. Rec., 35th sess., Supp. No. 48 (A/35-48) (1981), p. 260.