

# A Matter of Interest – Recent Developments in English Courts on the Applicable Law to Awards of Interest in Cross-Border Tort Cases

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## Issues in the appeal

In *Troke v Amgen Seguros Generales Compania de Seguros Y Reaseguros SAU*, the claimants suffered personal injury from a road traffic accident in Spain, for which the defendant insurers admitted both liability and quantum<sup>1</sup>. The only legal point in dispute concerned what law governed the award of interest in relation to the tort: the *lex causae* (the law of the jurisdiction in which the cause of action arose), which in this case was Spanish law; or the *lex fori* (the law of the forum in which the claim was being brought), which in this case was English law<sup>2</sup>.

The parties had obtained an agreed joint expert report which stated that Spanish law “contemplates a penalty interest where insurers have not made a relevant interim payment within 3 months from the accident”<sup>3</sup>. Unsurprisingly, given that the penalty interest under Spanish law was substantially higher than that ordinarily available under English law, the claimants sought to argue on appeal

<sup>1</sup> [Troke v Amgen Seguros Generales Compania de Seguros Y Reaseguros SAU \[2020\] EWHC 2976 \(QB\)](#) at [4].



to the High Court before Griffiths J that they should have been awarded the rates of penalty interest under Spanish law instead of the rates applied under English law by the trial judge<sup>4</sup>. They made two alternative arguments, that either: (1) Spanish law should govern the award and rate of interest (‘the Applicable Law Argument’); or (2), even if English law governed the rate of interest, the Judge ought

<sup>2</sup> *Troke* (n 1) at [1]-[2] and [5].

<sup>3</sup> *Troke* (n 1) at [6].

<sup>4</sup> *Troke* (n 1) at [7] and [14].

to have awarded the Spanish rates in exercise of his discretion under s.69, County Courts Act 1984 ('the Discretionary Argument')<sup>5</sup>.

### The Applicable Law Argument – distinguishing the right and the rate

***Maher v Groupama Grand Est*** was the previous leading case on this same issue, although the facts fell outside the temporal scope of Rome II and it was therefore decided under the Private International Law (Miscellaneous Provisions) Act 1995 ('PIL(MP)A 1995')<sup>6</sup>. Moore-Bick LJ was concerned with "the proper classification of the court's power to award interest"<sup>7</sup> and made the following distinction:

- The existence of a *substantive legal right* to claim interest on damages was properly to be classified as a substantive matter to be determined by reference to the *lex causae*, in accordance with s.11, PIL(MP)A 1995<sup>8</sup>.
- By contrast, s.35A of the Senior Courts Act 1981, which empowers the High Court to award interest, created a *procedural remedy* rather than a substantive right to interest, to be determined by reference to the *lex fori*, in accordance with s.14(3)(b), PIL(MP)A 1995. Therefore, "whether such a substantive right exists or not, the court has available to it the *remedy* created by section 35A of the 1981 Act"<sup>9</sup>.

Nonetheless, he went on to hold that the factors to be taken into account in exercise of the court's discretion under s.35A may well include "any relevant provisions" of the *lex causae* relating to the recovery of interest, such that both the *lex fori* and *lex causae* are relevant to the award of interest<sup>10</sup>.

In short, then, the question with which Griffiths J was concerned in *Troke* was essentially whether the same approach should be applied under Rome II. The answer to this question is still important after EU law ceases to apply in the UK with the end of the implementation period on 31 December 2020, because the UK has retained the scheme for applicable law under the Rome I and Rome II Regulations (with some minor amendments) with effect after that date<sup>11</sup>.

In ***Troke***, Griffiths J focused on two key provisions of Rome II:

- Article 1(3), which provides, "This Regulation shall not apply to evidence and procedure..."; and
- Article 15, which provides, "The law applicable to non-contractual obligations under this Regulation shall govern in particular: (a) the basis and extent of liability ... (c) the existence, the nature and the assessment of damage or the remedy claimed; (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation; ...".

Griffiths J noted that Article 1(3) was introduced to reflect the "universal principle" that procedural questions are to be governed by the *lex fori* rather than the *lex causae*<sup>12</sup>, a principle previously reflected at both common law and under s.14(3)(b), PIL(MP)A 1995. The question for Griffiths J was therefore whether the award of interest was procedural within the meaning of Article 1(3) or whether it fell within one of the provisions of Article 15 that specifically required the application of the *lex*

<sup>5</sup> *Troke* (n 1) at [6]-[8].

<sup>6</sup> [Maher v Groupama Grand Est \[2009\] EWCA Civ 1191, \[2010\] 1 WLR 1564.](#)

<sup>7</sup> *Maher* (n 6) at [25].

<sup>8</sup> *Maher* (n 6) at [25], [33] and [40].

<sup>9</sup> *Maher* (n 6) at [37] and [40].

<sup>10</sup> *Maher* (n 6) at [40].

<sup>11</sup> See the [Law Applicable to Contractual Obligations and Non-Contractual Obligations \(Amendment etc.\) \(EU Exit\) Regulations 2019 \(SI 2019/834\).](#)

<sup>12</sup> *Troke* (n 1) at [40].

*causae*<sup>13</sup>.

In answering those questions Griffiths J followed the reasoning in *Maher*, concluding that “if there is an absolute right to interest under the *lex causae*, that is part of the substantive claim under Rome II and would not be excluded by Article 1(3)” but that “a procedural, discretionary power to award interest under English law could be applied “whether such a substantive right exists or not” in the foreign *lex causae*” under s.35A or s.69 and that such a power to award interest was not inconsistent with Rome II by virtue of Article 1(3)<sup>14</sup>.

As a brief aside, some commentators, particularly *Dicey, Morris & Collins on the Conflict of Laws*, have summarised the decision in *Maher* as distinguishing between: (1) the legal right to claim interest on damages, which is governed by the *lex causae*; and (2) the rate at which interest was to be awarded, which is governed by English law, the *lex fori*<sup>15</sup>. Whilst this distinction does reflect the practical reality of how interest is awarded by an English court, and this article will refer to it at points by way of convenient shorthand, the distinction can be potentially misleading<sup>16</sup>. It is true that the existence of a legal right to claim interest is to be determined by reference to the *lex causae*. However, under *Maher*, and now *Troke*, interest is both awarded and calculated under the free-standing procedural remedy provided under the *lex fori* by s.35A or s.69. The relevance of rights under the *lex causae* enters the equation only as a relevant consideration when the court comes to determining the rate of any interest it has

decided to award under the *lex fori*.

### The Applicable Law Argument – when is the right to interest a matter of *lex causae*?

That is, however, subject to one caveat – the existence of a legal right to claim interest on damages is only properly to be classified as a substantive matter to be determined by reference to the *lex causae* where the right is itself a substantive, not a procedural right. Griffiths J concluded that the right to penalty interest under Spanish law was not “properly classified as a substantive right”, instead it was “a procedural right, in the discretion of the forum, and procedural rights are excluded by Article 1(3) of Rome II and will be governed by the *lex fori* not the *lex causae*”<sup>17</sup>. The reasons for such a procedural characterisation were three-fold:

- The legal entitlement to penalty interest was not mandatory, but discretionary<sup>18</sup>.
- Penalty interest was only payable “where insurers have not made a relevant interim payment within 3 months from the accident” and interim payments have a procedural quality<sup>19</sup>.
- A penalty “is a procedural sanction (or incentive)” rather than a fundamental right<sup>20</sup>.

Some commentary has appeared to suggest that Griffiths J was actually indicating that, regardless of the general position that the *lex fori* governs the rate as a procedural matter under Article 1(3), where foreign law provides

the approach to damages to the way in which interest should be approached, none of the precise reasoning in those cases was expressly approved in *Maher* (n 6); Moore-Bick LJ’s approach in that case is distinct.

<sup>13</sup> *Troke* (n 1) at [41] and [43].

<sup>14</sup> *Troke* (n 1) at [49]-[52] and [56].

<sup>15</sup> *Dicey, Morris & Collins on the Conflict of Laws* (15<sup>th</sup>

edn, Sweet & Maxwell 2015) at para 7-109.

<sup>16</sup> This distinction is the approach taken to damages at common law and under PIL(MP)A 1995, where the right to recover a head of damage is determined by the *lex causae* and the calculation of the quantum of that head of damage is determined by the *lex fori*:

see [Harding v Wealands \[2006\] UKHL 32, \[2007\] 2 AC 1](#). However, whilst some previous cases did analogise

<sup>17</sup> *Troke* (n 1) at [63].

<sup>18</sup> *Troke* (n 1) at [59]-[66] and [69]-[70]. The discretionary nature of Spanish penalty interest is examined further below.

<sup>19</sup> *Troke* (n 1) at [64].

<sup>20</sup> *Troke* (n 1) at [64].

a substantive or absolute (as opposed to a discretionary and procedural) right to interest, then the corresponding foreign law rate can be directly relied upon as part of the *lex causae* applicable under Article 15 of Rome II. This might be seen to follow from Griffiths J's description of the claimants' argument that the right to interest "was a substantive right in this particular case, and that it was therefore part of the *lex causae* which fell to be applied to their tort claim under Rome II"<sup>21</sup>.

However, Griffiths J's judgment does not address the applicability of Article 15, focusing instead on Article 1(3). Moreover, such a conclusion would appear to be inconsistent with the reasoning in *Maher*, which Griffiths J approved under Rome II, that interest awarded under s.35A or s.69 was a procedural matter for the *lex fori*. Whilst Griffiths J's judgment is not entirely clear, the most coherent interpretation is that he was talking about the existence of a legal right, rather than the rate, which has a knock-on effect for whether there are any substantive legal rights under the *lex causae* that the English courts can duplicate via their discretion under the *lex fori*. This is both compatible with the *ratio* in *Maher* and follows from Griffiths J's conclusion that "the Judge was right not to apply the Spanish rates as a matter of substantive right to be governed by the *lex causae*"<sup>22</sup>.

### **The Applicable Law Argument – remaining uncertainty?**

Whilst Griffiths J's conclusion is relatively clear that the rate of interest is governed for the *lex fori*, it is not certain that this question has been definitively resolved. This is because in the previous case of *AS Latvijas Krajbanka v Antonov*, Leggatt J reached the opposite conclusion that the rate of interest was governed by the *lex causae*, quoting the editors of *Dicey, Morris & Collins on the*

***Conflict of Laws*** to the effect that the rate of interest fell within the scope of Article 15 of Rome II<sup>23</sup>:

"Article 1(3) of Rome II states that the regulation "shall not apply to evidence and procedure." A distinction is therefore made between matters of procedure and matters of substance. It does not follow, however, that this distinction is to be drawn in precisely the same way as it is drawn at English common law and under the 1995 Act. In particular, the authors of *Dicey & Morris, "The Conflict of Laws"* (15th Edn, 2015) at para 7-112, point out that it might be argued that the rate of interest recoverable on damages goes to, or is intrinsically linked with, the assessment of the overall amount which the claimant can recover in respect of a damages claim and thus falls within the scope of Article 15 of Rome II. It is their tentative suggestion that the rate of interest on damages is governed by the law applicable to the non-contractual obligation. I find this suggestion and the argument on which it is based persuasive. Indeed, it seems to me that the broad wording of Article 15 requires the court to exercise any power conferred by its procedural law to award interest as compensation to a claimant for being kept out of money as a result of the defendant's wrong only when and in the way that a remedy would be granted under the applicable foreign law to provide such compensation".

In *Troke*, Griffiths J did not address this argument specifically. He rejected the defendant's submission that "if the Claimants cannot show a right to recover interest under the *lex causae*, the claim for interest will fail entirely" on the basis that "Leggatt J was not deciding that, because (in his case) the foreign law did not recognise a right to interest, he had no power to award such interest under section 35A of the Senior Courts Act 1981 because Rome II applied. Rather, he was bearing the

<sup>21</sup> *Troke* (n 1) at [59].

<sup>22</sup> *Troke* (n 1) at [65] and [70].

<sup>23</sup> [AS Latvijas Krajbanka v Antonov \[2016\] EWHC 1679 \(Comm\)](#) at [10]; citing *Dicey, Morris & Collins on the Conflict of Laws* (n 15) at para 7-112.

position in Latvian law in mind when deciding to exercise his discretion under the 1981 Act not, in that case, to award interest<sup>24</sup>. However, on a closer reading, this appears to be inconsistent with the fact that, in **Antonov**, Leggatt J expressly stated that because “the remedy as well as the right to recover interest is therefore governed by Latvian law pursuant to Article 15 of the regulation, no interest should be awarded for the period prior to the entry of judgment because such a remedy is not available in Latvian law”<sup>25</sup>. It appears, therefore, that there is a clash of inconsistent authority between **Troke** and **Antonov**.

In such a situation, a future judge should follow the second of those decisions, namely **Troke**, unless she is persuaded of “cogent reasons to the contrary”<sup>26</sup>. Whatever possible inconsistency there is between **Troke** and **Antonov**, Griffiths J’s reasoning in **Troke** is to be preferred to that of Leggatt J in **Antonov** and should be followed. Whilst Griffiths J focused his analysis on the procedure/substance distinction in Article 1(3) and did not address the applicability of Article 15 head on, his judgment is clearly cognisant of the existence of Article 15. Indeed, the crux of his reasoning can be inferred from his citation of **Actavis UK Ltd v Eli Lilly & Co** where the Court of Appeal had said that “The distinction between substance and procedure is a fundamental one” and that they did “not regard Article 15 as a safe guide to whether matters which do not fall within its scope are procedural or substantive”<sup>27</sup>. In other words, having considered the terms of both Articles 1(3) and 15, Griffiths J’s conclusion that the award and rate of interest under s.35A and s.69 was a procedural matter meant that it fell outside of Article 15 which deals only with substantive matters. Moreover, such a conclusion is consistent with the interpretation given to the identical Article

1(3) under Rome I and Griffiths J considered that the interpretation of Article 1(3) in both Rome I and Rome II respectively should be the same<sup>28</sup>.

One might think that this debate splits hairs unnecessarily and that there is no real practical difference between a situation where the rate is governed by the *lex causae* and where it is governed by the *lex fori* but the judge takes into account and can duplicate the *lex causae*. However, it does make a difference for two reasons. First, whilst, as we shall see, a judge applying the *lex fori* will most frequently have good reason to duplicate the position under the *lex causae*, the judge retains a discretion as to the rate, whilst if the applicable law is the *lex causae*, she has no such discretion. Secondly, if the applicable law is the *lex causae*, then where that law does not permit the award of interest, the judge has no discretion to award any interest at all, even at the rate allowed for under English law, as Leggatt J held in **Antonov**. This latter point is particularly important in practice because many civil law systems do not recognise a right to pre-judgment interest on damages and so the effect of the analysis in **Antonov** would have a substantial impact on the availability of any award of interest in a wide range of cases.

### **The Discretionary Argument – when will the *lex fori* duplicate the *lex causae*?**

Having lost their ground of appeal under the Applicable Law Argument, the claimants argued that the Judge ought to have awarded the Spanish rates in exercise of his discretion under s.69, County Courts Act 1984, as was envisaged in **Maher**. Griffiths J made clear that awarding a duplication of *lex causae* rates under the *lex fori* is a matter within the trial judge’s discretion, which means that judges must be asked to apply their discretion in this

<sup>24</sup> *Troke* (n 1) at [52]-[53].

<sup>25</sup> *Antonov* (n 23) at [13].

<sup>26</sup> [Willers v Joyce \[2016\] UKSC 44, \[2018\] AC 843](#) at [9].

<sup>27</sup> *Troke* (n 1) at [42], citing [Actavis UK Ltd v Eli Lilly & Co \[2015\] EWCA Civ 555, \[2016\] 4 All ER 666](#) at [130]-[133].

<sup>28</sup> *Troke* (n 1) at [44]. This point is also acknowledged by *Dicey, Morris & Collins* (n 15) at paras 7-111 and 7-113.

way<sup>29</sup>. It is therefore helpful to extract from Griffiths J's survey of the relevant case law some basic principles for the exercise of the discretion, given that parties must be prepared to provide argument on this issue. Whilst some of these cases involved PIL(MP)A 1995 rather than Rome II, or even contract rather than tort, the general approaches taken are still instructive.

First, where the *lex causae* provides a substantive legal right to the award of interest:

- Courts may award the rates of interest that apply under the *lex causae*: The most persuasive reason for doing so is given in ***XP v Compensa Towarzystwo SA***, that such an approach “would be consistent with this Court’s role in hearing the Claimant’s case against [the defendant] under Rome II, namely to arrive at a figure for damages which equates to that which would have been awarded by a Polish court if this case had been heard in Poland. Any different approach would be inconsistent with that role”<sup>30</sup>.
- Alternatively, courts may award the rate of interest prevailing in the forum under English law<sup>31</sup>. That said, the cases in which courts have taken such an approach do not seem to have involved any in-depth argument for doing so and also pre-date ***Maher***. This makes arguments in favour of duplicating the *lex causae* rates of interest under the *lex fori* more likely to be successful, provided that reasoning such as that given in ***XP*** is deployed by any party attempting to argue for this.

Secondly, where the *lex causae* does not

provide a substantive legal right to the award of interest, courts may still award the rate of interest prevailing in the forum under English law. The reason for doing so is because simple interest is designed to compensate the claimant for being deprived of the use of his money and it would not be just to ignore that economic reality by depriving the claimant of such compensation merely because a similar procedural remedy would not be available under the *lex causae*<sup>32</sup>. This essentially appears to have been the outcome in ***Troke***.

Moreover, the implications of ***Troke*** might be interpreted as going further, effectively holding that where there a legal right to interest under the *lex causae* is procedural, rather than substantive, the English courts cannot duplicate the *lex causae* rates under the *lex fori* discretion and can only apply the rate of interest prevailing under the *lex fori*. This follows from Griffiths J’s summary of ***Maher*** that “if there is an absolute right to interest under the *lex causae*, that is part of the substantive claim under Rome II and would not be excluded by Article 1(3)”<sup>33</sup> and his conclusion that where the right to interest was procedural it is excluded by Article 1(3) and that “the Judge was right not to apply the Spanish rates as a matter of substantive right to be governed by the *lex causae*”<sup>34</sup>. In other words, a procedural, discretionary right is not a matter to be determined by the *lex causae* at all and does not even enter the equation when exercising the *lex fori* discretion as to the rate.

That said, this requirement for an “absolute right” appears potentially to be an additional gloss on what was decided in ***Maher*** – Moore-Bick LJ said that the court may take into

<sup>29</sup> *Troke* (n 1) at [58].

<sup>30</sup> [XP v Compensa Towarzystwo SA \[2016\] EWHC 1728 \(QB\)](#) at [67], a Rome II case, albeit proceeding on the basis that it was not necessary to decide whether interest was a substantial or a procedural matter because duplicating Polish rates of interest under the *lex fori* generated the same end result, cited in *Troke* (n 1) at [58].

<sup>31</sup> E.g. *Rogers v Markel Corporation* [2004] EWHC 1375 (QB) at [81], a PIL(MP)A 1995 case, cited in *Troke* (n 1) at [57].

<sup>32</sup> E.g. [JSC BTA Bank v Ablyazov \[2013\] EWHC 867 \(Comm\)](#) at [26], albeit under PIL(MP)A 1995 and *obiter*; approved in *Antonov* (n 23) at [13] for claims under PIL(MP)A 1995 falling outside the scope of Rome II.

<sup>33</sup> *Troke* (n 1) at [49].

<sup>34</sup> *Troke* (n 1) at [63] and [65].

account “any relevant provisions” of the *lex causae*, without any indication that this was limited only to provisions providing for a substantive right to interest<sup>35</sup>. Nor is this how Cavanagh J interpreted ***Mahe*** when summarising it in his judgment in ***Scales v MIB***<sup>36</sup>. Moreover, if the interest to be awarded truly is a matter for the *lex fori*, there appears to be no reason in principle why the court cannot take any relevant factors into account, even procedural rights to interest. Weighed against that, however, is the fact that all the cases, including ***Mahe***, as well as Article 1(3), recognise that the *lex causae* is only to be applied in respect of substantive, rather than procedural matters<sup>37</sup>. The lack of clarity on this point leaves it open for parties to argue the point either way until further certainty is provided by the higher courts.

Thirdly, where the *lex causae* positively prohibits the award of interest, courts may still award the rate of interest prevailing in the forum under English law<sup>38</sup>. The cases in which courts have taken such an approach have not provided any detailed reasoning for doing so, but the same reasoning can be applied as above, under the second principle, to more or less persuasive effect.

#### Penalty interest under Spanish law

Given the conclusion in ***Troke*** that there was no substantive legal right to penalty interest under Spanish law, it is perhaps helpful to conclude this article by examining how this type of interest operates. ***Troke*** is the second occasion in 2020 where the High Court has had to consider the rules of interest under Spanish law, the first occasion being in ***Scales***.

Spanish law provides for two alternative types and rates of interest: (1) “standard” interest; and (2) “penalty” interest in claims against

insurers under Article 20 of the 50/1980 Insurance Contract Act of 8 October 1980<sup>39</sup>.

Article 20 “contemplates a penalty interest where insurers have not made a relevant interim payment within 3 months from the accident” which is payable upon the full amount of the award for damages, including pecuniary and non-pecuniary loss. The rate is calculated as follows: (1) for the first two years from the date when interest starts running, interest will accrue at 150% of the current Spanish legal interest rate; (2) after two years have passed, interest continues to accrue at a flat rate of 20% per annum<sup>40</sup>.

Article 20(8) provides for an “exception” to the recovery of penalty rates of interest, such that penalty interest “will not apply where there is a justified delay or the delay in payment is not attributable to the Defendant” insurer<sup>41</sup>. Whilst Griffiths J in ***Troke*** relied on this exception to confirm his conclusion that the recovery of penalty rates of interest under Spanish law is discretionary, not mandatory<sup>42</sup>, it is clear from the more detailed discussion in ***Scales*** that this is not an unfettered discretion and that there are a number of principles to be borne in mind in its judicial application:

- First, the purpose of penalty interest is to discourage delays in litigation and, in particular, to discourage insurers from deliberately using litigation as an excuse to delay payment where they are aware of their payment duties under the insurance policy<sup>43</sup>.
- Secondly, Article 20(8) must be interpreted restrictively in light of that purpose and it is only in an exceptional case, where there is a compelling reason to defend the claim in court, that the

<sup>35</sup> *Mahe* (n 6) at [40].

<sup>36</sup> [Scales v MIB \[2020\] EWHC 1747 \(QB\)](#) at [256].

<sup>37</sup> *Mahe* (n 6) at [25].

<sup>38</sup> E.g. [Abdel Hadi Abdallah Al Qahtani & Sons v Antliff \[2010\] EWHC 1735 \(Comm\)](#) at [59] which appears to be a PIL(MP)A 1995 falling outside the

temporal scope of Rome II, cited in *Troke* (n 1) at [54].

<sup>39</sup> *Scales* (n 36) at [260]-[261]; *Troke* (n 1) at [6].

<sup>40</sup> *Scales* (n 36) at [262]-[263]; *Troke* (n 1) at [6].

<sup>41</sup> *Scales* (n 36) at [265] and [273].

<sup>42</sup> *Troke* (n 1) at [66].

<sup>43</sup> *Scales* (n 36) at [264] and [274].

defence of proceedings is treated as a justified reason to delay payment for the purposes of Article 20(8)<sup>44</sup>. In **Scales**, Cavanagh J gave three illustrative examples of such exceptional cases, including: (1) where there is some reason to doubt that the claim is covered by the wording of the insurance policy; (2) where there is an issue about whether the insured had paid the insurance premiums; and (3) where there is an issue about whether the accident was an RTA at all<sup>45</sup>. Each of these examples involves some form of “uncertainty about the insurance coverage that makes the intervention of the Court necessary due to the discrepancy between the parties”<sup>46</sup>.

- Thirdly, whilst uncertainty about insurance coverage is the main category of exceptional case under Article 20(8), in **Troke**, Griffiths J indicated that there is another potential category of exceptional case<sup>47</sup>. He was of the provisional view that where a delay in payment by a defendant insurer of more than three months after the accident was attributable to the fact that they had not been made aware of a claim, the defendant’s lack of knowledge would seem capable of justifying their failure to make an interim payment before that date. Although Griffiths J’s comments are *obiter*, and he does not explain his reasoning in detail, he refers to Cavanagh J’s summary of the purpose of penalty interest in **Scales**<sup>48</sup>. One can infer, therefore, that Griffiths J’s conclusion is justified by the fact that the purpose of penalty interest is to discourage deliberate delays via the medium of litigation and a delay due to lack of knowledge is not deliberate. Such an argument is likely to fall under the limb of the exception that delay is “not attributable” to the

defendant.

- Fourthly, by contrast, the mere fact that the defendant insurer has decided to defend the claim, and thinks it may have a good defence, does not mean that Article 20(8) applies. Whilst, in an exceptional case, a dispute about liability or, even more unusually, about quantum, might provide a justification for delay under Article 20(8), this is very rare<sup>49</sup>.

With those principles in mind, in **Scales** Cavanagh J added two further reasons, in the context of non-Spanish defendants litigating in the courts of England and Wales, that he considered would not provide a reason to disapply Article 20: (1) the fact that such defendants may not be as familiar with Spanish law as a Spanish insurer would have been; and (2) the fact that the English courts have exercised jurisdiction and have their own methods of encouraging early settlement, in the form of CPR Pt 36<sup>50</sup>.

The position post-**Troke** on how Spanish penalty interest is to be treated under English law is, however, again not entirely clear. In **Troke**, Griffiths J relied on the discretionary nature of penalty interest, citing Cavanagh J’s judgment in **Scales**, to conclude that the right was procedural not substantive and therefore he applied the rate of interest prevailing under English law. However, in **Scales** itself Cavanagh J held that penalty interest was a substantive right, albeit this was common ground between the parties<sup>51</sup>. He went on to apply the penalty rates of interest under Spanish law<sup>52</sup>.

Whether this difference of opinion truly makes a difference to the outcome in any given case depends upon whether courts in future interpret **Troke** to indeed hold that an English court can only duplicate *lex causae* rates under

<sup>44</sup> *Scales* (n 36) at [273]-[275] and [278].

<sup>45</sup> *Scales* (n 36) at [277].

<sup>46</sup> *Scales* (n 36) at [275].

<sup>47</sup> *Troke* (n 1) at [67]-[68].

<sup>48</sup> *Scales* (n 36) at [264].

<sup>49</sup> *Troke* (n 1) at [273]-[274], [276] and [278].

<sup>50</sup> *Scales* (n 36) at [279].

<sup>51</sup> *Scales* (n 36) at [255].

<sup>52</sup> *Scales* (n 36) at [279].



the *lex fori* where the right to interest under the *lex causae* is substantive and absolute rather than procedural and discretionary. However, lawyers should note that neither characterisation of penalty interest in *Troke* or *Scales* is precedentially binding because the nature and effect of foreign law is a matter of fact to be proved on the basis of foreign law evidence in each individual case. Parties should therefore be prepared to argue whether the right to penalty interest (or indeed any kind of foreign law right to interest) is procedural or substantive.

So far as penalty interest is concerned, a possible counterargument to Griffiths J's extensive reasoning might be that Article 20(8) is better characterised as an exception defence, rather than a true discretion. Article 20 gives rise to right to penalty interest which may be defeated in cases where the exception is engaged. The limb of the exception that "delay in payment is not attributable to the Defendant" involves no exercise of any true discretion, just an analysis of attributability. Whilst the limb of the exception relating to the justifiability of the delay does appear to give the judge some discretion in determining justifiability, we have seen that it is a very limited discretion. In such circumstances, it is just as arguable that penalty interest is a substantive right as it is arguable that it is a procedural right.

### **Conclusion**

In summary, then, post-*Troke*, the award and rate of interest under s.35A and s.69 is governed by the *lex fori*. Whilst this legal position is not definitive in the face of inconsistent case law, Griffiths J's reasoning should be preferred in the absence of any further examination of the point by the higher courts. Where there is a substantive legal right to interest, the existence of which is determined by the *lex causae*, a trial judge may exercise her discretion under the *lex fori* to

duplicate the rate prevailing under the *lex causae*. However, it appears that where there is only a procedural, rather than a substantive, legal right to interest under the *lex causae* the judge is not permitted to duplicate this via her discretion under the *lex fori*. It remains an open question whether the right to penalty interest under Spanish law is a substantive or procedural legal right, there now being inconsistent case law on this. What is clear is that, specific questions of Spanish law aside, the broader questions as to the applicable law governing the award and rate of interest, and the dividing line between substance and procedure under Rome II, requires more authoritative consideration by the higher courts.

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