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MEALEY'S **International Arbitration Report**

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Commentary

Where Post-Award Interest Has Not Been Awarded By An International Arbitration Tribunal, May It Be Obtained From State Courts?

Further Lessons From The BAII / IAIGC Case In France And Belgium

By
Christopher R. Seppala

*[Editor's Note: Christopher R. Seppala, who is a member of the New York and Paris bars, is a partner of White & Case, resident in Paris, specializing in international arbitration. Supplementing an earlier article by him in the May 1996 issue of Mealey's, Mr. Seppala writes here about the latest developments in the well known arbitration between Banque Arabe et Internationale d'Investissement ("**BAII**") and The Inter-Arab Investment Guarantee Corporation ("**IAIGC**") which resulted in a US$ 10 million award in favor of BAII in 1994 (**See Section A**). Mr. Seppala was lead counsel for BAII in the arbitration and responsible, together with his partner, François Farmine, and Bertrand Moreau, both members of the Paris bar, for subsequent successful enforcement proceedings in France and, together with Bernard Hanotiau of the Brussels bar, for successful enforcement proceedings in Belgium. Copyright 2001 by the author. Replies to this commentary are welcome.]*

In international arbitration, it is usual for the claimant to request that, in addition to its claim for damages, it be awarded interest from the date of the breach of contract (assuming a contract action) or the date of commencement of arbitration or of an award until payment of the award in full. It is also usual for the arbitral tribunal to direct the losing party to pay such interest at an appropriate rate, which may be simple interest or interest compounded monthly or on some other basis.[1]

However, what happens in a case where:

(1) a claimant claims post-award, as well as pre-award, interest from the arbitral tribunal,

(2) the tribunal, while awarding the claimant damages, including pre-award interest, omits to award post-award interest, and

(3) thereafter, the respondent refuses to pay the award voluntarily resulting, in theory at least, in a substantial potential post-award interest claim against the respondent?

May the claimant still claim post-award interest and, if so, from whom? From the same arbitral tribunal or from a new one? From a state court and, if so, which one? These were the questions presented recently in relation to an international arbitration proceeding in Jordan which had been brought by Banque Arabe et Internationale d'Investissement, a French bank (formerly Arab-owned), for itself and as leader of a pool of banks ("**BAII**"), against The Inter-Arab Investment Guarantee Corporation, an international corporation, based in Kuwait ("**IAIGC**").[2]

In 1992, BAII began an international arbitration against IAIGC under the arbitration clause in the relevant contract (an insurance policy) providing for an *ad hoc* international arbitration procedure. BAII claimed damages for breach of contract as well as pre-award and post-award interest until the award was paid. The relevant contract provided that, when deciding the dispute, the arbitral tribunal had to apply the "common principles" of law prevailing in the Arab countries.

In 1994, the arbitral tribunal issued its award ordering IAIGC to pay BAII damages and pre-award interest in the amount of US$ 10 million.[3] However, the arbitral tribunal omitted to say anything about BAII's claim for post-award interest.[4]

The tribunal's omission in this respect would have been without significance had IAIGC paid the award promptly. However, IAIGC refused to honor the award with the result that almost two and a half years elapsed between the time the award was made (November 1994) and the time the award was paid (April 1997), after BAII had seized assets of IAIGC in Belgium and France and applied them to payment of the award. As a result, BAII had potentially the right, in theory at least, to a substantial amount of post-award interest.

In these circumstances, three avenues might, in theory, be open to BAII:

(1) if permitted under the relevant arbitration clause, BAII could ask the same arbitral tribunal as had issued the award to complete and to correct it by awarding post-award interest, or

(2) BAII could begin an entirely new arbitration for the purpose of recovering post-award interest (which should be possible under most standard arbitration clauses providing for the resolution of "any" or "all" disputes "in connection with" a given contract by arbitration), or

(3) BAII might seek such interest from a court in any state where BAII applied to enforce the award.

Unfortunately, the relevant arbitration clause in this case merely gave the arbitral tribunal the power to "interpret" any award it had rendered and not the power to correct or supplement it so as to be able to award post-award interest.[5]

In these circumstances, BAII had to consider whether to begin an entirely new arbitration to recover post-award interest or whether to request this relief from a state court.

As BAII had been successful in obtaining an enforcement order (*exequatur*) on the award in Belgium and in seizing assets of IAIGC there, BAII applied initially to the Belgian

courts for an order directing IAIGC to pay post-award interest. However, the Belgian courts held that they were without power to award BAII post-award interest. In a decision dated January 24, 1997, the Brussels Court of Appeals (Ninth Chamber) held that:

(1) under Belgian law, the question of post-award interest was a substantive (and not a procedural) question, and

(2) given the existence of an arbitration agreement (an arbitration clause) between the parties, this was an issue that only the arbitrators could decide.

The court's decision was subsequently upheld by Belgium's highest court for civil matters, the *Cour de Cassation*, in a judgment dated June 5, 1998.

However, this ruling of the Belgian courts did not conclude the matter as BAII had also obtained an enforcement order (*exequatur*) on the award in France (where BAII had also been successful, as mentioned above, in seizing assets of IAIGC) and France has a statutory provision relating to interest on "judgment(s)" (*"jugement(s)"*) that does not exist in Belgium. This is Article 1153-1, paragraph 1, of the French Civil Code which provides as follows:

> *"En toute matière, la condamnation à une indemnité emporte intérêts au taux légal même en l'absence de demande ou de disposition spéciale du jugement."*
>
> [Translation: In any matter, where a party is held liable to pay damages, such liability shall be deemed to include liability for interest at the legal rate even in the absence of a demand therefor or a special provision in the judgment.]

While Article 1153-1 does not refer explicitly to arbitral awards, BAII argued that, by virtue of the French statute on arbitration (specifically, Article 1476 of the French New Code of Civil Procedure), which provides that an arbitration award has *res judicata* effect when it is rendered,[6] an arbitration award should be considered as being equivalent to a "judgment" within the meaning of such Article 1153-1. Consequently, as IAIGC was bound by the award to pay damages to BAII, Article 1153-1, paragraph 1, of the Civil Code should apply and BAII should be entitled to interest from the date of the award (or, at least, from the date of the enforcement order in France) until it was paid. BAII argued that the fact that post-interest had not been awarded by the Belgian courts was irrelevant as there was no provision similar to Article 1153-1 in Belgium.

A difficulty with BAII's case was that no French court had previously held that a party could claim interest under Article 1153-1 based on an arbitration award. Moreover, it could be argued that under French law (as the Belgian courts had held to be the case under Belgian law) the issue of entitlement to post-award interest is a substantive (rather than a procedural) matter and, therefore, for decision by an arbitral tribunal, where the parties have agreed to arbitration,[7] and, thus, that BAII's remedy was to begin a new arbitration against IAIGC and demand post-award interest from the new arbitral tribunal and not to apply for this from the French courts.

Notwithstanding these possible objections, based on Article 1153-1, the Paris Court of Appeals (8th Chamber, Section D) held that BAII was entitled to interest as from the date of the award and ordered IAIGC to pay BAII approximately US$ 1.5 million in interest. The Paris Court of Appeals reasoned, in part, as follows (translation):

> "Considering that Article 1153-1, paragraph 1, provides that 'In any matter, where a party is held liable to pay damages, such liability shall be deemed to include liability for interest at the legal rate even in the absence of a demand therefor or a special provision in the judgment';
>
> Considering that, pursuant to Article 1476 of the New Code of Civil Procedure, an arbitral award constitutes a decision of a judicial nature and that as it gives rise to an award of damages, it is appropriate to apply Article 1153-1, paragraph 1, of the Civil Code with respect to the interest that has run as from the date of the arbitration award until April 7, 1997, the date of payment;
>
> Considering that it is not a serious objection that in Belgium interest has not been awarded inasmuch as it has not been shown that there exists in that country a provision analogous to Article 1153-1, paragraph 1, mentioned above." [Emphasis added]

The case is a significant one in international arbitration as it is the first time that the French courts have ordered a party to pay post-award interest in respect of an international arbitration award where the award itself has not ordered the payment of such interest. Indeed, there may not yet be much support for such a rule under the laws of other countries when an international arbitration award is being enforced there.[8] However, by relieving a claimant of the burden of having to commence a second arbitration merely to recover post-award interest, where the arbitrators have omitted to address this issue, this decision is a sensible one and supportive of international arbitration.

In this case, as noted above, the award was made not in France but in Jordan. Thus, regardless of where an award is made, if it does not address the issue of post-award interest and an enforcement order on the award has been obtained in France, then the French courts may be requested to order the payment of post-award interest based on Article 1153-1 of the French Civil Code.

Before the Paris Court of Appeals, the case was argued for BAII by Mr. François Farmine of White & Case, Paris, and for IAIGC by Mr. Xavier-Henri Ortoli of Frère Cholmeley, Paris. It is anticipated that IAIGC will file a *pourvoi* (appeal) against the Paris Court of Appeals' decision to the *Cour de Cassation*, France's highest court for civil matters.

ENDNOTES

1. *See, e.g.* Article 49(3) and (4) of the English Arbitration Act 1996, Article 28.4 of the AAA International Arbitration Rules and Article 26.6 of the LCIA Rules, all of which expressly authorize an arbitral tribunal to award simple or compound pre-award and post-award interest, at such rates and on such basis as the tribunal considers appropriate. For a recent discussion of the power of arbitrators to award interest in international arbitration, *see* Paul D. Friedland, *Arbitration Clauses for International Contracts* (Juris Publishing, Inc., New York, 2000), pages 71 to 73.

2. IAIGC was established in 1975 by an international convention among 22 Arab states for the purpose of promoting investments in Arab countries by providing, *inter alia*, insurance coverage for Arab investors against losses from non-commercial risks.

3. The award, by an arbitral tribunal consisting of three Arab lawyers, was commented upon in an earlier article by the present author in **Mealey's International Arbitration Report**, *see* Christopher R. Seppala, *Preconceptions of Arbitrating Disputes in the Middle East Dispelled*, **Mealey's International Arbitration Report**, Vol. 11, No. 4, April 1996, page 1, as well as in Carroll Dorgan, *The French Supreme Court Follows the Belgian Supreme Court in Upholding Enforcement of the BAII/IAIGC Award*, **Mealey's International Arbitration Report**, Vol. 15, No. 10, October 2000, page 30.

4. Nothing in the award suggests that the arbitrators considered the "common principles" of Arab law to be an obstacle to the award of interest. As mentioned earlier, the arbitral tribunal expressly ordered IAIGC to pay pre-award interest.

5. The relevant arbitration clause simply provided in this respect that:

> "Any dispute arising from the interpretation of the award of the Arbitral Tribunal on any specific issue shall be submitted to the Tribunal by which the award has been made within thirty days from the date of rendering of the award."

While BAII had, upon the basis of this clause, requested the Arbitral Tribunal supplement its award by an award for post-award interest, the Arbitral Tribunal ruled to the above clause was too narrow and that it was, therefore, without power any longer to make such an award.

Interestingly, the precise situation presented in this case is dealt with effectively by Article 57(3)(b) of the English Arbitration Act 1996 which provides:

> "The tribunal may on its own initiative or on the application of a party . . .
>
> x x x
>
> (b) make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award." [Emphasis added]

Article 49 of the same Act dealing with "Interest" indicates that the term "interest" as used generally in the Act may include post-award interest.

6. Article 1476 of the French New Code of Civil Procedure provides as follows (translation):

> "Once it is made, the arbitral award is *res judicata* in relation to the dispute it decides."

By virtue of Article 1500 of the French New Code of Civil Procedure, the provisions of Article 1476 which relate to domestic arbitration apply equally to international arbitration and, thus, to the case of BAII *et al.* v. IAIGC.

7. As stated earlier, the relevant contract provided for the resolution of disputes by application of the "common principles" of law in the Arab countries which, therefore, constituted the "substantive law" applicable to the relevant contract.

8. However, *see* Redfern and Hunter, *Law and Practice of International Commercial Arbitration*, third edition, 1999, page 405, where the authors state:

> "Once an arbitral award is enforced in a particular country as a judgment of a court, the post-award interest rate may be replaced by the rate applicable to civil judgments." [Emphasis added]

While this passage does not address the exact issue in the BAII case, where there was no provision for post-award interest in the award at all, the situation is comparable. ■