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Allocating Pre-award Interest When a Procedural Delay is Beyond Parties' Control

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The allocation of pre-award interest is a standard feature of most international arbitration proceedings and is often contested before a tribunal. The complexity is accentuated when a tribunal is unable to render a timely award for procedural reasons beyond its own control and beyond the parties' control. The delay caused by the rescheduling of evidentiary hearings due to the ongoing pandemic is a relatable example but is far from being the only one.

As a rule of thumb, a tribunal has wide discretion in deciding the pre-award interest in an arbitration regardless of whether there is a provision in the applicable law.[1)] Nor does the lack of a provision on pre-award interest in institutional rules stop a tribunal from awarding it. However, depending on the law applicable to the allocation of pre-award interest, a tribunal will likely evaluate the allocation of pre-award interest differently.

Common law and civil law jurisdictions treat pre-award interest differently. While most common law jurisdictions tend to treat pre-award interest as a procedural matter, civil law jurisdictions usually view it as a substantive one for conflict of law purposes.[2)] We illustrate this below with Singapore and Korea as examples.

Further, institutional rules tackle the issue differently. For example, in SIAC 2016 Rules, Rule 32.9 provides that a tribunal may award simple or compound interest at a rate it deems appropriate unless the parties have agreed otherwise. This arguably provides a tribunal with even broader discretion to award (or to not award) pre-award interest as it considers appropriate. In contrast, the KCAB International Arbitration Rules 2016 are silent on the issue of interest.

Therefore, depending on which curial law is combined with which institutional rules, the allocation of pre-award interest can turn into a complex subject. Thus, it is no surprise that despite the availability of scholarly writings on the topic, parties, counsel, and tribunals often struggle to agree on the appropriate amount, rate, and period for pre-award interest in situations of a procedural delay not attributable to any party.

Singapore and South Korea are two prominent arbitration hubs of the common law and the civil law worlds, respectively. A comparative view of both jurisdictions might give some perspective on how to approach the issue practically.

Singapore

Singapore's International Arbitration Act (IAA) specifically empowers a tribunal to award interest under section 12(5) and 20(1). In 2005, the Singapore Academy of Law's Law Reform Committee expansively examined the question of interest awarded by the courts, including interest running on arbitral awards. The Committee's report concluded that an arbitrator should have the power to set an appropriate interest rate to run on the award. It also stated that an arbitrator "*should be allowed to order interest on an award unfettered by the rules of court whether the award is made in a Singapore or foreign currency.*" Thus, it can be said that Singapore's approach towards the issue is two-fold: First, the tribunal has maximum freedom to exercise discretion in awarding pre-award interest. Second, stemming from the first point, the preferred approach is one that bolsters Singapore's pro-arbitration stance.

In 2012, after section 20 of the IAA was repealed and re-enacted, it granted an arbitral tribunal broad powers to award interest. Section 20(1) provides that unless parties otherwise agree, "*an arbitral tribunal may […] award simple or compound interest from such date, at such rate and with such rest as the arbitral tribunal considers appropriate […]*". Unlike that for the post-award interest, there is no guidance on what the rate of interest for pre-award interest should be.[3)] There is also no default pre-award interest if the award is silent on the issue. However, the flexibility empowers the tribunal to determine the appropriate rate of interest. Thus, if a tribunal decides to delve into the issue it will have wide powers which may include: 1) not awarding any interest for the period if it deems fit; 2) imposing a reduced interest rate (i.e., lower than the post-award interest rate) for the entire period to balance the delay effect; 3) enhancing the overall interest rate (as compared to the post-award interest) if the losing party is to benefit unduly from the delay; and 4) increasing the interest rate only for the period where the losing party is to benefit unduly.

Singapore's legislative framework and institutional rules, therefore, encourage arbitral tribunals to devise an appropriate rate and duration of interest where there is a procedural delay beyond the parties' control. How this plays out in practice varies, and a survey on the specific issue of a tribunal evaluating interest owing to an unforeseen procedural delay would be resourceful for the arbitration community.

Korea

Unlike Singapore law, Korean law treats the issue of interest as a substantive law matter. Thus, if a tribunal were to award pre-award interest where the delay was beyond the parties' control, it would factor in the statutory interest that accrues under Korean law (provided that Korean law governs the merits). More specifically, if there is no agreement on any interest rate, either party may seek pre-award and post-award interest at the statutory rate of 5% per annum for general civil claims (Article 379 of the Civil Code) and 6% per annum for claims arising out of commercial activities (Article 54 of the Commercial Code). Such pre-award interest would run notwithstanding an unexpected procedural delay, for instance, a delay of the hearing or a subsequent postponement of rendering the award. Therefore, at least in theory, in comparison to a common law jurisdiction like Singapore, there is little that a tribunal can do to reduce the applicable interest rate or period in a case where the substantive applicable law is Korean law.

Article 34-3 of the 2016 Korean Arbitration Act allows a tribunal to award interest in the absence of a contrary agreement by the parties.[4] But that is not to say that a tribunal has uninhibited power and discretion that it would have under Singapore law or any other common law jurisdiction. In Korea, the tribunal is to "have regard to all of the circumstances" to determine whether it would be "appropriate" to order it.[5] This would also mean that a tribunal should consider and have regard to the issue of pre-award interest from a substantive law perspective.

Therefore, in a Korea-seated arbitration for which the governing law of the contract in question is Korean law, the arbitral tribunal will have less flexibility to reduce the rate or applicable period of interest if a procedural delay has occurred and such delay is not attributable to any party.

Conclusion

Singapore's IAA allows the tribunal broad discretion to deal with adjusting pre-award interest where delays have occurred beyond the parties' control. In other words, from a party's perspective, everything is unclear and difficult to predict until an award has been issued.

Korean law governed and Korea-seated arbitrations provide more predictability on this issue (that pre-award interest is likely to be deemed running no matter what). However, that also means that the arbitral tribunal has less flexibility in comparison to a tribunal seated in Singapore.

Instead of leaving the issue of pre-award interest entirely to the tribunal, parties and counsel may want to approach this issue more proactively and creatively. One viable option could be to enter into a standstill agreement on pre-award interest prior to agreeing on a postponement of the proceedings as it might be difficult to do so at the post-hearing stage. This would allow counsel to save time and resources as they would not have to address any of the above pre-award interest-related arguments. This option would also relieve the tribunal from having to dive into one more issue at the outset.

Another option could be parking a consolidated sum of money in an escrow bank account for it to generate interest, which may be later transferred to the parties in the proportion of the claims awarded to them. While the interest generated from a bank escrow may not yield as much value and may greatly differ depending on the jurisdiction in which the principal is deposited, it will mitigate the potential loss to some degree.

Finally, even if the parties would not be able to agree on a standstill agreement or an escrow arrangement, a tribunal could still communicate to the parties (by way of routine correspondence or through a procedural order) prior to granting an extension that it will consider the delay later when deciding the pre-award interest. On the one hand, this would provide the parties with a certain level of assurance that the tribunal is mindful of the issue, and, on the other, it would allow the tribunal to have more flexibility to exercise the option best suited under the given circumstances at a later point in time and alleviate potential concern for due process violations.

References

?1 See Berger, *General Principles of Law in International Commercial Arbitration: How to Find Them – How to Apply Them*, 5 World Arb. & Med. Rev. 97, 130-36 (2011) (practice of international tribunals "to award interest goes back to the famous '*Alabama*' Award of 1872") (as cited in Born, International Commercial Arbitration [2014] at 3103).

?2 See Born, International Commercial Arbitration [2014] at 3106.

?3 Post-award interest for awards governed by IAA is currently set at 5.33% per annum.

?4 Notably, this explicit provision allowing an arbitral tribunal to award interest is a recent phenomenon i.e., it was introduced in 2016. Before 2016, interest found no "interest" in the arbitration legislation of Korea i.e., the arbitration law did not specifically contain a clause on that point because this was conceptually not a procedural issue.

?5 Joongi Kim, International Arbitration in Korea, page 312.