

Powers of Arbitrators to grant interest in India seated International & Domestic Arbitrations

All of us aware that Arbitrators have powers to grant pre-reference, Pendent lite and Post award interest to the awarded sum. But one of the challenges faced by the Arbitrators is the awarding of appropriate and legally sustainable pre-award, post award interest and the appropriate interest rates. This article deals with the law settled in India regarding interest that can be granted by arbitrators. The procedural law governing the arbitration space in India is Arbitration and Conciliation Act,1996 (Herein after the Act). The said Act is enacted in the lines of UNCITRAL Model law since India is a model law country. The above said legislation is continuously getting polished and strengthened by the interpretations of the High Courts in India and the Supreme Court of India Section. 31(7)(a) & (b) provides for a guideline to compute the applicable interest in arbitration cases. The above said section 31(7) is reproduced below for the convenience,

31(7)(a) Unless otherwise agreed by the parties, where and in so far as an arbitral award is for payment of money, the arbitral tribunal may include in the sum for which the award is made interest, at such rate as it deems reasonable, on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(b) A Sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two percent higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment.

From the above 31(7)(a), it can be understood that the interest rate can be decided by the parties for the pre-arbitration period and be incorporated in the contract. In case of the parties incorporating a specific interest rate, the arbitral tribunal can follow the same. In case the parties, have failed to finalize an interest rate, the tribunal gets the power to grant interest for the pre-arbitration period also. The pre-arbitration period interest includes the pre-reference period and the pendent lite interest. The above section will apply to all the domestic cases and India seated International arbitrations. When parties agree for a specific interest rate in a commercial contract, the Courts in India have refused to interfere in the award interest, when the arbitrator has awarded the contract interest rate. In a recent Videocon case¹ Delhi High Court upheld Pre-reference award interest of 21% per annum and 36% per annum. The Court held that the interest agreed by commercial parties in the contract cannot be interfered by the court on the ground of reasonableness, following another Delhi High Court Judgment in PEL Industries case². In Hyder Consulting Case³ Supreme Court of India had allowed the appeal and set aside the directions of the High Court reducing the interest awarded by the arbitrator to 16% with quarterly rest from the date of cause of action till the date of award and there after 18% with quarterly rest from the date of award till final payment. Hence, Courts in India have been consistent in respecting the contract interest rate. In the same case, Supreme Court of India also held that the post award interest can be applied on the “sum awarded” that includes the principal and the pre-award interest determined under S.31(7)(a) of the Act.

From the above 31(7)(b), it can be understood that the post award interest rate can be decided by the arbitrator failing which the award amount shall carry interest at the rate of two percent, higher than the current rate of interest prevalent on the date of award, from the date of award to the date of payment. The above said interpretation is applicable to the India seated domestic Arbitrations. But Indian courts have been consistently holding that the awarding

¹ Videocon Industries Limited Vs Morgan Securities & Credits Pvt Ltd., (2009) SCC Online Del 7034

² PEL Industries Ltd., Vs SE Investment Limited (2018) SCC Online Dell 8746

³ Hyder Consulting (U.K)Ltd Vs Governor, State of Orissa, (2015) 2 SCC 189

of interest over the award amount is only a compensation and not a punishing mechanism. Hence, the Judgments have always been insisting that arbitrators must grant only a reasonable interest. Normally, while awarding interest an arbitrator should keep in mind various factors including (i) Loss of use of principal sum (ii) the types of claim amounts to which interest shall apply (iii) Period for which interest to be applied (iv) Cost of the relevant borrowing (v) Whether simple or compound interest is to be granted (vi) Whether the proposed interest rate is commercially prudent etc., In Shenzhen Shandong case⁴, Supreme Court of India set aside an award that imposed a higher interest rate granted by the arbitral tribunal, if the losing party does not pay the amount within 120 days from the date of award.

Some Contracts provides for clauses that prohibit awarding of Pre-award interest and always there is a debate whether such a bar to grant interest be sustainable in law. One of the contention against such a bar is that such clauses are unfair and they are illegal since consent to such contracts are obtained by compulsion. There are some Judgments under Arbitration Act,1940 that allowed interest despite such a bar in the contract. But under 1996 Act, law is well settled by upholding such clauses that imposes a bar to grant pre-reference and pendent lite interest. In a recent judgment in Jaiprakash Associates case⁵ Supreme Court of India upheld a High Court Judgment that set aside an arbitration award that granted interest ignoring the bar in the contract.

Internationally, the interest rates are much lower than the commercial lending rates prevalent in India. Hence, in international Arbitrations seated in India and in cases of capital borrowed from a foreign country, the question of reasonable rate of interest always arises. This is very important because granting of 12% or 18% will be a lottery for a foreign party that mobilized funds from international markets and it won't fall within the limits of reasonable interest. In Shenzhen

⁴ Vedanta Ltd., Vs Shenzhen Shandong Nuclear Power Construction Co Limited (2018) SCC Online SC 1922.

⁵ Jaiprakash Associates Ltd Vs Tehri Hydro Development Corporation India Limited (2019) SCC Online SC 143

Shandong case⁶ the Supreme Court of India dealt with an award that granted the same interest for Indian rupee claim and a Euro claim. In the said case Supreme Court of India altered the interest rate from 12% to LIBOR⁷ rate plus three percent as the interest rate applicable to the foreign currency claim on the ground of reasonableness.



⁶ Vedanta Ltd., Vs Shenzhen Shandong Nuclear Power Construction Co Limited (2018) SCC Online SC 1922.

⁷ London Inter Bank offered rate.