

Are There Limits to an Arbitrator's Award of Interest?

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Abraham J. Gafni

ADR

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Subsequently, however, they discover that certain of the characteristics to which they have become accustomed may no longer be available. For example, parties that expect to develop their case through extensive discovery soon appreciate that the arbitrator may lack either the power or inclination to allow or order such discovery. Similarly, under ADR provider standards, rules of evidence may be either enforced or ignored by the arbitrator.

Another example was set forth by Charles F. Forer in his ADR article published in *The Legal* on May 14 ("Can Judgment on Your Arbitration Award Be Entered in Court?"), in which he pointed out that failing to include in the arbitration agreement a statement that the award of the arbitrator may be entered as a judgment in court having jurisdiction of the matter may render the arbitration award unenforceable.

In this regard, parties often ignore the critical issue of whether the arbitration panel may include in its award interest for the periods prior or subsequent to the award's entry and whether it may set the rate of interest to be paid on that award. Additionally, may the arbitrator award interest after the award has been entered as a judgment at a rate that differs from the statutory rate?

The U.S. Court of Appeals for the Fifth Circuit recently addressed these issues in *Tricon Energy v. Vinmar International*, No. 12-20100, May 3, 2013.

In *Tricon*, the arbitration panel found that the defendant, Vinmar International Ltd., had breached the contract and awarded the plaintiff, Tricon Energy Ltd., damages in excess of \$1.3 million, plus attorney fees and "pre and post-award interest" at a rate of 8.5 percent.

The award on the breach of contract was affirmed by the district court; however, it disallowed the 8.5 percent interest rate awarded by the arbitration panel and allowed post-judgment interest only at the statutory rate.

In affirming the decision of the district court, the Fifth Circuit reviewed some of the principles relating to the award of interest in arbitrations.

The court pointed out that as a general rule, in federal cases, post-judgment interest is not discretionary but is calculated in accordance with the statutory rate set forth in 28 U.S.C. Section 1961(a). Moreover, a judgment confirming an arbitration award is no different from any other civil judgment in this regard; the cause of action (including any contractual or other interest accrued until the date of the judgment) merges into the judgment, and the contractual interest rate disappears for post-judgment purposes. Moreover, all courts appear to agree that the arbitrator may not independently establish a post-judgment interest rate..

As the court noted, however, this did not necessarily resolve the question, as parties may contract for a different post-judgment interest rate so long as it is consistent with state usury and other applicable laws. The arbitrators may award a nonstatutory rate if "they did so based on the parties' submission of the issue to them, not on their own authority." As parties' intent to agree to an alternative rate is a "quintessential fact question," an arbitration panel with authority to decide a contractual dispute can also determine whether the contract in question includes language clearly, unambiguously and unequivocally stating the parties' intent to bypass Section 1961.

Indeed, the court acknowledged that if an arbitration panel sets a post-judgment rate as a matter of contract interpretation, its award in that regard will be entitled to almost absolute deference. In fact, the courts "would be required to enforce the award even if the intent to contract around Section 1961 did not seem clear, unambiguous and unequivocal to the court."

In *Tricon*, the court determined that the arbitration agreement authorized the arbitration panel to resolve any disputes, including the award of post-judgment interest of 8.5 percent, which had been demanded by Tricon. The demand for interest had been disputed by Vinmar on the ground that there was no written or other authority authorizing the claim for an award of interest. Because this issue was submitted by the parties to the arbitration panel, it had the authority to award a nonstatutory rate.

Nonetheless, the court disallowed the nonstatutory 8.5 percent interest rate post-judgment, as it was not clear and unequivocal that the award was, in fact, intended to apply to post-judgment interest.

Here, the arbitration panel did not state that it was awarding "post-judgment interest" but rather that it was awarding "post-award interest" only. Had the arbitration panel stated that the interest rate bore interest at the nonstatutory rate both before and after the judgment, that interest rate would have been upheld and enforceable. The court found, however, that the arbitrators' reference to a specific interest rate does not unequivocally include post-judgment interest "except where they have specifically referred to post-judgment interest." "Because the arbitration panel did not use the words 'post-judgment interest' it is far from clear that it meant to award post-judgment interest," the opinion said.

In support of this position, the Fifth Circuit referenced other courts that rejected the allowance of the awarded nonstatutory interest from the date of the award "until paid" (which could presumably take it beyond the date judgment is entered). In short, the courts will not enforce the award of a post-judgment interest rate that differs from the statutory rate unless the award specifically states it to be post-judgment interest.

Yet another aspect of arbitrator authority is often ignored by parties. As earlier noted, *Tricon* makes clear that the parties may authorize the arbitration panel to award both pre- and post-judgment interest at a rate to be determined by the panel. In fact, pre-arbitration memoranda submitted to arbitration panels at the commencement of the arbitration hearing will often include a claim for such interest. However, at the conclusion of the hearing, the party seeking interest may suddenly realize that it has agreed to be subject to the rules of an ADR provider, the rules of which do not provide for the awarding of interest.

Compare, for example, the rules of ADR Options and the American Arbitration Association's Commercial Arbitration Rules.

The ADR Options rule provides, "Subject to relevant substantive legal principles, no monetary award shall be imposed for delay damages or pre-judgment interest, unless all parties agree in advance and in writing that the prevailing party would be entitled to such an award."

The AAA rule (Rule 43(d)) provides, in contrast, that arbitrators may award "interest at such rate and from such date as the arbitrator(s) may deem appropriate."

In short, under one set of rules, the arbitrators may not award prejudgment interest unless there is a specific agreement allowing such, whereas, under the other, the arbitrators have virtually unlimited authority in that regard. Often parties will agree to be subject to the rules of an ADR provider, such as ADR Options or the AAA, but ignore how those rules impact the scope of arbitrator authority. Three important lessons with respect to the awarding of interest, therefore, should be gleaned from *Tricon*:

- Arbitrators may determine the scope of their authority as to whether interest may be awarded and whether this includes post-judgment interest and the applicable interest rate; and, the courts will sustain their award in this regard so long as the arbitration award "draws its essence from the contract."
- Parties should ensure that the arbitration agreement or the rules of the ADR provider clearly and unequivocally reflect whether the arbitrators have the authority to award pre- or post-award interest (or its equivalent such as delay damages), or post-judgment interest; and, if they do, have they unfettered discretion in assigning a specific rate of interest, or have the parties agreed upon a specific interest rate that may be awarded.

- If it is agreed that the arbitrators may award nonstatutory interest, including pre- or post-judgment interest, their authority in this regard should be reviewed with them as part of the arbitration hearing so that, unlike the award in *Tricon*, the final award is clear and unequivocal as to the scope of the interest awarded. •

Abraham J. Gafni is a mediator/arbitrator with *ADR Options* and a professor at *Villanova University School of Law*.
