

EXPERTS CORNER

Pre-Award, Pendente Lite, and Post-Award Interest in Arbitration: Decoding the Supreme Court's Perspective



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Pre-Award, Pendente Lite, and Post-Award Interest in Arbitration: Decoding the Supreme Court's Perspective

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Published on May 28, 2024 - By Bhumika Indulia



Introduction

The scope and extent of an Arbitral Tribunal's powers to grant interest have always been hotly debated. While parties typically expect that an arbitration award will include provisions for interest payments, they may be surprised at the enforcement stage if their expectations are not fully met due to varying legal thresholds applicable to different time periods.

The issue of interest is frequently considered in terms of "pre-award" and "post-award" period. However, a more detailed analysis reveals three distinct time periods for which interest may be awarded i.e. (i) pre-award¹; (ii) pendente lite²; and (iii) post-award³ period. In this article, we examine the provisions governing the grant of interest and review significant rulings of the Supreme Court of India that have shaped the jurisprudence on the powers of an Arbitral Tribunal to grant interest.

Position under the Arbitration Act

Section 31 of the Arbitration Act sets out provisions pertaining to the "form and content of arbitral award".⁴ Within Section 31 sub-section (7) deals with the grant of interest on claims at the pre-award and post-award stage.⁵

Section 31(7)(a) provides for pre-award interest i.e. the interest component payable on claims from the date on which cause of action arose until the date on which the arbitral award is rendered.⁶ The provision begins with the words “unless otherwise agreed by the parties”⁷ thereby highlighting the legislative stance that parties possess the autonomy to determine the applicability of pre-award interest on the award. The language of the provision empowers parties to expressly forego or waive their entitlement to interest during the pre-award stage.

Similarly, Section 31(7)(b) provides for post-award interest and reads as: “(b) A sum directed to be paid by an arbitral award shall, unless the award otherwise directs, carry interest at the rate of two per cent higher than the current rate of interest prevalent on the date of award from the date of the award to the date of payment.”

In general, going by the provisions contained in Section 31(7) of the Arbitration Act, an Arbitral Tribunal has the power to grant (i) pre-award; (ii) *pendente lite*; and (iii) post-award interest.

The intent behind awarding pre-award interest in arbitrations is primarily to provide compensation to the prevailing party for the pecuniary loss arising from the time the claim(s) arose until the issuance of the arbitral award. This compensation aims to ensure that the prevailing party is made whole by accounting for the financial detriment incurred due to the delay in resolving the dispute. Additionally, awarding pre-award interest serves as an incentive for parties to diligently pursue arbitration proceedings and to promptly resolve disputes, thereby promoting efficiency in the arbitration process.

Similarly, awarding post-award interest in arbitrations also serves crucial purposes. Firstly, it compensates the prevailing party for the delay in receiving the awarded sum, acknowledging the time value of money. Secondly, it disincentivises non-compliance from the losing party by adding the prospect of accruing interest on the awarded amount, thus reducing the likelihood of prolonged disputes and enforcement actions.

Controversy surrounding the term “sum” in the context of post-award interest

Until recently, a contentious issue in arbitration revolved around the definition of the word “sum” featured in Section 31(7)(b) of the Arbitration Act in relation to post-award interest. The moot point was whether the word “sum” under Section 31(7)(b) would comprise of only the principal award amount or whether it also included of the amount awarded as pre-award interest. To put it differently, it was not clear whether an Arbitral Tribunal acting under Indian substantive law could grant interest over interest.

The controversy holds relevance due to its significant implications for the party responsible for paying the awarded amount. Initially, courts construed “sum” to encompass solely the principal claim amount(s) awarded by the Arbitral Tribunal,

excluding any pre-award interest component.⁸ However, a notable shift was witnessed when a Supreme Court judgment⁹ expanded the interpretation of the “sum” to encompass not only the principal amount but also any pre-award interest accrued.

Decisions of the Supreme Court

(i) State of Haryana v. S.L. Arora & Co.

In *State of Haryana v. S.L. Arora & Co.*¹⁰, the Supreme Court had to interpret the expression “sum” under Section 31(7). A 2-Judge Bench of the Supreme Court ruled that Section 31(7) of the Arbitration Act did not make any reference to the payment of compound interest or interest on interest. In view of the above, the Supreme Court opined that the phrase “sum directed to be paid by the award” refers to the award of “sums on substantive claims”, that is, the principal amount. In the absence of a provision enabling the grant of compound interest, the Supreme Court in *S.L. Arora*¹¹ opined that such a power cannot be read into the provisions either for the pre-award period or for the post-award period. Lastly, to further support its reasoning, the Supreme Court observed that a high rate of interest computed at 18% per annum was already recognised statutorily to “deter” the award debtor from delaying the payment of awarded amounts. Thus, the Supreme Court in *S.L. Arora*¹² concluded that under Section 31(7)(a), an arbitrator had the discretion to determine (i) the rate of interest; (ii) the period for which interest is to be paid; and (iii) the quantum on which interest is to be awarded. Given the usage of the words “unless otherwise agreed by the parties”, the Supreme Court opined that the discretionary powers under Section 31(7)(a) was subject to the terms of the underlying agreement entered between the parties. Insofar as Section 31(7)(b) of the Arbitration Act is concerned, the Supreme Court in *S.L. Arora*¹³ opined that the arbitrator’s discretion was not subject to or curtailed by the terms of the contract. Should the arbitrator opt not to exercise their discretion, the statutorily provided interest amount of 18% per annum would be applicable for the post-award period.

(ii) Hyder Consulting (UK) Ltd. v. State of Orissa

In *Hyder Consulting (UK) Ltd. v. State of Orissa*¹⁴, a 2-Judge Bench of the Supreme Court doubted the correctness of the decision rendered in *S.L. Arora*¹⁵ and accordingly referred the matter to a 3-Judge Bench giving rise to three separate judgments.¹⁶ S.A. Bobde, J., while expressing his view, observed that the view in *S.L. Arora*¹⁷ that pre-award interest ought not to be included in “sum” for calculating the post-award interest was erroneous. As per Bobde, J., since the Parliament had not qualified the word “sum” with “principal”, the word “sum” would only take the meaning of a particular amount and shall include both principal and interest.

A.M. Sapre, J., while concurring with Bobde, J., clarified that while the grant of pre-award interest is at the discretion of the Arbitral Tribunal, post-award interest is mandated by the statute where the arbitrator only has the discretion to decide upon the rate of interest. Sapre, J., also agreed with Bobde, J., and reiterated that for the purposes of an

