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Can An Arbitrator Award Compound Interest?

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In *British Columbia v. Teal Cedar Products Ltd.*, the Supreme Court of Canada recently held that compound interest could not be awarded in an arbitration arising from a statutory compensation regime. The decision raises the issue of whether, in their arbitration agreement, the parties should specifically deal with pre-and post-award interest and state whether the arbitrator may award compound interest.

Background

Teal's annual forestry cut was reduced following the creation of a provincial park. The province enacted forestry legislation which required that Teal's expropriation claim to be dealt with by arbitration under the provincial Commercial Arbitration Act (CAA). Teal commenced an arbitration and in the arbitration award and in addition to the $5.2 million and costs, the arbitrator awarded Teal $ $2.2 million in pre-award compound interest. The award of compound interest was upheld by the B.C. Supreme Court and Court of Appeal. The Supreme Court of Canada reversed the decision of the B.C. Court of Appeal and held that only simple interest is payable under the relevant B.C. legislation.

The Supreme Court's Decision

The Supreme Court's decision depended upon the inter-relationship between the forestry legislation, section 28 of CAA and sections 1 and 7 of the B.C. *Court Order Interest Act* (COIA)**.** Section 28 of CAA states that "For the purposes of the *Court Order Interest Act* and the *Interest Act (Canada),* a sum directed to be paid by an award is a pecuniary judgment of the court."

Section 2(c) of COIA that states that "**the court must not award interest under section 1**…on interest or on costs…." Section 7(2) says that "**A pecuniary judgment bears simple interest**…" and section 7(1) defines simple interest to be "an annual simple interest rate that is equal to the prime lending rate of the banker to the government." Referring to those subsections, the Supreme Court concluded that compound interest is prohibited, both for pre-judgment interest under section 2(c) and post-judgment interest under section 7(2) .

So in British Columbia, the Supreme Court concluded, only simple interest may be awarded by a court. The Supreme Court effectively held that this court-mandated regime is, by reason of section 28 of CAA, also mandated for arbitrations conducted under the CAA.

A number of submissions why this should not be so were advanced by Teal, all of which were rejected by the Supreme Court. One of Teal's submissions was that the arbitrator could order compound interest as part of the substantive compensatory award, not as interest on that award. The Supreme Court rejected that submission, holding that it did not conform to the plain meaning and statutory history of the sections.

While the Supreme Court held that the statutory regime in British Columbia mandated simple interest for pre and post-award interest in arbitrations under B.C's domestic arbitration statute, it recognized that this regime may not exist in other provinces. The Court also made several comments indicating its view that compound interest awards are truer compensation for a pecuniary loss than simple interest. The Court said:

"There is no doubt that compound interest is a more accurate way of compensating parties for the time value of money….compound interest is no doubt a better measure of the true cost of the loss suffered by Teal…."

Discussion

This decision is somewhat surprising in light of the previous decisions about the authority of courts and arbitrators to award compound interest.

Many provincial statutes dealing with the power of the court to award interest state that interest on interest may not be awarded. Thus, both the Alberta *Judgment Interest Act* and the Ontario *Courts of Justice Act* say that the court shall not award interest on interest. Both the Alberta *Arbitration Act* and the Ontario A*rbitration Act, 1991* say that the court-ordered regime for interest applies to arbitration. Yet, arbitral tribunals and courts have been held entitled to award compound interest, notwithstanding the apparent statutory prohibition. The Alberta Court of Appeal so decided in *Alberta (Minister of Infrastructure) v. Nilsson*, 2002 ABCA 283 and the Supreme court of Canada so decided in *Bank of America Canada v. Mutual Trust Co*, [2002] 2 SCR 601 so far as the Ontario legislation is concerned.

There appear to be two relevant differences between the interest regime in the B.C. COIA and the interest regimes in the Alberta and Ontario. The latter two regimes give the court the power to award a different rate of interest and to award interest "where the payment of pre-judgment interest is otherwise provided by law." It was those subsections that were relied upon by the Supreme Court in the *Bank of America Canada* decision for the conclusion that the Ontario court did have power to award compound interest notwithstanding the apparent prohibition of compound interest. Those powers do not appear in the B.C. statute. The only apparent exception to the mandatory simple interest rate in the BC Act is "an agreement about interest between the parties".

So far as international commercial arbitration is concerned, the B.C. *International Commercial Arbitration Act* (ICAA) does not contain any provision relating to interest that is similar to that found in the CAA and empowers the arbitral tribunal to award interest, unless the parties have agreed otherwise. But there is no reference to the rates or compounding of interest. Similarly, the federal *Commercial Arbitration Act* does not deal with an award of interest by the arbitral tribunal. Accordingly, international commercial arbitral tribunals in British Columbia and under federal legislation appear to have a wider authority to award interest than domestic arbitral tribunals under British Columbia law.

If the parties wish the arbitrator to have the authority to compound interest in a domestic arbitration governed by B.C. law, then they should write that authority into the arbitration agreement. If they have not done so, then once the dispute arises they may agree to the arbitral tribunal having that authority.

***British Columbia v. Teal Cedar Products Ltd.*, 2013 SCC 51**

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