

New Zealand

Janet Walker, CM

INTRODUCTION

This chapter examines the power of an arbitrator to make an order for post-award interest in New Zealand. Section I sets out the national law and institutional rules that regulate this area. In New Zealand, international and domestic arbitration are both governed by the Arbitration Act 1996 (*the Act*), which grants an arbitrator the power to make an order for post-award interest. In addition, the New Zealand Dispute Resolution Centre's rules explicitly provide for post-award interest. Furthermore, as a result of the basis on which interest is awarded, it may be regarded part of the procedural law.

Section II of this chapter considers instances where the arbitration agreement does not prohibit interest from accruing on an arbitral award. In such cases, interest is calculated in accordance with the rules applicable to a judgment debt, as provided in the national legislation.

Section III of this chapter considers the acceptance in New Zealand of international standards for post-award interest. As a Model Law jurisdiction for over 20 years, international decisions have often influenced the approach taken by New Zealand courts.

Sections IV and V of this chapter then consider substantive and procedural law issues raised by post-award interest. In *Parts & Services Ltd v. Brooks*,¹ the High Court of New Zealand held that some circumstances may require the tribunal to depart from contractual terms in calculating interest. The implications of this decision and the importance of contractual terms of interest are explored, followed by a consideration of the public policy objection provided by the Act and the narrow scope for this exception recommended in the High Court's decision in *Ironsands Investments Ltd & Anor v. Toward Industries Ltd & Anor* ('Ironsand').²

1. [Nov. 25, 2005] Rotorua CIV 2005-463-431, (Cooper J).

2. [Jul. 8, 2011] Auckland CIV-2010-404-4879, (Courtney J).

Section VI of the chapter turns to the enforcement of foreign court orders, and Section VII discusses the power of the enforcing court to vary post-award interest. In New Zealand, foreign court orders and awards are usually enforced. However, the limited circumstances in which an award may be varied are considered in the High Court's decision in *Rosser v. Global Construction Services Ltd.*³

I POWER TO GRANT POST-AWARD INTEREST

1. Does an Arbitral Tribunal Have the Power to Grant Post-Award Interest Under New Zealand's Law?

Unless otherwise agreed by the parties, an arbitral tribunal may award interest on the whole or part of any sum awarded to a party. Typically, an agreement to exclude interest would be found in the parties' contract.⁴

The Act, which applies to all domestic and international arbitrations seated in New Zealand, provides:

12 Powers of an arbitral tribunal in deciding disputes

(1) An arbitration agreement, unless otherwise agreed by the parties, is deemed to provide that an arbitral tribunal—

...

(b) may award interest on the whole or any part of any sum which—

(i) is awarded to any party, for the whole or any part of the period up to the day on which the sum awarded (including all interest) is paid in full; or

(ii) is in issue in the arbitral proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of payment.

As noted in the International Bar Association (IBA) Guide to Arbitration in New Zealand, '*there is no prohibition under the Act on the awarding of compound interest. Since the High Court has the power to award compound interest in particular situations, it follows that arbitrators in a New Zealand arbitration also have this power,*'⁵ as they have all the powers of the court under section 12(1) of the Act.

Moreover, the New Zealand Dispute Resolution Centre's (NZDRC) Arbitration Rules provide for post-award interest in Article 34.6:

Unless otherwise agreed by the Parties, the Arbitral Tribunal may award simple or compound interest from such dates, at such rates and with such rests, as the Arbitral Tribunal considers meet the justice of the case, on the whole, or any part of:

3. [10 Aug. 2004] Auckland CIV 2004-404-2564, (Randerson J). See further discussion in Section VII below.

4. Doug Jones, AO, Janet Walker, CM, *Commercial Arbitration in Australia under the Model Law* (3rd edn, Law Book Co 2022) at para. [9.840].

5. Daniel Kalderimis, *Arbitration Guide: New Zealand*, International Bar Association Arbitration Committee (February 2018) <https://www.ibanet.org/MediaHandler?id=278729D0-AAA9-4D8B-A7D8-A27F2E3F711D>.

- (a) any sum which the Arbitral Tribunal determines any Party is liable to pay any other Party, for the whole or any part of the period from the date on which the cause of action arose up to the date of the Award; and/or
- (b) any amount claimed in the Arbitration and outstanding at the commencement of the Arbitration proceedings but paid before the Award is made, for the whole or any part of the period from the date on which the cause of action arose up to the date of payment.

2. Is the Power Exercisable Without a Request or Submission, or Is Such a Submission Required?

Under the Act, an arbitration agreement is deemed to provide the arbitral tribunal with the power to award interest as a court would have in deciding a case before it. There is no formal prohibition on awarding interest without a request or submission, although interest is typically a form of relief that is sought explicitly.

3. Is the Power Classified as One under the Substantive Applicable Law or the Procedural Law of the Arbitration?

Subject to the matter being provided for in the agreement between the parties, which would form part of the substantive issues to be addressed under the applicable law, the inclusion of this power among the remedial powers of the tribunal renders it part of the procedural law of the arbitration,⁶ particularly as the arbitration law of New Zealand is closely based on the Model Law.

II CHOICE OF LAW

4. What is the Law That Applies to Determine the Rate of Post-award Interest? Would This Be the Governing Law of the Dispute or the Law of the Seat?

Article 31(5) of Schedule 1 of the Act provides ‘*unless the arbitration agreement or the award provide otherwise, a sum directed to be paid by an award carries interest as from the date of the award and at the same rate as a judgment debt*’. Accordingly, where the question is not answered by the parties’ agreement, the tribunal is free to determine the availability and rate of interest, which will likely be regarded as a matter for the law of the seat as in many common law jurisdictions.

The rate of judgment debt in New Zealand is governed by the Interest on Money Claims Act 2016 for cases which commenced on or after 1 January 2018. Section 12 of the same provides:

Calculation of interest awarded under Section 10

- (1) Interest awarded under Section 10 for a period is to be calculated at the relevant interest rate or interest rates on a daily basis using the Internet site calculator in accordance with Sections 14 and 15, except if this Act expressly provides otherwise.

6. Nigel Blackaby, Constantine Partasides KC, Alan Redfern, Martin Hunter, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015), at para. [9.73].

- (2) For the purposes of Subsection (1), interest accrued over any particular year is to be added to the principal in the subsequent year.
- (3) In this Section, interest rate, for any given day ('day A'), means the base rate plus the premium expressed as a daily effective rate, where—
 - (a) base rate means—
 - (i) the average of the 6 observations for the retail 6-month term deposit rate most recently published by the Reserve Bank of New Zealand before day A; or
 - (ii) if some other indicator interest rate is prescribed as the base rate that applies for the purposes of this Section from a specified date, the prescribed rate, if day A is after the specified date; and
 - (b) premium means—
 - (i) 0.15 per cent; or
 - (ii) if some other percentage is prescribed as the premium that applies for the purposes of this Section from a specified date, the prescribed premium if day A is after the specified date.

III DO THE COURTS TAKE INTO ACCOUNT INTERNATIONAL STANDARDS WHEN FACING CHALLENGES ON THE POST-AWARD INTEREST?

New Zealand has adopted international standards in arbitration by enacting a statute based on the Model Law in 1996. Judgments interpreting the Model Law have referred to international decisions, including decisions from the United Kingdom Court of Appeal, the Supreme Court of India, and the United States Court of Appeals for the Second Circuit.⁷ Therefore, New Zealand courts are likely to consider international standards in disputes involving post-award interest.

IV SUBSTANTIVE LAW ISSUES

5. How are Contractual Provisions on Late or Non-payment of Interest Relevant to Post-Award Interest? Will These Be Considered By the Arbitral Tribunal?

Contractual provisions may be considered in the award of post-award interest by arbitral tribunals and by courts in the enforcement of an award. For example, in *Parts & Services Ltd v. Brooks*,⁸ the High Court set aside an award on the ground that there had been a breach of natural justice, as the tribunal reduced the rate of interest to less than that provided for in the contract without prior notice to the parties.

7. See, e.g., *Almatat Corporation Ltd v. Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 (CA), which referred to international decisions on the threshold to establish a conflict with public policy; *Ironsands Investments Ltd & Anor v. Toward Industries Ltd & Anor*, [8 Jul. 2011] HC Auckland CIV-2010-404-4879, (Courtney J) at pp. [9]-[11].

8. [November 25, 2005] Rotorua CIV 2005-463-431, (Cooper J).

Section 22 of the Interest on Money Claims Act 2016 also provides:

22 Award of interest if contract makes relevant provision

- (1) This Section and Section 23 apply to a period for which a contract provides for the award of interest, or provides that no interest is payable, on any amount payable under, or for the breach of, the contract.
- (2) A court may award interest for a period to which this Section applies in accordance with the rights and obligations of the parties specified in the contract.
- ...
- (5) A court may not award interest under Part 1 or Section 24 for a period to which this Section applies if it would be inconsistent with the provisions of the contract to do so.

6. How Do the Procedural Rules of the Substantive Law Apply?

New Zealand's choice of law provisions are based on the United Nations Commission on International Trade (UNCITRAL) Model Law. According to the Model Law Article 28(1), incorporated in Article 28(1) of Schedule 1 of the Act:

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

Therefore, where the law of the seat is New Zealand, the procedural rules of the governing law of the arbitration are not applied to the determination of interest. Instead, the power of arbitral tribunals to award interest is provided in the Act.

7. Whether the Award of Interest Can Be Subjected to Public Policy Objections, and if So, What Are They?

The Act differs from the Model Law in providing expressly, in Article 34(6) of Schedule 1, for the application of the public policy exception in New Zealand:

For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is hereby declared that an award is in conflict with the public policy of New Zealand if—

- (a) the making of the award was induced or affected by fraud or corruption; or
- (b) a breach of the rules of natural justice occurred—
 - (i) during the arbitral proceedings; or
 - (ii) in connection with the making of the award.

Although a violation of public policy is a ground for setting aside an award, it is a narrow ground of recourse, the threshold for which has not yet been settled by the courts. In the case of *Ironsands*,⁹ the High Court endorsed a 'high threshold' for what constitutes a conflict with New Zealand's public policy. Courtney J suggested that it is

9. *Ironsands Investments Ltd & Anor v. Toward Industries Ltd & Anor* [8 Jul. 2011] HC Auckland CIV-2010-404-4879, (Courtney J).

necessary to 'show some element of illegality or that the enforcement of the award would be clearly injurious to the public good or wholly offensive to the ordinary, reasonable and fully informed member of the public'.¹⁰

V PROCEDURAL LAW ISSUES

8. What Are the Main Procedural Law Issues When Considering Post-Award Interest? How Are the Arbitration Laws and Other Laws or Regulations of the Seat Relevant?

New Zealand has been a Model Law jurisdiction for over 20 years and has developed a jurisprudence largely consistent with other Model Law jurisdictions. An award may be set aside under Article 34 of Schedule 1 of the Act. Grounds for a court to deny enforcement of an arbitral award include where the award contains a decision on matters beyond the scope of the arbitration agreement.

Under Article 33(1) of Schedule 1, which is based on the Model Law, a party may request a correction or interpretation of an award within 30 days of receipt of the award. Therefore, the parties have an avenue of recourse should there be an evident mistake or miscalculation of the interest.

Where an award has not addressed a claim of post-award interest made in the proceedings, a party may also request the making of an additional award.¹¹

It is also notable that New Zealand makes one reservation to the New York Convention – that of reciprocity:

- (a) This State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State.

VI EFFECT OF ENFORCEMENT ORDERS ON INTEREST ON THE AWARD AT THE SEAT AND ELSEWHERE

New Zealand's enforcement regime is based on the Model Law. Therefore, the effect of enforcement orders is typically to uphold the money award and interest contained in the award. Setting aside an award in part or in full is generally difficult. In an early case, prior to the adoption of the Act, the New Zealand Court of Appeal stated in *Money v. Ven-Lu-Ree Ltd*¹² that:

Reasons given by an arbitrator or umpire should be read fairly and as a whole. Awards should not be vitiated by fine points; the modern approach is in favour of upholding awards where that can fairly be done, rather than setting them aside in their entirety.

10. *Ironsands Investments Ltd & Anor v. Toward Industries Ltd & Anor* [8 July, 2011] HC Auckland CIV-2010-404-4879, (Courtney J).

11. Ch 1, Article 33(3), Arbitration Act, 1996.

12. [1988] 2 NZLR 414 (CA), 417.

VII POWERS OF THE COURT TO ORDER OR ADJUST POST-AWARD INTEREST

9. *Does a New Zealand Court Have the Power to Order or Adjust the Post-award Interest Awarded By the Tribunal, as the Court at the Seat or an Enforcing Court?*

An award may be enforced by application to the High Court or District Court. The value of the award, including interest, may be enforced in its original currency. The power of the court to order interest was formerly restricted by the statutory maximum interest rate. Section 87 of the Judicature Act 1908 enforced a maximum interest rate on damages, which would also apply in arbitral proceedings.¹³ However, this provision was repealed on 1 January 2018.

In *Rosser v. Global Construction Services Ltd*,¹⁴ the arbitrator awarded costs of NZD 28,864 in respect of an award of NZD 23,298 plus interest. The High Court stated:¹⁵

This court will not lightly interfere with costs awards made by an arbitrator unless it is plainly shown that the award was unreasonable in all the circumstances. This court will not interfere merely because it would have arrived at a different conclusion. If the award accords with principle and if it is one which would reasonably be made by an arbitrator in all the circumstances, this court will not interfere.

Based on the court's approach to the award of costs in arbitration, the court has the power to adjust the interest awarded but, typically, will not do so.

13. *Angus Group Ltd v. Lincoln Industries Ltd* [1990] 3 NZLR 82.

14. *Rosser v. Global Construction Services Ltd*, [10 Aug. 2004] High Court Auckland CIV 2004-404-2564, (Randerson J).

15. *Rosser v. Global Construction Services Ltd*, [10 Aug. 2004] High Court Auckland CIV 2004-404-2564, (Randerson J).

