

Australia

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INTRODUCTION

This chapter examines the power of an arbitrator to make an order for post-award interest in Australia. First, it is important to understand the sources of this power to be found in Australian legislation and elsewhere. As a federal system, the power to legislate in Australia is divided between the State and the Federal Governments. International arbitration in Australia is regulated by the Federal International Arbitration Act 1974 (Cth), and domestic arbitration is governed by the harmonised State Commercial Arbitration Acts. Both regimes grant the power to order post-award interest. Further, the International Arbitration Act 1974 (Cth), together with a mechanism adopted by the Federal Court of Australia, provides guidance in determining the meaning of a *'reasonable rate.'* Finally, international standards may also be of assistance in this determination.

This leads into discussions of the substantive and procedural issues raised by post-award interest in Australia. The chapter begins with the role of the terms of the contract governing non-payment and late payment. Then it considers the application of the procedural rules of the governing law and the narrow exception for the use of public policy to order post-award interest. Following this, it considers procedural issues, including those of interpretation and limitation periods.

Finally, the chapter turns to the courts' ability to enforce foreign court orders and to vary them in respect of orders of post-award interest. The Australian Common Law typically views orders in relation to the payment of post-award interest made in foreign jurisdictions as part of the judgment debt. Accordingly, these payments are usually enforceable within Australia. Additionally, consideration is given to the Federal Court of Australia's ability to vary the relevant dates for the purposes of calculating post-award interest. The discussion then turns to the significant decision of the Federal

Court of Australia in *Energy Service Company (ESCO) Corporation v. Bradken Resources (ESCO)*,¹ which dealt with the application of differing interest rates.

I POWER TO GRANT POST-AWARD INTEREST

1. Does an Arbitral Tribunal Have the Power to Grant Post-award Interest under the National Law?

Unless otherwise agreed by the parties, the Australian International Arbitration Act 1974 (Cth) (*the IAA*) enables arbitrators to make an award for interest overall or as part of a principal claim at such a rate as the arbitrator determines reasonable. Typically, an agreement to exclude interest would be found in the parties' contract.²

The relevant provision of the IAA is section 26, which provides as follows:

26. Interest on debt under award

- (1) This Section applies if:
 - (a) an arbitral tribunal makes an award for the payment of an amount of money; and
 - (b) under the award, the amount is to be paid by a particular day ("the due date").
- (2) The arbitral tribunal may direct that interest, including compound interest, is payable if the amount is not paid on or before the due date.
- (3) The arbitral tribunal may set a reasonable rate of interest.
- (4) The interest is payable:
 - (a) from the day immediately following the due date; and
 - (b) on so much of the amount as remains unpaid.
- (5) The direction is taken to form part of the award.

Similar provisions exist for domestic arbitrations in the Commercial Arbitration Acts. For example, the power to award post-award interest is provided in section 33F of the Commercial Arbitration Act 2010 in New South Wales (NSW):

33F Interest on debt under Award

- (1) This Section applies if:
 - (a) an arbitral tribunal makes an award for the payment of an amount of money, and
 - (b) under the award, the amount is to be paid by a particular day ("the due date"), unless otherwise agreed by the parties.
- (2) The arbitral tribunal may direct that interest, including compound interest, is payable if the amount is not paid on or before the due date.
- (3) The arbitral tribunal may set a reasonable rate of interest.
- (4) The interest is payable:
 - (a) from the day immediately following the due date, and
 - (b) on so much of the money as remains unpaid.
- (5) The direction is taken to form part of the award.

1. [2011] 282 ALR 282.

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

The institutional rules of the Australian Centre for International Commercial Arbitration do not address the power to award interest. Arbitrators have broad discretion to award interest, including compound interest, with or without a request from the parties. Unless the parties agree otherwise, there is no statutory constraint on the final remedy that an arbitral tribunal can award, and there are no specific statutory or other requirements for exercising or excluding this power. However, arbitral tribunals typically order pre-award interest *in* the award pursuant to a claim by a party for it, and, subject to the parties' agreement, arbitral tribunals typically permit the court to order post-award interest *on* the award if the award is not paid promptly.

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

Under the IAA, 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. In *Government Insurance Office (NSW) v. Atkinson-Leighton Joint Venture*,³ a case concerning the power of an arbitral tribunal to award interest, the High Court endorsed the power at common law of an arbitral tribunal to exercise 'every right and discretionary remedy given to a court of law'.⁴

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 power in section 26 of the IAA is part of the procedural law of international commercial arbitrations seated in Australia.⁵ It serves as an additional provision to the Model Law, which has the force of law in Australia.⁶ The inclusion of this power among the remedial powers of the arbitral tribunal renders it procedural in nature.⁷

II CHOICE OF LAW

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

According to the arbitration law in Australia, the arbitral tribunal may set 'a reasonable rate of interest'.⁸ Therefore, arbitrators have broad discretion to determine the

3. *Government Insurance Office (NSW) v. Atkinson-Leighton Joint Venture* [1981] 146 CLR 206, (Mason J) at pp. [246]-[247].

4. *Chandris v. Isbrandtsen-Moller* [1950] 84 Ll L Rep 347, (Tucker J) at p. [352].

5. Richard Garnett, 'The Legal Framework for International Arbitration in Australia: The Old and the New' in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (The Federation Press 2010) at pp. [38], [53].

6. See International Arbitration Act 1974 (Cth) section 16.

7. Doug Jones, AO, Janet Walker, CM, *Commercial Arbitration in Australia under the Model* (3rd edn, Law Book Co 2022) at para. [9.500].

8. International Arbitration Act 1974 (Cth) section 26(3).

entitlement and rate of post-award interest. Some parties may argue that the rate applied by Australian courts may serve as a reasonable analogue. Where the parties have prescribed the availability of interest and the rate of interest, these questions may both be considered matters of substance governed by the law that governs the parties' agreement. Where the parties have not provided this in their agreement, the availability and rate of interest are, in principle, governed by the law of the seat in Australia.

Section 52(2)(a) of the Federal Court of Australia Act 1976 (Cth) provides that the post-judgment period is payable at the rate prescribed by r. 39.06 of the Federal Court Rules:⁹

- (a) for the period from 1 January to 30 June in any year – the rate that is 6 per cent above the cash rate last published by the Reserve Bank of Australia before the period commenced; and
- (b) for the period from 1 July to 31 December in any year – the rate that is 6 per cent above the cash rate last published by the Reserve Bank of Australia before the period commenced.

For example, effective from 1 July 2022 to 31 December 2022, the Federal Court Interest on Judgments Practice Notice provides for a post-judgment interest rate of 6.85%.¹⁰ Arbitral tribunals may also have regard to general commercial rates.

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

According to Allsop P in *Telephone Communication Limited (TCL) Air Conditioner (Zhongshan) Co Ltd v. Castel Electronics Pty Ltd TCL*, the IAA's adoption of the Model Law reflects 'Australia's acceptance of United Nations General Assembly's recommendation to give 'due consideration' to the Model Law in the interests of international uniformity'.¹¹ Therefore, an Australian court may be persuaded to consider foreign precedents in adjusting a post-award interest if asked to do so.

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?

Pursuant to section 26 of the IAA, arbitral tribunals may consider the terms of the parties' contract on late payment or non-payment of interest in determining the availability of post-award interest and the rate of interest. The ability of the Federal

9. Federal Court of Australia, *Interest on Judgments Practice Note*, 18 September 2017, at para [3.2].

10. *Pre-judgment & Post-judgment Interest Rates*, Federal Court of Australia (January 2019), <http://www.fedcourt.gov.au/forms-and-fees/interest-rates>.

11. [2014] FCAFC 83, at p. [57].

Court to award a lower rate of interest if justice so requires¹² may also be relevant to the arbitral tribunal's determination.

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

Australia's choice of law rules are derived from the United Nations Commission on International Trade (UNCITRAL) Model Law. Article 28 of the Model Law, contained in Schedule 2 of the IAA, provides:

- (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.

Article 28(2) further provides that in the absence of an express or implied choice by the parties, the arbitral tribunal shall apply the conflict of law rules of the arbitral seat to determine the substantive law governing the dispute.

The procedural rules of the substantive law do not apply in determining interest if Australia is the seat.

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

Section 19 of the IAA provides:

Without limiting the generality of Articles 17I(1)(b)(ii), 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is declared, for the avoidance of any doubt, that, for the purposes of those Articles, an interim measure or award is in conflict with, or is contrary to, the public policy of Australia if:

- (a) the making of the interim measure or award was induced or affected by fraud or corruption; or
- (b) a breach of the rules of natural justice occurred in connection with the making of the interim measure or award.

There is no explicit barrier to making a public policy objection to post-award interest, but Australian courts have generally adopted a restrictive interpretation of public policy objections. In *TCL*, the Full Federal Court held:¹³

An international commercial arbitration award will not be set aside or denied recognition or enforcement under Arts 34 and 36 of the Model Law (or under Art V of the New York Convention) unless there is demonstrated real unfairness or real practical injustice in how the international litigation or dispute resolution was conducted or resolved, by reference to established principles of natural justice or procedural fairness. The demonstration of real unfairness or real practical injustice will generally be able to be expressed, and demonstrated, with tolerable clarity and

12. See the Note to r 39.06 which reads: Section 52(2) of the Act provides that interest is payable: 'if the Court, in a particular case, thinks that justice so requires – at such lower rate as the Court determines': Federal Court Rules 2011 r 39.06.

13. *TCL Air Conditioner (Zhongshan) Co Ltd v. Castel Electronics Pty Ltd* [2014] FCAFC 83, at p. [55].

expedition. It does not involve the contested evaluation of a fact-finding process or 'fact interpretation process' or the factual analysis of asserted 'reasoning failure,' as was argued here.

Erroneous legal reasoning or misapplication of law is not a violation of public policy; rather, Australia's public policy is to enforce arbitral awards '*wherever possible*'.¹⁴ The parties' adoption of institutional rules which are putatively inconsistent has also been held to not overrule Model Law provisions with respect to public policy.¹⁵

According to the International Bar Association (IBA) Guide to Arbitration in Australia, '*the question of whether punitive or exemplary damages or interest can be awarded by an arbitrator is doubtful and has yet to come before the courts*'.¹⁶

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?*

When Australia is the seat of the arbitration, the IAA applies. Parties should be aware of the general avenues of recourse open to them under the IAA.

Under Schedule 2, Article 33(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. This provides one means of recourse for an evident mistake or miscalculation of the interest.

In addition, a party may request the making of an additional award where the award has not addressed a claim of post-award interest made in the proceedings.¹⁷

A party may apply to set aside the award and/or request that the court remit the award to the arbitral tribunal under Schedule 2, Article 34 of the Act.

The limitation for an action to enforce an award is six years; or it is 12 years if the award is made under an arbitration agreement and the arbitration agreement is made by deed. The time runs from the date on which the cause of action accrued, which, in

14. *Uganda Telecom Pty Ltd v. Hi-Tech Telecom* [2011] 277 ALR 415, (Foster J) at p. [436]:

The whole rationale of the Act, and thus the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual arrangements entered into in the course of international trade, in order to support certainty and finality in international dispute resolution and in order to meet the other objects specified in s 2D of the Act.

15. *Cargill International SA v. Peabody Australia Mining Ltd* [2010] 78 NSWLR 53, 3 (Ward J) at p. [534], which noted by way of example that '*insofar as Art 19 of the Model Law allows the parties to adopt a set of procedural rules different from those which would otherwise apply under the Model Law, it cannot be said that the Model Law and International Chamber of Commerce Rules are inconsistent and irreconcilable*'.

16. Doug Jones, *Arbitration Guide: Australia*, International Bar Association Arbitration Committee (March 2012) <https://www.ibanet.org/MediaHandler?id=6A71C416-8AAC-4738-A0E1-8A06B5DD7E5E>.

17. International Arbitration Act 1974 (Cth) sch 2, Article 33(3).

the case of enforcing an arbitral award, is the date on which default first happens in observance of the award.¹⁸

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

In enforcement proceedings, Australian courts have generally respected arbitrators' decisions when determining interest. For example, in *Antclizo Shipping Corporation v. The Food Corporation of India*,¹⁹ the plaintiff brought an application to enforce a foreign arbitral award under section 8 of the IAA. The award was made in London, and it required the defendant to pay various sums to the plaintiff, including post-award interest and costs. The Supreme Court of Western Australia entered judgment on the same terms as the award, including the post-award interest rate, which was determined by English law. Post-award interest was also ordered in the enforcement of the London Court of International Arbitration (LCIA) award in *Traxys Europe SA v. Balaji Coke Industry Pvt Ltd (No 2)*.²⁰ These authorities confirm that post-award interest is payable as part of the judgment debt and therefore constitutes a part of the award on which enforcement is sought.

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

9. Does the Australian Court Have the Power to Order or Adjust the Post-award Interest, Assuming It is Either the Seat Court or the Enforcing Court?

Pursuant to section 51A of the Federal Court of Australia Act 1976 (Cth), the enforcing court has the power to award interest from the date of the award at such a rate as the court thinks fit.²¹ Section 52 also permits interest on the judgment at a rate fixed by the Rules of Court or at such a lower rate as the court determines. An Australian court may also order partial enforcement, for example, severing interest from the remainder of the award.²²

In *ESCO*,²³ the Federal Court of Australia was asked to consider the application of a different interest rate from that awarded by the arbitral tribunal. ESCO sought to have the arbitration award enforced in Australia under section 8(3) of the IAA after Bradken refused to pay costs under the award. The outcome of their enforcement proceedings

18. See, e.g., New South Wales Limitation Act 1969, section 20.

19. [1998] WASC 342 (6 November 1998).

20. [2012] FCA 276.

21. See *ESCO Corporation v. Bradken Resources* [2011] 282 ALR 282 at p. 284, in which the relief sought by ESCO included the payment of interest pursuant to section 51A(1) of the Federal Court of Australia Act 1976 (Cth).

22. *William Hare UAE LLC v. Aircraft Support Industries Pty Ltd* [2014] NSWSC 1403, at pp. [105]-[106] and [136]. In this case, the judge found that it was open to the court to sever a portion of the interest affected by the breach of the rules of natural justice.

23. *ESCO Corporation v. Bradken Resources* [2011] 282 ALR 282.

in the United States (US) was yet to be decided by the time of the Australian hearing. In the US District Court, the dispute as to interest centred on whether post-award interest should be ordered at the US federal rate of 0.19% per annum or the Oregon State rate of 9%.

In Australia, the parties were in dispute as to the relief to which ESCO was entitled and whether ESCO was entitled to post-judgment interest at Australian rates pursuant to section 51A of the Federal Court Act 1976 (Cth) (which were higher than the US federal rate). ESCO was prepared to stay or adjourn the Australian proceedings until the US proceedings were finished, but only if Bradken provided a bank guarantee for the award amount and additional sums of interest. The court granted the adjournment, ordering Bradken to provide security for the award, but not for the interest.