Title:
ICC Award No. 5835, 10 ICC Bull. No. 2, 1999, at 33 et seq.

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Table of Contents:
Interim and Final Awards in Case 5835
  Final Award
    With respect to Respondent's financial charges and interest:

Content:

Interim and Final Awards in Case 5835

Dates December 1989, June 1996

Languages

Claimant: Kuwaiti company
Respondent: Italian company

Place: Rome, Italy

In connection with a construction contract (Main Contract) entered into by Respondent and X, Respondent subcontracted to Claimant the supply, installation and maintenance of electrical works (by virtue of an Agreement). Claimant argues that Respondent wrongfully withheld sums due and refused to release performance bonds which had been issued, despite completion of the works and the fact that Respondent had itself received payment under the Main Contract. Claimant seeks damages and release of the performance bonds. Respondent argues that Claimant's arbitration request is inadmissible and that its claims are time-barred or estopped, and makes a counterclaim for damages. In an initial interim Award, the Arbitral Tribunal determines the law applicable to the merits of the dispute, rejects Respondent's defence regarding inadmissibility and partly approves/partly rejects its defence of time-bar and estoppel. In a second interim Award, the Arbitral Tribunal rejects Respondent's application for interim protection orders. In a third interim Award, the Arbitral Tribunal rejects certain of Claimant's claims, considers others to be without object and accepts others in principle, leaving the amount to be determined later. Respondent's counterclaim is admitted, due to Claimant's liability, the amount of the damages being left to be determined in the final Award.

In the majority final Award, the Arbitral Tribunal examines the various claims submitted by each party. In so doing, it applies Kuwaiti civil law, which it compares with the Unidroit Principles (Art. 7.1.6 (to determine whether conduct may be deemed to be gross mistake), Art. 7.4. 7 (reduction of damages according to parties' conduct), Art. 7.4.3 (3) (assessment of damages by court)). It awards Claimant payment for extra works and compensation for damage to electrical works. It grants Respondent compensation for office and site overheads, additional labour costs and for a certain proportion of its financial charges. The awards made to each party are set off against each other, leaving a balance in Respondent's favour. Arbitration costs are split between Claimant and Respondent in accordance with the success of their respective claims (90% borne by Claimant, 10% by Respondent).

[...]

Page: 35
Final Award

With respect to Respondent's financial charges and interest:

'... Respondent claims interest on payments made to its Kuwaiti site, interest on its further claims and, originally, compensation for its rate of exchange losses. . .

It is undisputed that Respondent had borrowed funds during the entire period for which it is claiming interest, that its interest rate averaged 13% per annum and that it had claimed damages and interest from Claimant as early as . . .

Claimant addressed the present issue only in its Post Hearing Brief . . . and only with respect to the restrictions applicable, under Kuwaiti law, on interest rates. It indicated that the interest rate may not exceed 7% according to Art. 110 and 111 of the Kuwaiti Commercial Code (law no. 68/1980).

Respondent replied . . . as follows: "Whether this may apply to interest due on [sic] Kuwait, this cannot apply to interests paid in . . . under the local official banking rate (which averages 13%). In any event Claimant has provided no evidence that such a rate would exceed any rates announced by the Kuwaiti Central Bank."

The Tribunal holds that Kuwaiti law restricts the rate of interest only with respect to contractual rates and to the interest rate applicable when the payment of money the amount of which is known to the debtor, is delayed (cf. Art. 110 and 111 of the Kuwaiti Commercial Code no. 68), but not however to interest aimed at compensating the aggrieved party for the fact that the damages awarded shall only be paid some time after the damage occurred and that the creditor may have incurred financial charges in order to survive the period during which he was awaiting compensation of his damages . . .

Kuwaiti law provides that the compensation shall include "the damage suffered by the creditor . . . provided that this is a natural result of non-fulfilment of the obligation or delay thereof" (Art. 300 Sect. 2 of the Civil Law no. 67/1980). The Tribunal holds that the said financial charges may qualify, according to the circumstances of the case, as a "natural result" of a debtor's delay in paying damages owed to his contractual partner. Particularly, if the basis of the debtor's liability is "grave mistake" . . . the normally applicable limits on interest rates are no longer applicable (Art. 300 Sect. 3 and Art. 304 Civil Law per analogiam).

This understanding of Kuwaiti law is in accordance with internationally accepted principles which otherwise would become applicable pursuant to the Tribunal's First Interim Award. Reference may again be made to the Unidroit Principles of 1994, which provide in Art. 7.4.9 (3) that the aggrieved party is entitled to additional damages if the non-payment caused it a greater harm than covered by the normally applicable interest rate.'

Referring Principles:

- VII.1 - Damages in case of non-performance
- VII.6 - Duty to pay interest