Banque Arabe et Internationale d'Investissement (BAII) et al. v. The Inter-Arab Investment Guarantee Corporation (IAIGC).

[...]
2. The Events leading to the Dispute:

Under an agreement dated November 17, 1984 (the "Loan Agreement"), BAII extended a credit facility of US $20 Million (Twenty Million U. S. Dollars) to Amanat Al Assima, the Baghdad Sewage Board ("BSB").

Repayment of principal and payment of interest by BSB were guaranteed by the Rafidain Bank ("Rafidain") by an agreement between Rafidain and BAII dated November 18, 1984. (the "Rafidain Guarantee").

BAII entered into an agreement with the Banks on November 23, 1984 (the "Funding Agreement"). The Banks and their proportions of commitment to the funding of the facility under the Loan Agreement were listed in a schedule to the Loan Agreement.

The Banks are included in the list of financial institutions approved by the Council of IAIGC. The aggregate commitment of the Banks amounted to 65%. BAII funded 35% of the loan.

BAII and IAIGC entered into an agreement dated November 29, 1984 (the "Guarantee Contract") whereby, in return for an agreed premium and subject to other conditions, IAIGC undertook to indemnify BAII against certain proportions of losses in respect of the Loan Agreement arising from certain defined non-commercial risks.

BSB drew down the entire US$ 20 Million (Twenty Million U. S. Dollars) facility under the Loan Agreement. Repayment of principal under the Loan Agreement was to take place in five installments falling respectively on December 14, 1987, December 21, 1988, June 13, 1988, October 11, 1988 and November 30, 1988.

BSB defaulted on the last four installments and Rafidain failed to meet calls made by BAII in respect thereof under the Rafidain Guarantee. BAII notified these events to IAIGC under the Loan Guarantee Contract. IAIGC proceeded with the processing of the associated applications for compensation.

After BSB's default on payment of the first three installments, BAII and Rafidain entered into an agreement on September 21, 1988 providing for deferral of payment of the entire loan (the "Deferment Agreement"). Rafidain assumed the obligations of the loan and undertook to repay it in six semi-annual installments of US$ 3,333,333.33 (Three Million Three Hundred Thirty Three Thousand Three Hundred Thirty Three and 33/100 U. S. Dollars) each, plus interest.

Payments were due on June 30, December 30, 1989; June 30, December 30, 1990; June 30, December 30, 1991. BSB and Rafidain defaulted on the fourth repayment that was due on October 17, 1988.

BAII notified IAIGC of the default and applied for compensation from IAIGC under the Guarantee Contract.

Thereafter, the Extension Agreement was concluded between IAIGC and BAII by exchange of letters dated November 8 and 30, 1988.

The purpose of the Deferment and the Extension Agreements as intended by the Parties, their interpretation and effect on the rights and obligations of the Parties is a basic issue of contention in the present case.

Before the Deferment and Extension Agreements became effective, BSB and Rafidain had defaulted on the fifth and final repayment of principal which was due on December 30, 1988 under the Loan Agreement.

Rafidain defaulted on the first, second and third installments under the Deferment Agreement.

BAII made calls upon the IAIGC Guarantee following each of these three defaults. IAIGC paid BAII in accordance with the
terms of the Extension Agreement.

On July 7, 1990, BAII's share capital ceased to be at least 50% owned by Arab nationals and entities as Banque Nationale de Paris, (BNP) a French bank became the majority shareholder of BAII.

Rafidain defaulted on the payments that were due under the Deferment Agreement on December 30, 1990, June 30, 1991 and December 30, 1991. BAII claimed compensation from IAIGC following each of these defaults.

On January 5, 1991, IAIGC requested from BAII a list of its shareholders. BAII responded that as of July 1, 1990, 98% of the equity was owned by BNP.

IAIGC terminated the Guarantee Contract by its Letter dated February 16, 1991 addressed to BAII for the lose of BAII of the nationality condition on the Basis of Paragraph (2) of Article 17 of the Convention, Article 4, paragraphs (b) and (c) of Article 27, and Article 55 of the General Terms and Conditions of the Guarantee Contract.


BAII's demand for compensation in respect of the default on installments due on June 30 and December 30, 1991 were rejected by IAIGC by its letter dated December 24, 1991 and January 6, 1992 on the same grounds outlined in IAIGC's letter dated February 16, 1991.

BAII initiated arbitration proceedings and the matter was referred to this Tribunal as indicated above.

Section VII - Operative Part of the Award

50. As to compensation for delay in payment, BAII claims this at "a commercial rate for the US dollar", from the date of each of BAII's demands for payment addressed to IAIGC.

The Tribunal notes that, by reason of BAII's treatment of the Extension Agreement as repudiated and its claiming compensation in lieu of performance, rather than performance itself, BAII considers that the consensual rate of moratory interest under Clause 1(e) of the Extension Agreement (which refers to the rates set out in the Deferment Agreement) does not apply.

That consensual rate of moratory interest would have been, under the Deferment Agreement (Paragraph 6) "LIBOR plus 0.25% per annum referred to in Paragraph 3 above. LIBOR shall be fixed for such periods as determined by BAII." Paragraph 3 of the Deferment Agreement states the rate of interest applicable to the loan covered thereby to be LIBOR plus 0.25% for each Interest Period. But this reference to Interest Periods cannot apply to Paragraph 6, which provides that, in respect of payments which are in delay, the periods in respect of which LIBOR shall be fixed shall be determined by BAII. The reference to Paragraph 3 is evidently intended as a reiteration of the rate of LIBOR plus
0.25%, without being linked to Interest Periods as to the period for which rates are to be quoted. Paragraph 7 designates the Reference Banks provided for by the original Loan Agreement as those to be referred to in determining LIBOR. They are: the London Branch of Gulf International Bank, UBAF Limited, and National Westminster Bank PLC, International Banking Division; but (according to Paragraph 7 of the Deferment Agreement) if any of these should be unable or otherwise fail to notify a rate to BAII, LIBOR shall be determined on the basis of the rates notified by the remaining Reference Bank or Reference Banks, as the case may be.

Paragraph 6 of the Deferment Agreement, which relates to moratory interest, gave BAII the liberty to set the periods for which LIBOR should be fixed for that purpose. It is therefore clear that BAII in these proceedings is claiming compensation at a rate inevitably lower than that which it could have claimed had it considered the Extension Agreement to be still in effect and demanded performance thereof. Whether it could have elected for the latter course is not an issue in this arbitration. The fact is that it has not done so and that the basis for compensation for delay in payment put forward by BAII is lower than the consensual rate of moratory interest contained in the Extension Agreement. The Tribunal has no choice therefore but to treat that part of the Extension Agreement as inapplicable to BAII's claim. The Tribunal must proceed on the basis that the

provisions of the contract between the Parties that were to have governed compensation for delays in payment are exhausted. The contract, being treated as repudiated or terminated, even though wrongfully terminated, is no longer applicable as to remedies for delayed performance or non-performance. So the Tribunal must turn to other sources in order to ascertain how such compensation is to be determined.

In this connection, the Tribunal finds and holds that there is no common legal principle prevailing in the member countries of the Corporation which governs the application, or the rate, of moratory interest in regard to delayed payments. There is however such a common legal principle which can equally govern the case, namely the compensatory principle: a party may claim the *damnum emergens* (*ma lahaqahu min darar*) and the *lucrum cessans* (*ma fatahu min ribh*) suffered by it as a direct result of a breach of contract, provided (in the absence of wilful default (*ghish*) or grave fault (*khata' gasim*)) such result was reasonably foreseeable by the parties when they entered into the contract. In the present case, there is no question but that the loss by BAII and the Funding Entities of working funds in the amounts stated in paragraph 47 of this Award, from the date when these amounts became due for payment, and the loss, consequently, of their income earning or debt discharging power, is a direct and foreseeable result of the failure, in breach of contract, to pay such amounts. The issues of wilful
default or grave fault do not therefore arise and no such allegations have been made.

The Tribunal considers that the LIBOR rate for US dollar interbank deposits with prime banks is a reasonable measure of the loss of earnings or cost of money arising from non-receipt of US dollar by a bank and the overnight rate from the respective due dates, averaged over the applicable over the applicable period, is appropriate to a debt payable on the due date and each and every day thereafter until settlement.

In accordance with the compensatory principle referred to above, the loss from delay in payment must be calculated from the due date for each of the respective payments until the date of award. According to Clause 1(e) of the Extension Agreement, in the case of claims subsequent to the fast claim, IAIGC shall make payment within two months of the date of the notification by BAII to IAIGC of the occurrence of the event of default. The notification of the events of default were made by the three calls of BAII (referred to in paragraph 41 above).

The Tribunal considers that the loss to BAII due to delay in payment is to be calculated using the average overnight LIBOR deposit rate for US dollars up to the date of this Award:
In respect of the call of January 3, 1991, on the net amount of US $ 3,106,793.44 from March 4, 1991 (the third of March having fallen on a Sunday),


In respect of the call of January 2, 1992, on the net amount of US $ 2,820,126.02 from March 2, 1992.

The average overnight LIBOR deposit rate for US dollars for the relevant period shall be documented by certificates from the Reference Banks referred to above and if any of them shall be unable to or otherwise fail to furnish such a certificate such inability or failure shall also be documented and in that event the applicable rate shall be determined on the basis of the certificates provided by the remaining Reference Bank or Reference Banks.

[...]

**Referring Principles:**

- VII.6 - Duty to pay interest