Division of Opinion on Compound Interest

The question of the right of an arbitrator to award compound interest in an award has not been free from controversy. Lately, and before legislative amendments have come into force, this issue was again before the Court of Appeal in *A-G v Shimizu Corp* [1997] HKLRD 297. This month J.A. McInnis looks at the background to the continuing division of opinion on the subject.

The *Shimizu* case raised squarely the issue of a local arbitrator's power to award compound interest and pointed out some important differences in the wording of not only the Hong Kong, English and Australian legislation; in particular, but also that of New Zealand and Singapore as well. On the facts, very briefly, the arbitrator awarded compound interest on sums he found then due to Shimizu on a claim advanced against the Hong Kong Government. The A-G appealed against the award on the basis of these differences in wording. The arbitrator's justification for the award followed from his reading of ss 22 and 22A of the local Arbitration Ordinance versus s 19A of the 1950 UK Arbitration Act. The arbitrator concluded that in Hong Kong, without any qualification of the term 'interest' in the legislation, such as the use of the word 'simple', he could construe the term as comprehending both compound as well as simple interest. This holding by the arbitrator was first taken on appeal before Justice Seagroatt: *A-G v Shimizu Corp* (formerly known as Shimizu Construction Co Ltd) (No 2) [1996] 3 HKC 175.

The High Court

Justice Seagroatt followed the arbitrators reasoning and also traced the development of interest awards historically. The Judge's review underscored two things in particular: first, a traditional aversion to condoning the award of interest on a moral basis, e.g. it was usurious; and second, statutory wording which limited the award of interest to simple interest alone. However, in the case of Hong Kong, under s 48(3) of the Supreme Court Ordinance, 'interest simpliciter', in distinction to 'simple interest', is used and this suggested, in Justice Seagroatts' view, that awarding compound interest was permissible. Turning to s 22A of the Arbitration Ordinance, it was noted that the term interest was again unqualified. In addition, the power of the arbitrator to award interest, under s 22A(2) was stated to be 'without prejudice to any power of an arbitrator to award interest' at p 182. Justice Seagroatt drew out many of the arguments in the leading earlier cases on the award of interest; in particular the ways in which the courts have sought to meet the needs of the parties. Notwithstanding some awards of compound interest in a few cases in the courts in England most judges have been reluctant to formulate a general rule which would meet the needs of all of the cases when compound interest could be said to be due. The courts reluctance has been confirmed recently with the reporting of *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 2 WLR 802 in the House of Lords. However, while that reluctance was evident in the majority reasons in that case, Justice Seagroatt preferred instead to follow two dissenting law Lords, Goff and Woolf LJJ. In *Westdeutsche* it was Lord Goff's view that the court's equitable jurisdiction could be expanded to include personal claims in restitution both at common law and in equity to prevent unjust enrichment and thereby justify an award of compound interest. Lord Woolf framed his reasons rather in terms of recovery under *Hadley v Baxendale* (1854) 9 Ex LJ 341 a leading case on damages. Influenced by the powerful reasoning of both Lords Goff and

Woolf, and unencumbered by any express limitations on the award of interest by arbitrators under the local legislation (and again in contrast to many other jurisdictions) Justice Seagroatt upheld the award. Upholding the award was also reinforced on policy grounds; that is, amendments to the Arbitration Ordinance in 1984 were intended to update the law of arbitration and many institutional rules themselves expressly anticipate the award of interest at commercial or compound rates.

The Court of Appeal

While the reasoning of Justice Seagroatt in the High Court was clear and compelling, it was still overturned on appeal; albeit not unanimously. In the majority opinion Justices Liu and Mayo reviewed the arguments from the leading cases but relied upon one case under the Crown Lands Resumption Ordinance: *Shun Fung Ironworks Ltd v Director of Buildings & Lands* [1994] 1 HKC 25 (CA). In effect the argument in the *Shun Fung* case was that notwithstanding the economic arguments in favour of awarding compound interest it was the wording of the statute as well as settled practice which had to dictate the result. For the majority in the Court of Appeal allowing an award of compound interest was simply too great a policy change to occur without a statutory change. The majority was not prepared to read an intention to change the law as a result on only the omission of the word 'simple' from s 22A(2). This, as noted though, was just the majority view and Justice Godfrey wrote a minority opinion agreeing with the reasoning of both Justice Seagroatt and the arbitrator. Justice Godfrey read the unqualified power to award interest as entitling the arbitrator to award either simple or compound interest as he saw fit.

Conclusion

The *Shimizu* case will be one of the last on the controversial issue of compound interest in arbitration proceedings. Both locally and in the United Kingdom recent amendments to the legislation are finally giving the arbitrator a clear and unequivocal power to award compound interest. Locally section 2GH provides in part: "(1) An arbitral tribunal may, in arbitration proceedings before it, award simple or compound interest from such dates, at such rates, and with such rests as the arbitral considers appropriate". This plain wording, even more so than under the UK legislation, should overcome past uncertainty on this question. As a result, the interest in the *Shimizu* case will in future be less for what it has had to say about the award of compound interest itself than perhaps what it has said about individual judges' views on the powers of arbitrators in general. It is also currently being appealed.

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