SARHANK GROUP, Petitioner, -against- ORACLE CORPORATION, Respondent.

01 Civ. 1285 (DAB)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2004 U.S. Dist. LEXIS 2493

February 10, 2004, Decided
February 19, 2004, Filed

PRIOR HISTORY: Sarhank Group v. Oracle Corp., 2002 U.S. Dist. LEXIS 19229 (S.D.N.Y., Oct. 8, 2002)

DISPOSITION: [*1] Petitioner's motion to amend judgment filed pursuant to Fed. R. Civ. P. 59(e) granted in part.

CORE TERMS: pre-judgment, arbitral, post-award, interest rate, arbitration award, post-judgment, compensate, calculated, reply, statutory rate, confirmation, arbitration, wronged, amend, motion to amend, considerations of fairness, judgment confirming, rate of interest, remedial purpose, enter judgment, set forth, overcompensate, calculating, arbitrators, confirming, persuasive, equitable, deprived, confirm, inform

COUNSEL: FOR PETITIONER: BARRY R. FISCHER, DEBORAH R. SROUR, AUDREY DURSHT, SROUR FISCHER & MANDELL LLP, New York, NY.

FOR RESPONDENT: ROBIN L. COHEN, JAMES MIRRO, DICKSTEIN, SHAPIRO, MORIN & OSHINSKY, New York, New York.

JUDGES: DEBORAH A. BATTS, United States District Judge.

OPINIONBY: DEBORAH A. BATTS

OPINION:

MEMORANDUM ORDER

DEBORAH A. BATTS, United States District Judge.

Petitioner moves this Court to amend the judgment in this case, dated October 8, 2002. Fed. R. Civ. P. 59(e). For the reasons set forth herein, Petitioner's motion is GRANTED in part.

I. BACKGROUND

On March 11, 1999, the Cairo Regional Centre for International Commercial Arbitration rendered a monetary award (the "Award") to Petitioner Sarhank Group ("Sarhank") jointly and severally against both Oracle Corporation ("Oracle") and its subsidiary Oracle Systems, Ltd. ("Oracle Systems"). Petitioner brought an action in this Court to confirm and enforce the award pursuant to the Convention on the Recognition [*2] and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "Convention"), codified at 9 U.S.C. § § 201-08. On October 8, 2002 this Court granted Petitioner's Motion for Confirmation of the Arbitration Award, denied Respondent's Petition to Vacate, and directed the Clerk of the Court to enter judgment accordingly. Sarhank Group v. Oracle Corporation, 2002 U.S. Dist. LEXIS 19229, 2002 WL 31268635 (S.D.N.Y. 2002).

On October 23, 2002, in a letter addressed to the Court, ("Pet. Letter"), Petitioner requested an Amended Judgment that would "clearly spell out the amount awarded in confirmation of the arbitration award," requesting both the full amount of the award and pre-judgment interest computed from the date of the arbitration award, at a rate of 9%, pursuant to CPLR § 5001, et seq. By letter of November 1, 2002, ("Def. Resp."), Respondent requested that the Court decline to amend the judgment. Respondent also argued that, if the Court granted Petitioner's motion, the Court should apply the federal statutory post-judgment interest rate, 28 U.S.C. § 1961, or the rate of interest applicable under Egyptian law, in calculating pre-judgment interest [*3] on the award. Id. Petitioner submitted a reply letter, ("Pet. Reply"), on November 6, 2002.

For the reasons set forth below, the Court GRANTS Petitioner's motion to amend judgment in part.

II. DISCUSSION

As a preliminary matter, on October 18, 2002, Respondent notified the Court by letter that it had filed a Notice of Appeal of the Court's October 8, 2002 judgment, "out of an abundance of caution," since Petitioner's request for amendment of judgment was not a formal Rule 59(e) motion, and if the Court did not treat the request as a Rule 59(e) motion Respondent's time to appeal might expire.

Although Petitioner did not move formally for amendment of judgment, it was served within ten days of this Court's October 8, 2002 judgment, and placed the correctness of the judgment in question. See Osterneck v. Ernst & Whinney, 489 U.S. 169, 176, 103 L. Ed. 2d 146, 109 S. Ct. 987 (1989) (motion for pre-judgment interest filed after entry of judgment "involves the kind of reconsideration of matters encompassed within the merits of a judgment to which Rule 59(e) was intended to apply."). Accordingly, Petitioner Sarhank's letter request for pre-judgment interest is construed as a motion [*4] pursuant to Fed.R.Civ.P. 59(e) to amend judgment. See Rados v. Celotex Corp., 809 F.2d 170, 171 (2d Cir. 1987) (post-judgment argument of whether dismissal of a summary judgment motion was too severe construed as a Rule 59(e) motion to amend).

A. Whether Pre-judgment Interest is Appropriate.

The Convention is silent on the issue of post-award, pre-judgment interest. In accord with the Supreme Court's approach on this issue, the Second Circuit has held that a discretionary award of pre-judgment interest is appropriate, notwithstanding a statute's silence on the subject of interest, when such an award is "fair, equitable and necessary to compensate the wronged party fully." Wickham Contracting Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, 955 F.2d 831, 835 (2d Cir. 1992) (upholding pre-judgment interest on an arbitration award under the Labor Management Relations Act, which was silent on the subject of pre-judgment interest), cert denied, 506 U.S. 946, 113 S. Ct. 394, 121 L. Ed. 2d 302 (1992).

Under Wickham, a district court is guided in its determination of whether to award pre-judgment interest [*5] by consideration of: "(i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court." Id. at 833-834. Of further guidance here, prior to deciding Wickham the Second Circuit recognized a presumption in favor of pre-judgment interest on a judgment confirming an arbitral award under the Convention. Waterside Ocean Navigation Co. Inc. v. International Nav. Ltd., 737 F.2d 150, 154 (2d Cir. 1984) ("it is almost unnecessary to reiterate that only if such interest is awarded will a person wrongfully deprived of his money be made whole for the loss"); see also P.M.I. Trading Ltd. v. Farstad Oil, Inc., 2001 U.S. Dist. LEXIS 227, 2001 WL 38282, at *3 (S.D.N.Y. 2001) ("Absent persuasive argument to the contrary, post-award, pre-judgment interest is available for judgments rendered under the Convention, and is presumed to be appropriate").

In view of the factors set forth in Wickham and the presumption in Waterside, an award of pre-judgment [*6] interest is appropriate here. Underlying the adoption of the Convention is a strong federal policy favoring arbitration as a means to resolve expeditiously disputes by avoiding time-consuming and costly litigation. Scherk v. Alberto-Culver Co., 417 U.S. 506, 511, 41 L. Ed. 2d 270, 94 S. Ct. 2449, citing H.R. Rep. No. 68-96, at 1, 2 (1924) and S. Rep. No. 68-536, (1924) (adoption of 9 U.S.C. 1, et seq. represents legislative approval of arbitration as an alternative to litigation). The Convention was adopted to further that policy by "promoting the enforcement of arbitral agreements in contracts involving international commerce so as to facilitate international business transactions." Smith/Enron Cogeneration Ltd. Pshp., Inc. v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 92 (2d Cir. 1999), quoting David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 250 (2d Cir.), cert. dismissed, 501 U.S. 1267 (1991).

The purpose of the Convention would be impeded were Respondent able to receive an interest-free loan by delaying payment of the award, particularly by engaging in protracted litigation. Respondent [*7] unsuccessfully appealed the arbitral decision to the Cairo Court of Appeals and is currently appealing that decision before the Egyptian Court of Cassation. Sarhank Group v. Oracle Corp., 2002 U.S. Dist. LEXIS 19229, 2002 WL 31268635, *2 (S.D.N.Y. 2002). Before this Court, Respondent opposed Petitioner's Motion for Confirmation of the arbitral award, id. 2002 U.S. Dist. LEXIS 19229, [WL] *1-*2; it is apparent from Respondent's Notice of Appeal that Respondent intends to challenge this Court's judgment. (Resp. Opp. at 1). Respondent's attempts to circumvent the arbitral decision have resulted in the delay and costly litigation that adoption of the Convention sought to prevent. Denying pre-judgment interest in this case would allow Respondent to be better off for the delay and would frustrate the goals of the Convention.

Petitioner has been deprived of the use of the money awarded by the Arbitral Tribunal for more than three years between the date of the award and the Order entered by this Court. During that time, the economic value of the Tribunal's award of US $ 1,902,573, Sarhank, 2002 U.S. Dist. LEXIS 19229, 2002 WL 31268635 at *2, has eroded due to inflation. Petitioner will not be made whole nor fully compensated unless post-award, [*8] pre-judgment interest is awarded to offset its loss in value over time. In view of the foregoing, an award of pre-judgment interest is "fair, equitable and necessary to compensate the wronged party fully." Wickham Contracting Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, 955 F.2d 831, 835 (2d Cir. 1992).

Relying on Waterside, 737 F.2d at 154, Respondent suggests that in deciding whether Petitioner is entitled to pre-judgment interest, the Court must "give great weight" to whether an Egyptian court could have, and did, award pre-judgment interest. (Resp. Opp. at 2). However, Waterside does not require this Court to inquire into the availability of pre-judgment interest under Egyptian law, nor to require this Court to attempt to divine the wishes of the arbitrators as to post-award, pre-judgment interest. In Waterside, the Second Circuit acknowledged a presumption in favor of pre-judgment interest on awards enforced under the Convention, and specifically noted that the respondent in the case had not presented any reasons that would overcome the presumption. Waterside, 737 F.2d at 154. Noting that the Convention's purpose of reducing [*9] duplicative litigation would be seriously eroded if a party were forced to confirm its arbitral award in England, and then to enforce the British judgment in the United States, the Waterside court found the facts before it "particularly compelling," since pre-judgment interest would have been available to the petitioner under the law of England, the arbitral forum, and since an English court had in fact included post-award interest as part of its judgment confirming an interim arbitral award. Id. At most, this portion of Waterside sets forth a standard for a "particularly compelling" case for pre-judgment interest. But clearly such facts were not necessary to the Waterside court's ruling in favor of pre-judgment interest, since the court specifically stated that the respondent in the case had not provided "any reasons, let alone persuasive reasons, that would overcome [the court's] presumption in favor of pre-judgment interest." Id.

Moreover, regardless of whether an Egyptian court would have awarded pre-judgment interest, this Court is authorized to enforce the arbitration award pursuant to 9 U.S.C. § 207, the federal statutory enactment [*10] of the Convention. As Waterside made clear, the Convention applies only to "enforcement of a foreign arbitral award and not to the enforcement of foreign judgments confirming foreign arbitral awards." Waterside, 737 F.2d at 154, quoting Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313, 1319 (2d Cir. 1974); see also Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709 (2d Cir. 1987) (recognition of foreign judgments is governed by principles of comity, while the Convention governs the enforcement of foreign arbitration awards). Thus, whether or not an Egyptian court would award pre-judgment interest has little bearing on this Court's determination of whether pre-judgment interest is appropriate. Finally, after Waterside, the Second Circuit issued Wickham, which sets forth more specific factors, on the basis of which this Court finds pre-judgment interest to be appropriate in this case.

Respondent also misreads Kruse v. Sands Brothers & Co., 226 F. Supp.2d 484 (S.D.N.Y. 2002). Kruse does not, as Respondent implies, require interest to be awarded "in accordance with the rules [*11] of 'the state where the award was rendered.'" (Resp. Opp. at 2, quoting Kruse, 226 F. Supp.2d at 488). While the court in Kruse adopted the legal rate of interest of "the state where the award was rendered," it did so because this approach accorded with the approach of the Arbitration Manual of the National Association of Securities Dealers ("NASD"), the same Manual that governed the disputed arbitration proceedings. Kruse, 226 F. Supp. 2d at 488-489. Here, of course, the NASD's Manual is completely irrelevant.

Accordingly, petitioners motion for amendment of judgment to include post-award, pre-judgment interest in this case is GRANTED.

B. The Date from which Interest Accrues.

The arbitration award in this case does not specify a date or event on which payment was to have been made; accordingly, the interest should be calculated from the date of the award. PMI Trading Ltd., 2001 U.S. Dist. LEXIS 227, 2001 WL 38282, *3, (S.D.N.Y. 2001) (awarding pre-judgment interest running from the date on which the arbitrators intended payment of the award); Sae Sadelmi S.p.A. v. Papua New Guinea Elec. Comm'n, 1994 U.S. Dist. LEXIS 16978, 1994 WL 669543, *2 (S.D.N.Y. 1994) [*12] (both New York and federal law follow the rule that interest runs from the date of the arbitral award).

Respondent's assertion that under Egyptian law interest should "run from the date of the claim in court," (Resp. Opp. at 2), misses the point since, as noted above, Egyptian law does not control this Court's award of pre-judgment interest. Accordingly, the post-award, pre-judgment interest to which Petitioner is entitled shall be calculated from March 11, 1999, the date the arbitration award was rendered by the Arbitral Tribunal under the auspices of the Cairo Regional Centre for International Commercial Arbitration.

C. The Applicable Rate of Interest.

District courts have federal question jurisdiction over actions under the Convention, 9 U.S.C. § 203, and accordingly, the rate of post-award, pre-judgment interest assessed is a matter of federal law. Waterside at 153-154; P.M.I. Trading Ltd., 2001 U.S. Dist. LEXIS 227, 2001 WL 38282, at *3, (S.D.N.Y. 2001), citing Industrial Risk v. M.A.N. Gutehoffnungshutte, 141 F.3d 1434, 1447 (11th Cir. 1998). While the federal post-judgment interest rate is determined by 28 U.S.C. § 1961, [*13] "there is no federal statute that purports to control the rate of pre-judgment interest." Jones v. UNUM Life Ins. Co. of America, 223 F.3d 130, 139 (2d Cir. 2000). Rather, "the rate of pre-judgment interest is within the broad discretion of the district court." New York Marine & Gen. Ins. Co. v. Tradeline (L.L.C.), 266 F.3d 112, 131 (2d Cir. 2001) (quoting Mentor Ins. Co., Ltd. v. Brannkasse, 996 F.2d 506, 520 (2d Cir. 1993)).

In exercising its discretion, the Court must arrive at a pre-judgment interest rate that will fully compensate Petitioner

for the diminution in value over time of its award. See P.M.I. Trading, 2001 U.S. Dist. LEXIS 227, 2001 WL 38282, at *3; McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund, 2001 U.S. Dist. LEXIS 15534, 2001 WL 1154630 *12 (S.D.N.Y 2001), quoting Webb v. Gaf Corp., 949 F. Supp. 102, 105 (S.D.N.Y. 1996) ("the purpose of pre-judgment interest is to fully compensate the plaintiff by taking into account the time value money."). At the same time, the interest rate must not overcompensate the Petitioner. Wickham 955 F.2d at 834 (where a [*14] statute provides that damages awarded are fully compensatory or punitive in nature, pre-judgment interest is inappropriate).

Of further guidance, the Second Circuit has explained that "the same considerations that inform the court's decision whether or not to award interest at all should inform the court's choice of interest rate." Jones, 223 F.3d at 139 (partially vacating a judgment and remanding for findings to support a rate of pre-judgment interest). As noted, under Wickham, determination of whether pre-judgment interest is appropriate proceeds from consideration of the need to compensate fully the Petitioner, considerations of fairness and the relative equities, and the remedial purpose of the Convention. Wickham 955 F.2d at 833-834. Based on these factors, and mindful that the award of interest should not overcompensate Petitioner, the appropriate rate of pre-judgment interest here is the federal post-judgment rate, set forth at 28 U.S.C. § 1961. P.M.I. Trading Ltd. v. Farstad Oil, Inc., 2001 U.S. Dist. LEXIS 227, 2001 WL 38282 (2001 S.D.N.Y.) ("As for the rate of interest, the federal rate, 28 U.S.C. § 1961, is appropriate [*15] for calculating post-award, pre-judgment interest in cases arising under the Convention.") The federal rate reflects the economic conditions at the time this Court's judgment was rendered. It preserves the value of the award as originally decided, affording neither party a benefit, and is consistent with the Convention's goals of fostering stability and certainty in international commercial transactions. Moreover, it provides "make whole" relief without overcompensating Petitioner.

Petitioner argues it is entitled to $ 613,579.79 in post-award, pre-judgment interest, basing its calculation on the statutory rate of 9% provided for under New York CPLR § 5001, et seq. (Pet. Lett. at 1; n1 Pet. Reply at 2). However, Petitioner presents little evidence that this rate accords with providing fair compensation for its delayed receipt of the arbitral award.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 Petitioner's letter of October 15, 2002 appears to contain a typographical error. The letter indicates that if calculated at 9%, total interest due on the award of $ 1,902,573.00 would be $ 631,579.79.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - [*16]

Citing Retail, Wholesale & Chain Store Food Emples. Union, Local 338 v. Red Apple Supermarkets, 1999 U.S. Dist. LEXIS 11252, 1999 WL 551253 (E.D.N.Y. 1999), Petitioner also argues Respondent's resort to legal action in order to avoid or delay payment of the award should be a "very significant factor" in fixing an appropriate pre-judgment interest rate. (Pet. Reply at 2.) The court in Red Apple cited the defendant's repeated avoidance of an arbitral award as reinforcement for granting pre-judgment interest, but did not rely on that fact in adopting a pre-judgment interest rate. Indeed, the Red Apple court adopted the federal post-judgment interest rate that was current at the date of the award, rather than the higher New York state that was rate requested by the plaintiffs. Id. 1999 U.S. Dist. LEXIS 11252, [WL] at *5. Thus, Red Apple is of little assistance to Petitioner's argument.

Respondent maintains that this Court should apply the Egyptian statutory rate of five percent, and argues that pre-judgment interest calculated at a higher rate affords Petitioner a windfall. (Resp. Opp. at 2-3). However, Respondent has provided nothing to suggest that application of the Egyptian statutory rate would allow Petitioner [*17] to recoup losses it has incurred since the award was rendered.

Accordingly, pre-judgment interest on the arbitral award shall be assessed using the federal post-judgment rate for the week prior to October 8, 2002, set forth at 28 U.S.C. § 1961, to accrue from March 11, 1999 to October 8, 2002. n2

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 October 8, 2002 was the date of entry of this Court's original judgment confirming the award.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

III. CONCLUSION

For the foregoing reasons Petitioner's motion to amend judgment is GRANTED, and it is ORDERED that the Clerk of the Court shall calculate pre-judgment interest on the arbitral award of $ 1,902,573, commencing on March 11, 1999 and running through October 8, 2002; it is further ORDERED that such interest shall accrue at a rate equal to the federal post-judgment interest rate applicable for the calendar week before October 8, 2002; and it is further ORDERED that the Clerk of the Court SHALL include in the judgment to be entered in this case the sum of the arbitral award of $ 1,902,573, [*18]

plus interest calculated as herein ordered.

The Clerk of the Court SHALL enter judgment accordingly.

SO ORDERED.

Dated: February 10, 2004

DEBORAH A. BATTS

United States District Judge