

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM 2021/0192

BETWEEN:

[1] AB LIMITED
[2] CD LIMITED
[3] EF LIMITED

Claimants/Respondents

and

GH LIMITED

Defendant/Applicant

Appearances:

Mr. Stephen Moverley Smith, KC, with him Mr. Merrick Ricardo Watson and Mr. Timothy de Swardt for the Applicant

Mr. Alain Choo-Choy, KC, with him Ms. Tameka Davis for the Respondents

2022: July 6, 7, 27

2023: January 27, February 27, March 13.

JUDGMENT

[1] **WALLBANK, J. (Ag.):** On 27th January 2023 this Court pronounced judgment in relation to part of an application to set aside an order enforcing in this jurisdiction (the 'BVI') three arbitration awards made in Singapore (the 'Set Aside Application'). That judgment concerned what the parties referred to as the Compound Interest Issue. After hearing the parties further on 27th February 2023 on consequential matters, and other issues which had been left over for determination, the Court now renders judgment on those aspects.

[2] To enable the present judgment to be read on its own, it is expedient to repeat the essential background.

1. Introduction

- [3] By a notice of application dated 1st November 2021 (**‘the Enforcement Application’**) the Claimants sought to enforce the following three arbitration awards against the Defendant (**‘GHL’**) and its co-respondent in the arbitration proceedings, JKL, Ltd. (**‘JKL’**):
- (1) A first partial final award dated 22nd September 2017 in arbitration proceedings in Singapore (ICC Case No. [1]) (**‘the GHL Arbitration’**) in favour of the First Claimant (**‘ABL’**) in the sum of US\$85.75 million plus interest (**‘the GHL Award’**);
 - (2) A first partial final award dated 22nd September 2017 in parallel arbitration proceedings in Singapore (ICC Case No. [2]) (**‘the JKL Arbitration’**) in favour of the Second Claimant (**‘CDL’**) and the Third Claimant (**‘EFL’**) in relation to interest (**‘the JKL Award’**);
 - (3) A final award dated 3rd May 2021 in arbitration proceedings in Singapore (ICC Case No. [3]) in which JKL and GHL were ordered to pay the Claimants’ legal costs (**‘LMN Award’**).
- [4] The GHL Award and JKL Award will also be referred to below together as the ‘Phase 1 Awards’.
- [5] The Enforcement Application came on for hearing on 29th November 2021 *ex parte*, without notice to GHL. JKL is not a party to these proceedings. The Court declared each of the Awards to be enforceable as if it were a judgment or order of the Court and granted the Claimants permission to enforce the Awards as to the amounts remaining unpaid under them (**‘the Order’**). The Order identified those amounts as being:
- (1) In relation to the GHL Award, US\$79,789,715 together with interest;
 - (2) In relation to the JKL Award, US\$3,514,355 together with interest;
 - (3) In relation to the LMN Award US\$210,581 together with interest.
- [6] By the Set Aside Application, which was dated 20th January 2022, GHL applied to set aside the Order under rule 11.16, Civil Procedure Rules 2000 (**‘CPR’**). It is that Application which is before the Court.
- [7] In summary, the Court was being asked to consider:

- (1) Whether it offends public policy to enforce an arbitration award in relation to compound interest when all present parties accept it was made in error, being contrary to the law governing the underlying contract which prohibits compound interest, where the error was not identified until after the statutory time limit for appealing the award had expired and where the error made by the arbitration tribunal was contributed to by the very party seeking to enforce award (**'the Compound Interest Issue'**);
- (2) If the answer to (1) is yes, what order (if any) the Court should make (**'the Consequentials Issue'**);
- (3) Whether a payment made by GHL is to be treated as appropriated to principal or interest (**'the Allocation Issue'**);
- (4) Whether any sum remains due under the JKL Award (**'the JKL Issue'**).

[8] It is the Consequentials Issue, the Allocation Issue and the JKL Issue which are the subject of the present judgment.

2. Background

[9] The Claimants, ABL, CDL and EFL, are companies incorporated in Hong Kong. The Defendant, GHL, is a company incorporated in the Territory of the Virgin Islands ('BVI'). JKL is another company that features prominently. JKL is a company incorporated in Thailand.

[10] By two share purchase agreements dated 19th June 2015 (and amended and restated on 3rd July 2015) (**'the SPAs'**) GHL purchased from ABL, and JKL purchased from CDL and EFL, shares amounting to 48.94% of the share capital of a Thai company, that I will call E-Corp, Ltd, which operated a windfarm project in Thailand. GHL and JKL entered into deeds of guarantee to guarantee the obligations of each other under their respective SPAs.

[11] The SPAs are *mutatis mutandis* in almost identical terms. Each is governed by Thai law (by clause 12.15.1) and provides for disputes to be settled by means of ICC arbitration in Singapore (by clause 12.14). Clause 3.1 provides for initial payments of US\$85.75 million (in the case of the purchase price to be paid by GHL) (**‘the GHL First Instalment’**) and US\$89.25 million (in the case of the purchase price to be paid by JKL) (**‘the JKL First Instalment’**) by the earlier of (a) the Financial Close (as defined) and (b) 60 days after the Closing Date (as defined). Clause 12.9, which deals with interest, is in the following terms:

“If the Seller or Purchaser defaults in payment when due of any sum payable under this Agreement its liability shall be increased to include interest on such sum from the date when such payment is due until the date of actual payment (after as well as before judgment) at a rate per annum of 15 per cent. Such interest shall accrue from day to day and shall be **compounded monthly**”. [Emphasis added.]

[12] Disputes arose between the parties, as sellers and purchasers, over payment of sums allegedly due and un- (or under-) paid pursuant to the SPAs.

[13] The Claimants duly commenced the GHL and JKL Arbitrations, under the auspices of the International Chamber of Commerce. The Tribunal in each ultimately comprised three arbitrators.

[14] In the GHL Arbitration, ABL as seller sought rescission of the GHL SPA, alternatively payment of the First Instalment, and interest, pursuant to Clause 12.9. GHL and JKL made a series of counterclaims against ABL. The arbitration tribunal (**‘the Tribunal’**) decided to bifurcate the proceedings into two phases, with certain issues, including the determination of the counterclaims, being left to the second phase.

[15] In the dispositive section of the GHL Award, the Tribunal dismissed ABL’s claim for rescission but granted its alternative claim for payment of the GHL First Instalment.

[16] As for interest, the question of whether interest at 15% compounded monthly could in fact be awarded under Thai law had been raised in passing by the Tribunal without prior warning during an ‘expert witness conferencing session’ (colloquially known as a ‘hot-tubbing session’) on 10th February 2017 conducted in Geneva, Switzerland, in English, with each side’s Thai law experts. This session pertained to both the GHL and JKL Arbitrations, as the proceedings were being heard together. Neither party had raised the possibility that an award of compound interest might be illegal under Thai law. It was the Tribunal itself that queried the award of interest. It should be

observed that JKL, a Thai company, from which compound interest was being claimed, did not oppose the claim for compound interest, nor did it take a point as to its legality.

[17] In the GHL and JKL Awards, dated 22nd September 2017, the Tribunal subsequently referred to the Thai law experts' instant answers given in the expert witness conferencing session and the Tribunal concluded that interest could be awarded at 15%, with compound interest accruing annually as from December 2016.¹ We will look more closely at this provision shortly.

[18] In the GHL Award, the Tribunal stated (materially for present purposes) as follows:²

“287. In light of all of the above, the Arbitral Tribunal considers that there was an agreement of the Parties on the interest to apply to the First Instalment from 23 October 2015.

288. As for the interest *rate*, Article 12.9 of the GHL SPA provides as follows:

*“If the Seller or the Purchaser defaults in the payment when due or any sum payable under this Agreement, its liability shall be increased to include interest on such sum from the date when such payment is due until the date of actual payment (after as well as before judgment) at a rate per annum of 15 percent. Such interest shall accrue from day to day and shall be compounded monthly.”*¹⁹⁵ (emphasis added)

289. Respondents do not deny that this rate applies in principle and agree that the rate of 15% is acceptable under Thai law as the maximum allowed rate for loans.¹⁹⁶ Further, the Parties' Thai law experts agree that the interest can only be compounded on a yearly basis and not monthly.¹⁹⁷

Footnote 197: See Transcript of 10 February 2017, pp.981:7 – 982:19.

290. **Accordingly, the Tribunal finds that the 15% per annum interest rate is applicable to the First Instalment under the GHL Agreement from 23 October 2015. Such interest must be compounded on a yearly basis as from 30 December 2016,** however, as Respondents have been considered to be in default of its payment obligation from 30 December 2015. From 23 October 2015 until 30 December 2015, the applicable interest rate was a matter of separate agreement and not a contractual default in payment.” (Italics and underlining emphasis and italicization as per the original, bold emphasis added.)

[19] In the JKL Arbitration, the Tribunal stated as follows:³

“This leaves the issues related to the calculation of such interest – 1) whether the interest of 15% is acceptable as a matter of Thai law; 2) whether the interest is to be compounded on a monthly basis; and 3) whether the payment portions had to be applied to the outstanding interest first, or to the principal.

¹ At Bundle 2 pages 203 to 204.

² At Bundle 2, page 296.

³ At Bundle 2 pages 203 to 204.

209. The Arbitral Tribunal notes that Article 12.9 of the JKL SPA provides as follows:

*“If the Sellers or the Purchaser default in the payment when due or any sum payable under this Agreement, its liability shall be increased to include interest on such sum from the date when such payment is due until the date of actual payment (after as well as before judgment) at a rate per annum of 15 percent. Such interest shall accrue from day to day and shall be compounded monthly.”*¹⁵⁷

210. Respondents do not deny that this rate applies in principle and agree that the rate of 15% is acceptable under Thai law as the maximum allowed rate for loans.¹⁵⁸ Further, the Parties’ Thai law experts agree that the interest can only be compounded after the first year of arrears, and can only be compounded on a yearly basis and not monthly.¹⁵⁹

Footnote 159: See Transcript of 10 February 2017, pp.981:7 – 982:19.

211. Accordingly, the Tribunal finds that the 15% per annum rate is applicable to the First Instalment under the JKL Agreement. It also decides that such interest must be compounded as from 25 September 2016, on a yearly basis. This means that the 15% interest as calculated by Claimants and its experts, Accuracy, must be updated, since Accuracy used the compounded rate on a monthly basis starting with 25 September 2015 as opposed to 2016. Moreover, this may also result in an overpayment of interest by Respondents. In any event, as a result of the findings above, Claimants are not entitled to the payment of the shortfalls, **but are entitled to the payment of the interest.**” (Italics and underlining emphasis and italicization as per the original, bold emphasis added.)

- [20] In these quotations from the awards, only the immediately relevant footnotes are given.
- [21] In the JKL Arbitration, CDL and EFL sought payment of what they alleged were shortfalls. As appears from the Notice of Arbitration (the relevant parts of which were set out at §146 of the JKL Award) CDL and EFL were seeking a declaration that JKL had failed to pay the JKL First Instalment in full and an order that JKL pay the ‘Shortfalls’ to each of them, together with applicable late payment interest at a rate of 15% from 25th September 2015.
- [22] CDL and EFL admitted that they had received two payments on 30th November 2015 of US\$44,727,736.58 and US\$15,272,167.78; and on 29th December 2015 a further sum of US\$30,515,375, an aggregate amount which the Tribunal noted exceeded the JKL First Instalment by US\$1,265,179). However, they claimed they could appropriate those payments first to interest, thus giving rise to the ‘Shortfalls’ in relation to the principal (on which could be charged compound interest) (per §165 of the JKL Award).

[23] JKL claimed that, because of an agreed rescheduling, late payment interest was not due before 10th November 2015.

[24] The Tribunal subsequently dismissed the claim for shortfalls in relation to principal, and rejected JKL's rescheduling claim, finding that the principal was due on 25th September 2015 and accordingly awarding CDL and EFL interest at 15%, compounded annually as from September 2016. CDL and EFL had calculated interest compounded on a monthly basis from September 2015, so the Tribunal did not have an appropriate calculation to hand. It did however note that it might be the case that, in making the payments in November and December 2015, JKL might have already overpaid interest.

[25] Following the conclusion of the first phase of the GHL and JKL Arbitrations, the Claimants applied for conservatory measures and requests as a result of concerns arising from certain share sales and the continuing non-payment of the GHL First Instalment. In a letter to the parties dated 22nd December 2017 the Tribunal rejected the Claimants' application, but commented:

“...the Arbitral Tribunal considers that Claimants' concerns regarding the non-payment of the First Instalment under the GHL SPA are at least partially justified and therefore invites the Respondents, in good faith, to provide 85.75 million USD into an escrow controlled by the Tribunal pending the resolution of the dispute. The escrow would serve as a guarantee of payment by the Respondents of the first GHL payment and at the same time payment would occur only after the decision on the alleged set-off claims in the Second Phase of this Arbitration.”

[26] On 9th January 2018 GHL and JKL confirmed that they would place US\$85.75 million in an escrow account to be controlled by the Tribunal pending the resolution of phase 2 of the Arbitrations (see §317 of the Tribunal's phase 2 award in the GHL Arbitration (**'the GHL Phase 2 Award'**)).

[27] On 31st January 2018 the Claimants' lawyers emailed the ICC to convey the parties' instructions *'to set up an escrow account for the payment of US\$85.75m by the Respondents (which funds are only to be released only after the Tribunal executes its final award on Respondent's Set-Off Claims in Phase II of the arbitrations) and communicates the payment instructions to the Respondents.'*

- [28] On 7th February 2018 the ICC established an escrow account and on 28th February 2018 GHL and JKL confirmed that they had transferred US\$85.75 million into that account (**‘the Escrow Payment’**). At the request of the Claimants’ lawyers (by an email dated 6th March 2018) the ICC confirmed receipt of that amount on 6th March 2018.
- [29] The evidentiary hearing of Phase 2 of the Arbitrations took place in August 2018 and resulted in the GHL Phase 2 Award and an award in phase 2 of the JKL Arbitration (**‘the JKL Phase 2 Award’**).
- [30] The Thai law experts filed further reports in relation to Phase 2. They each confirmed that except in the case of loan agreements (where section 655 of the Thai Civil and Commercial Code (**‘CCC’**) applies) compound interest is not permitted under Thai law (*per* Professor ES’ Fourth Report §89 and 90, dated 26th March 2018, and Mr. EP’s report dated 14th July 2018 at §§155-9).
- [31] Part of the GHL Phase 2 Award dealt *inter alia* with the Escrow Payment (per §§316-323). At §316 the Tribunal concluded that the counterclaims had no merit and that the GHL First Instalment had become due and payable. As it had set out in its letter of 22nd December 2017, the escrow was to serve as a guarantee of payment by GHL and JKL of the GHL First Instalment. It accordingly ordered the ICC to release the Escrow Payment into an account designated by ABL for prompt payment of the GHL First Instalment (per §321).
- [32] In relation to interest, notwithstanding the agreed position reached by the Thai law experts that an agreement to pay compound interest in a sale and purchase agreement was prohibited under Thai law, by an apparent oversight the Tribunal awarded the Claimants compound interest compounded annually. The Claimants themselves applied to the Tribunal to have the GHL Phase 2 Award and the JKL Phase 2 Award corrected by the substitution of simple interest for compound interest, but the Tribunal considered itself *functus officio*.
- [33] GHL and JKL subsequently applied to the Singapore High Court to set aside the Phase 2 Awards and were successful in the Court of Appeal in having part of the Phase 2 Awards, including that element in relation to compound interest, set aside. The Phase 1 Awards, i.e., the GHL Award and JKL Award, were not set aside.

[34] The first issue to be decided in respect of the Set Aside Application before this Court was the Compound Interest Issue. The Court's decision in respect of that issue was that the Enforcement Order should be set aside in so far as it related to the Tribunal's award of compound interest, on the basis that that award was illegal under Thai law, a fact that this Court could and should have regard to out of comity and in order to preserve the integrity of this Court's processes.

3. The Consequential Issue

[35] The Consequential Issue comes down to what order (if any) the Court should make as a result of its finding in relation to the Compound Interest Issue and, in particular, whether any part of the GHL Award and the JKL Award is properly enforceable by the Court.

3.1 GHL's position on Consequential Issue

[36] The Applicant, GHL, explained its position, in summary, thus:

- (1) Whilst the Claimants say⁴ that, even if the award of compound interest cannot be enforced, the Court can instead simply substitute simple interest for that award, GHL, on the other hand, says that all this Court can do is to enforce the award as it stands: it cannot amend the award. Amending the award belongs to the purview of an arbitration tribunal if it retains the jurisdiction to do so (the 'Amendment Issue'). This issue arises in relation to both the GHL and JKL Awards.
- (2) The role of a Court when faced with an application to enforce a New York Convention arbitration is limited. Its task is a mechanistic one. As Gross J commented in **Norsk Hydro A/S v State Property Fund of Ukraine**.⁵

"17. Section 100 and following of the Arbitration Act 1996 provide for the recognition and enforcement of New York Convention Awards. There is an important policy interest, reflected in this country's treaty obligations, in ensuring the effective and speedy enforcement of such international arbitration awards; the corollary, however, is that the task of the enforcing court should be as "mechanistic" as possible. Save in connection with the threshold requirements for enforcement and the exhaustive grounds on which enforcement of a New York Convention award may be refused

⁴ The Claimants do not in fact say this, but GHL characterizes the Claimants' submissions thus.

⁵ [2002] EWHC 2120 (Comm.).

(sections 102 to 103 of the 1996 Act), the **enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions**. Additionally, the enforcing court seeks to ensure that an award is carried out by making available its own domestic law sanctions. It is against this background that issue I falls to be considered.

18. Viewed in this light, as a matter of principle and instinct, **an order providing for enforcement of an award must follow the award**. No doubt, true “slips” and changes of name can be accommodated; suffice to say, that is not this case. Here it is sought to enforce an award made against a single party, against two separate and distinct parties. To proceed in such a fashion, necessarily requires the enforcing court to stray into the arena of the substantive reasoning and intentions of the arbitration tribunal. In my judgment, this is all inappropriate territory for the enforcing court. **The right approach is to seek enforcement of an award in the terms of that award**”. (Emphasis added.)

- (3) Whilst in the English Court of Appeal case **Nigerian National Petroleum Corporation v IPCO (Nigeria) Ltd**⁶ Tuckey LJ held that the Court could enforce part of an award, it can only do so if the part to be enforced can be ascertained from the face of the award and judgment can be given in the same terms as those in the award. (This Court notes that these propositions derive from paragraphs 13, 14 and 18 of **IPCO**.)
- (4) The dispositive part of the GHL Award (paragraph 345) contains nine separate elements. It is accepted by GHL that, following **IPCO**, the Court could enforce only some of those separate elements.
- (5) What the Court cannot do is to go beyond deciding which of the separate elements to enforce and decide what part of any particular element to enforce. To do so would not be to ‘enter judgment in terms of the award’⁷ but in terms different from what the arbitral tribunal had awarded. In particular, the Court cannot decide that it will award simple interest at the rate of 15%, but not compounded, because that would require the Court to determine an issue of Thai law (the SPAs being governed by Thai law) as to whether clause 12.9 of the SPA for the payment of interest can be severed in that way (the ‘Severance Issue’).

⁶ [2008] EWCA Civ 1157.

⁷ Cf *Nigerian National Petroleum Corporation v IPCO (Nigeria) Ltd* [2008] EWCA Civ 1157 at paragraph 18.

- (6) If the Court resolves the Amendment Issue in GHL's favour (i.e. it is not entitled to amend the award), the Court is not required to make any order other than that contemplated by the Judgment, namely setting the Enforcement Order aside.
- (7) However, if, contrary to GHL's submission, the Court concludes that amending the Award is something it should address, it will then need to determine the Severance Issue.
- (8) As the expert evidence currently stands, GHL's expert, Professor ES says the whole clause relating to interest is void.⁸ The Claimants' expert, Mr. EP, disagrees, saying the clause can be severed, leaving an entitlement to simple interest.⁹
- (9) The Court has no way to resolve the Severance Issue absent cross-examination.

3.2 The Claimants' position on the Consequentials Issue

[37] Before we look at what the Claimants say in response, it is apt here to identify two things. The first is which of the nine elements in the dispositive part of the GHL Award we are concerned with. The second is what the law is on the applicable test for enforcement of part of an arbitral award.

[38] The dispositive segment of the GHL Award was at paragraph 345 of that Award. This materially provided:

"345. For the reasons set out above in this Partial Award, the Arbitral Tribunal issues the following decisions:

- (a) [dismissing ABL's claim for rescission];
- (b) [granting ABL's alternative claim for payment of the 'First Instalment'];
- (c) **Claimant [i.e. ABL] is granted interest on the First Instalment under the GHL SPA from 23 October 2015 on the basis of a 15% per annum rate, compounded annually as from 30 December 2016, until payment in full;**
- (d) [joinder of a claim for accelerated payments and a set-off claim and counterclaim to the second (damages) phase of the arbitration];
- (e) [confirming parts of an order made by an Emergency Arbitrator on 17th February 2016];
- (f) [a non-disposal of assets order];

⁸ See First Expert Report of Professor ES ('ES 1') at paragraph 42.

⁹ See Second Affirmation of EP ('EP2') at paragraph 12 et seq.

- (g) [rejection of a request for a different on-disposal order];
- (h) [general reservation of all other claims and counterclaims to a second phase of the arbitration];
- (i) [provision for determination of costs].” (Emphasis added.)

[39] It is 345(c) which concerns the Court presently. The Claimants submitted in sum as follows.

[40] The Claimants first carefully noted GHL’s position. This was as follows. Since this Court has ruled that the award of compound interest was unlawful, that part of the GHL Award which awarded compound interest should not be enforced. That part was paragraph 345(c). Paragraph 345(c) should thus be disregarded, according to GHL. What the Claimants cannot do, according to GHL, is have the phrase ‘compounded annually as from 30 December 2016’ excised, to give the Claimants an award of simple interest at 15% per annum. The Claimants cannot do that, says GHL, because the Tribunal did not, in its reasons or otherwise, make an award of simple interest and section 12.9 of the SPAs applied compound interest, not simple interest. According to GHL, excising that phrase would amount to rewriting or amending the award; the Court cannot do that.

[41] Similar considerations apply to paragraph 284(b) of the JKL Award. The material part of the Award for which enforcement is sought is as follows:

“Claimants are granted interest on the First Instalment amount under the JKL SPA from 25 September 2015 on the basis of a 15% per annum rate, compounded annually as from 25 September 2016, until payment in full;”

[42] The net effect of GHL’s position (which is its primary position), is that this Court should not permit enforcement of paragraph 345(c) of the GHL Award and paragraph 284(b) of the JKL Award.

[43] GHL’s secondary position was to submit that if this Court does not accept GHL’s primary case, the Court should direct the Thai law experts to be cross-examined, so that they could give evidence to this Court to enable this Court to determine whether under Thai law the agreement for compound interest under the GHL SPA could be severed.

[44] In respect of this Court's ability to enforce part only of an award, GHL placed particular weight upon dicta of Tuckey LJ in the English Court of Appeal decision in **IPCO** at paragraph 18. This reads as follows:

"[18] In these circumstances I think that the word 'award' in this part of the 1996 Act should be construed to mean the award or part of it. **To be enforceable it must be possible to enter judgment 'in terms of the award'** but in this case there is no difficulty about that as the exact correspondence between the award and the judgment shows. Put less formally if one were to ask whether enforcement of part of an award in accordance with its terms was enforcement of the award the answer would be 'of course'." (Emphasis added.)

[45] What one does not discern from this passage is a test as to what should be treated by a court as a 'part' of an award. This can, though, be found in paragraphs 13 and 14 of the same decision, and GHL has correctly stated it. These materially provide:

[13] Mr Nash also relied on a number of authorities where the courts have had to consider whether to enforce domestic awards under what is now s 66 of the 1996 Act which says that such an award may be enforced by leave of the court 'in the same manner as a judgment or order of the court to the same effect' and that judgment may be entered 'in terms of the award'. **These cases show that the court will not enter judgment unless the award is in a form which can be treated as a judgment to the same effect.** Thus enforcement was refused where the awards provided for payment of the difference between two commodity trading contracts (*Margulies Bros Ltd v Dafnis Thomaides & Co (UK) Ltd* [1958] 1 Lloyd's Rep 205) and for payment in India (*Dalmia Cement Ltd v National Bank of Pakistan* [1974] 3 All ER 189, [1975] QB 9) and did not provide for payment of interest on costs (*Walker v Rome* [1999] 2 All ER (Comm) 961).

[14] So do the Convention and the 1996 Act prevent part enforcement of an award in a case such as this as Mr Nash contends? I start by thinking this is unlikely because the purpose of the Convention is to ensure the effective and speedy enforcement of international arbitration awards. An all or nothing approach to the enforcement of an award is inconsistent with this purpose and unnecessarily technical. **I can see no objection in principle to enforcement of part of an award provided the part to be enforced can be ascertained from the face of the award and judgment can be given in the same terms as those in the award.** (Emphasis added.)

[46] It is this last sentence which sets out the test for part enforcement of an arbitral award.

[47] The Claimants disagreed with GHL's application of this test. The following is my understanding of the position taken by the Claimants.

[48] First, the Claimants took issue with GHL's identification of what constituted a 'part' of the Awards. GHL had proceeded upon the basis that each of the nine dispositive sub-paragraphs to paragraph 345 of the GHL Award constituted a 'part' of that Award. However, submitted the Claimants, the

form of an award may merely be an accident of presentation or grammar. That is not a safe guide as to what constitutes a distinct part of an award. The Court has to look deeper, to the substance of what the Tribunal awarded to the extent this can be ascertained from the face of the award.

[49] If, as the Claimants contend, looking to the substance is the right approach, this means that there is nothing wrong in principle with enforcing *a part of a part* of an award, as long as that sub-part 'can be ascertained from the face of the award and judgment can be given in the same terms as those in the award'.¹⁰

[50] The Claimants submitted that upon the face of the GHL and JKL Awards, the Court is indeed entitled to allow enforcement of simple interest at 15% and deny enforcement to the award of compound interest. The reason why the Court is entitled to do this is as follows.

[51] The material award in the GHL Award stated as follows:

“[ABL] is granted interest on the First Instalment under the GHL SPA from 23 October 2015 on the basis of a 15% per annum rate, compounded annually as from 30 December 2016, until payment in full.”

[52] We have to ask ourselves what exactly the Tribunal was doing here. It was doing three things. First it awarded simple interest at 15% per annum from 23rd October 2015. Secondly it awarded compound interest to run from a date over a year later. Thirdly, the Tribunal provided that interest was to run 'until payment in full'.

[53] But, said the Claimants, the difference between the simple interest part and the compound interest is more fundamental than merely being awarded with reference to two different periods. The more profound difference concerns the very nature of compound interest and simple interest respectively. Whilst they are both 'interest' (obviously), simple interest is interest upon principal, whereas compound interest is interest upon interest. Simple interest and compound interest are thus conceptually different.

[54] It can be ascertained from the face of the Award that the Tribunal awarded both types of interest. Whilst these awards are to be found within the same sentence, they can be seen to be distinct parts. They are temporally **and** conceptually distinct.

¹⁰ Cf Nigerian National Petroleum Corporation v IPCO (Nigeria) Ltd [2008] EWCA Civ 1157 at paragraph 14.

[55] The same analysis applies to the JKL Award.

[56] Since the Court has ruled that the award of compound interest should not be enforced as it was illegal under Thai law, that part of the Awards should not go forward to enforcement. This leaves in place the award of simple interest at 15% per annum, until payment in full.

[57] This is **not** a case of substituting simple interest for compound interest, as GHL has incorrectly characterized the Claimants' case. This is because interest on principal would always be accruing anyway, even if compound interest were to apply. Compound interest, being interest upon interest, is a separate layer of interest. Therefore, if the award of interest upon interest is not to be enforced, this leaves in place the award of simple interest until payment in full. Thus 'judgment can be given in the same terms as those in the award'.¹¹

[58] The Claimants submit that there is thus no need for cross-examination of Thai law experts. That is because this Court is concerned only with matters that can be ascertained from the face of the Awards. The Court's analysis does not concern issues of severability under Thai law of clauses in the SPA.

3.3 Discussion on Consequential Issue

[59] I am persuaded by the Claimants that their analysis is to be preferred. It appears to me that the Claimants' reasoning was careful, cogent, and solidly anchored in the test propounded at paragraph 14 of **IPCO**.

[60] The Claimants' analysis also has the benefit of prioritizing substance over form, whereas GHL's starting position was to elevate form over substance in its identification of nine 'parts' to the GHL Award.

[61] Moreover, GHL ignored the fact that the Tribunal had awarded simple interest. GHL's submission that the Awards are silent on simple interest is in fact mistaken. Whilst it is true that the Tribunals did not in terms say 'we award simple interest for such and such a period', the Awards are to be

¹¹ Cf Nigerian National Petroleum Corporation v IPCO (Nigeria) Ltd [2008] EWCA Civ 1157 at paragraph 14.

read sensibly. One can ask rhetorically, what interest at 15% did the Tribunal award from 23rd October 2015 in the GHL Award and from 25th September 2015 in the JKL Award, if it was not simple interest? It could not have been compound interest, because compound interest was applied from later dates. So, what was that interest if it was not compound interest? It must have been simple interest.

[62] This moreover appears from the Awards themselves. In the GHL Award, at paragraph 290, the Tribunal stated that it was applying compound interest to run from a date *more than a year after the date interest would begin to run*. This is to be read together with the dispositive section at paragraph 345, in which the Tribunal awarded first interest which must have been simple interest and then compound interest.

[63] In paragraph 210 of the JKL Award the Tribunal recorded that:

“Further, the Parties’ Thai law experts agree that the interest can only be compounded after the first year of arrears, and can only be compounded on a yearly basis and not monthly.”

[64] This must be read together with the award of interest at paragraph 284(b) of the JKL Award, in which ‘interest’ was awarded at 15% per annum from 25th September 2015, and ‘compound interest’ from exactly a year later, from 25th September 2016. It is obvious that the Tribunal was alive to the Thai law experts’ then views that a year would need to elapse before compound interest could be applied. It is equally obvious that the Tribunal considered that in that first year some kind of interest should apply, because that is what the Tribunal ordered. Such interest can only have been simple interest.

[65] None of these considerations require looking behind the face of the Awards. They are plain from the face of it.

[66] GHL’s analysis also ignored the different nature of compound interest from simple interest, namely that compound interest is interest upon interest. On GHL’s analysis, to permit enforcement of simple interest instead of compound interest would mean substituting simple for compound interest. On the Claimants’ explanation, however, since compound interest is interest upon interest, not enforcing the ‘interest upon interest’ layer simply leaves intact the underlying simple interest (‘interest upon principal’) layer – thus there is no substitution.

[67] I am thus satisfied that the Court can refuse enforcement of the compound interest part of the Awards and that the result is that the underlying layer of accruing simple interest continues to run and to be enforceable. Put differently, but to the same effect, the words 'compounded annually as from 30 December 2016' can be disregarded from paragraph 345 (c) of the GHL Award and the words 'compounded annually as from 25 September 2016' can be disregarded from paragraph 284(b) of the JKL Award, and exact effect can be given to the remaining words of those paragraphs.

[68] This analysis does not entail amending nor rewriting the Awards. Nor does it entail any severance of clauses in the SPA, because we are simply concerned with enforcement of the residual parts of the Awards once the compound interest parts have been excluded. I agree with the Claimants that there is no need for cross-examination of the Thai law experts.

[69] There is a further reason which lends support to this conclusion. It is that the Tribunal itself departed from section 12.9 of the SPAs. The Tribunal determined that it was illegal to give effect to immediate compound interest with monthly rests, as section 12.9 had provided for, and it imposed a different obligation of its own invention based upon the evidence they had received from the Thai law experts. The parties had not agreed upon such an obligation between themselves, save indirectly by agreeing to let the arbitral Tribunal determine their disputes. It is the decision of the Tribunal with which this Court is now concerned. This Court is not concerned with how section 12.9 of the SPAs should be interpreted or applied, nor whether that section can be severed or dismembered into simple and compound interest respectively.

3.4 Disposition on Consequential Issue

[70] In sum, the Court determines the Consequential Issue by allowing enforcement to proceed of the simple interest part of the Awards and by disallowing the compound interest part. Thus, this Court will permit enforcement of the awards of simple interest at 15% per annum from 23rd October 2015 until payment in full in respect of outstanding principal amounts pursuant to the GHL Award and similarly from 25th September 2015 in respect of the JKL Award.

4. The Allocation Issue

[71] The next issue requiring determination is whether a payment made by GHL is to be treated as appropriated to principal or interest (**'the Allocation Issue'**).

4.1 GHL's position on the Allocation Issue

[72] GHL's position in relation to the Allocation Issue is, in sum, as follows.

[73] The Allocation Issue raises the question of whether the payment of US\$85.75 million accepted by ABL has been applied in discharge of GHL's liability to pay the GHL First Instalment in full or has only partly discharged that liability because it was applied in part to discharge GHL's liability to pay interest.

[74] As appears from the facts described in the Background segment above, GHL submitted that it is self-evident that the payment of US\$85.75 million from the Escrow Account to ABL was a payment in full of the GHL First Instalment. GHL relies in particular on the following:

- (1) In its letter of 22nd December 2017, the Tribunal invited GHL and JKL to provide US\$85.75 million into an escrow account controlled by the Tribunal, stating that the escrow would serve as a guarantee of the GHL First Instalment;
- (2) GHL and JKL subsequently confirmed that they would place US\$85.75 million in an escrow account to be controlled by the Tribunal and, once that account was established, transferred that sum, the Escrow Payment, into it; receipt of it being acknowledged on 6th March 2018;
- (3) ABL subsequently confirmed its agreement to the escrow arrangement in its lawyers' email of 31st January 2018;
- (4) Having dismissed the Respondents' counterclaims, the Tribunal, at paragraph 321 of the GHL Phase 2 Award, ordered the ICC to release the Escrow Payment into 'the account to be designated by Claimant, ABL, for prompt payment of the First Instalment under the GHL SPA';

- (5) Even if it were arguable that the payment into the escrow account was not a payment of the GHL First Instalment, in making that payment on the escrow terms GHL constituted the Tribunal its agent to pay that sum to ABL for that purpose in the event the Tribunal found the GHL First Instalment to be payable. The Tribunal did so find and, as GHL's agent, explicitly made the payment for the express purpose.

[75] Notwithstanding that chronology, ABL now seeks to assert that because of the provisions of section 329 of the Thai Civil and Commercial Code ('s. 329'), the payment made by the ICC is to be treated as having been applied first in relation to interest, leaving part of the First Instalment outstanding.

[76] There is a question as to how the terms of s. 329 should be translated from Thai. The English translation advanced by GHL reads:

"If a debtor is obligated to pay interest and costs in addition to principal with respect to a particular obligation, a performance that is not sufficient to discharge such obligation in its entirety must be allocated first to the costs and then to the interest and lastly to the principal.

If the debtor specifies any other allocation, the creditor may refuse acceptance of the performance."

However, as GHL's expert Professor ES explains at paragraph 6 of his Second Expert Report dated 2nd June 2022 ('ES 2'), while the translation uses the word '*specifies*' that does not convey the entirety of the meaning in Thai. The Thai text of s. 329, on its plain words, states that the debtor may 'indicate or express his intention' to apportion the debt.¹² While the Claimants' expert Mr. EP responded to ES 2, he did not take issue with this interpretation.

[77] There is some common ground as to how s. 329 operates.¹³ First, s. 329 is not a mandatory provision of Thai law. A debtor and creditor can agree on a different application or allocation of funds between principal and interest where there has been a partial payment of a debt. Secondly, the Thai CCC does not specify clearly whether or not such an agreement has to be express or implied.

¹² ES 2 at paragraph 6.

¹³ See paragraph 6 of ES 2 and paragraphs 15 and 16 of the First Affirmation of EP ('EP 1').

- [78] The position taken by Mr. EP is that such an agreement can only be explicit. He reaches this conclusion relying on the word '*specify*' which he appears to be saying cannot be implicit because the creditor needs to be able to refuse to accept such performance.¹⁴ In support of his contention he cites five cases.
- [79] The first, Supreme Court Judgment No. 5007/2536 does no more than confirm that where, as in that case, the parties had entered into a settlement agreement that dealt expressly with the allocation of payments to principal and interest, s. 239 has no application. So much has been conceded by the Claimants.
- [80] The second, another decision of the Supreme Court (No. 3055/2526), dealt with an express request by the defendant as to the allocation of payments which was not denied by the plaintiff and had accepted payment. Unsurprisingly, the default provisions of s. 239 had no application in those circumstances.
- [81] The remaining three cases, again from the Supreme Court (No. 1565/2524; 2682/2560 and 2727/2530) simply provide an example of a case where s. 239 was applied. In none of those cases was there any suggestion of any agreement, whether express or implicit, as to the allocation of payments between principal and interest.
- [82] None of those cases accordingly advances the view expressed by Mr. EP in paragraph 19 of EP 1 that an agreement as to allocation (i) can only be explicit and (ii) cannot involve a third party.
- [83] Professor ES disputes both of Mr. EP's conclusions. In relation to (i), Professor ES makes reference to the (unsurprising) proposition that a contract can be formed by tacit acceptance.¹⁵ There is no requirement of formality for an agreement to derogate from the default rule in s. 329.¹⁶

¹⁴ See EP 1 at paragraph 17.

¹⁵ See paragraphs 11-15 of ES1.

¹⁶ See paragraph 10 of ES 2.

Any requirement of formality must be expressly and clearly stipulated by a relevant provision of law: there is no such requirement in relation to s. 239.¹⁷

[84] GHL submitted that the combination of the Tribunal's letter of 22nd December 2017, GHL's agreement to make the Escrow Payment as the Tribunal had suggested and the Claimants' lawyers' instruction to the ICC (jointly with the Respondents) clearly amounts to an implied agreement between the Claimants and the Respondents that any payment out of the escrow account at the direction of the Tribunal would be in relation to the GHL First Instalment.

[85] In relation to proposition (ii), Professor ES entirely rejects the bald suggestion, unsupported by any authority, that an agreement in relation to allocation cannot involve the actions of a third party.¹⁸ As Professor ES correctly explains in paragraph 24, the role of the Tribunal was as an intermediary, co-ordinating the agreement between the parties.

[86] Even if there was no agreement, the Tribunal, in its role as escrow agent, by paragraph 321 of the GHL Phase 2 Award, specified on behalf of GHL that the payment from the escrow account was to be allocated to the payment of the GHL First Instalment. The Claimants did not (in the words of s. 329) '*refuse acceptance of that performance*' and, as one would expect, accordingly waived any entitlement to rely on s. 329.¹⁹

4.2 The Claimants' position on the Allocation Issue

[87] The Claimants' position in relation to the Allocation Issue is, in sum, as follows.

[88] The Claimants observe that the Allocation Issue is of importance in so far as the Awards are enforceable as to simple interest only (which the Court has found above that they are).

[89] In short, the Claimants do not accept that there was any agreement (express or implied) between them and GHL and JKL, or any decision by the Tribunal, that any payments by GHL and JKL

¹⁷ See paragraph 12 of ES 2.

¹⁸ See paragraphs 22-4 of ES 2.

¹⁹ See ES 1 at paragraphs 27-8 and Thai Supreme Court decision 3055/2556.

should be apportioned to principal first. In the absence of an explicit agreement or a decision by the Tribunal to that effect, the default rule in s. 329 must prevail and the payments by GHL and JKL should be apportioned to interest first, then principal.

[90] The starting point in relation to the Allocation Issue is the default rule of apportionment under s. 329, namely, that payments are allocated to interest first and principal thereafter. GHL seeks however to displace the application of the default rule by reference to arguments of implied or inferred agreement.

[91] The Claimants do not accept that there was any agreement (express or implied) between the Claimants (on the one hand) and GHL and JKL (on the other), or any decision by the Tribunal, that payments by GHL and JKL should be apportioned to principal first. The issue of allocation or apportionment of payments as between principal and interest was not an issue that was specifically raised or the subject of any argument before the Tribunal.

[92] In the absence of an explicit agreement between the parties or a decision by the Tribunal to that effect which is legally binding on the parties, the default rule in Section 329 must prevail and the payments by GHL and JKL should be apportioned to interest first, then principal.

[93] In response to GHL's arguments, the Claimants emphasised the following points:

- (1) Since it is common ground that the default position under s. 329 is that partial payments are allocated to interest first and thereafter principal, it follows that the onus is on GHL to satisfy the Court that there was sufficient agreement between the parties to displace the operation of the default rule. Any doubt in this regard must logically be resolved in favour of the application of the default rule.
- (2) None of the materials to which the Court was referred by GHL evidence the presentation by the parties of any submissions to the Tribunal, or any specific decision (let alone a reasoned decision) by the Tribunal, as to the order in which partial payments were to be apportioned between principal and interest. Still less do they evidence any agreement between any of the Claimants and either GHL or JKL that the default rule under s. 329 should be reversed.

- (3) The high watermark of GHL's case is the Tribunal's direction, as recorded at paragraph 321 of the GHL Phase 2 Award, that the ICC should release the US\$85.75 million escrow payment to the First Claimant '*for prompt payment of the First Instalment under the GHL SPA*'. It is common ground in this regard that the principal amount of the GHL First Instalment was US\$85.75 million. However, this language cannot be looked at in isolation and does not ultimately justify the conclusion that GHL draws from it. In particular:
- (i) It is clear from the next following paragraphs of the GHL Phase 2 Award that the Tribunal simultaneously awarded **continuing interest** to ABL '*as from 23 October 2015 on the basis of the 15% per annum rate, compounded annually as from 30 December 2016, as per the first Partial Award, para. 345(c), until payment in full*'. The award of continuing interest '*until payment in full*' rather than until release of the escrow payment to ABL (as directed by the Tribunal at paragraph 321) strongly suggests that the Tribunal was **not** proceeding on the premise that the escrow payment would be allocated to principal first – otherwise, it is difficult to see why the Tribunal did not provide for the accrual of interest until the release of the escrow payment to ABL.
 - (ii) If there were any doubt about the matter, however, it is explicit from paragraph 167 of the GHL Phase 2 Award that the Tribunal was using the expression '*First Instalment*' to refer to **both** the principal amount of the First Instalment **and** the interest accrued on that unpaid amount – note in particular the Tribunal's reference to the US\$85.75 million escrow payment as '*ultimately a **partial** payment of the First Instalment (i.e. without the interest due under the first Partial Award)*' (emphasis added). Once this is understood, there is no reason to interpret the phrase '*for prompt payment of the First Instalment under the GHL SPA*' in paragraph 321) to be a reference to payment of principal only, rather than payment of both principal and interest.
 - (iii) Further and in any event, the Tribunal's direction at paragraph 321 of the GHL Second Partial Award cannot be equated with an agreement between ABL (as creditor) and GHL (as debtor) that the default rule of appropriation under s. 329 should be

displaced, especially in circumstances where the displacement of that rule was not the subject of any submissions to or discussion by the Tribunal within the Award.

4.3 Discussion on Allocation Issue

- [94] It is appropriate to record first of all that both sides accept that s.329 applies to allocation of the US\$85.75 million payment. The dispute surrounds whether or not the circumstances give rise to a derogation from s. 329's default allocation provisions.
- [95] I found determination of the Allocation Issue by no means easy. Initially, I was attracted by GHL's submissions, on the basis that the US\$85.75 million invited to be paid into escrow equated to the principal amount of the GHL First Instalment. It seemed to me rather obvious, or at least more probable than not, that the Tribunal intended that this sum be secured so that at least the principal could certainly be paid. But I was then persuaded by the Claimants' submissions that this line of reasoning went too far in its assumptions of the Tribunal's intentions. This was because the Tribunal did not rule or state in terms that the US\$85.75 million should be applied first either to interest or to principal.
- [96] Secondly, it was evident to me that in all probability none of the parties, nor the Tribunal, had s. 329 in mind at the time the escrow fund was set up. It can be said with a high degree of certainty that none of these parties (including the Tribunal) were thinking in terms of any allocation agreement or any agency agreement at the time.
- [97] Retrospectively fitting the events into the parameters of s. 329, or rather, into the exception to its provisions, thus requires construing the relatively simple and neutral circumstances around the establishment of the escrow fund as an agreement to derogate from its default allocation provisions. This was not readily apparent, even assuming that the terms of s. 329 in translation were sufficiently clear. The reality of the matter was that there was no clear communication (whether verbally or through conduct) by the Tribunal or the parties that the funds should be applied first to principal and then to interest, and no clear communication (whether verbally or through conduct) that the default position under s. 329 should be disapplied.
- [98] This, though, leads the Court to accept to the Claimants' position, that in the absence of evidence of a sufficient agreement to the contrary, the allocation default provisions in s. 329 should apply.

[99] From a different angle, it can be seen that a major difference between the parties concerns what should be understood as 'the First Instalment'. Does it mean just the principal of US\$85.75 million (as GHL suggests), or does it mean the principal of US\$85.75 million together with interest (as the Claimants suggest)? The crucial point is what the Tribunal understood the First Instalment to be referring to. As the Claimants submitted, it is apparent from paragraph 167 of the GHL Phase 2 Award that the Tribunal was using the expression '*First Instalment*' to refer to **both** the principal amount of the First Instalment **and** the interest accrued on that unpaid amount, as evidenced by the Tribunal's reference to payment of US\$85.75 million being a 'partial payment of the First Instalment (i.e. without the interest due under the first Partial Award)'. That statement is not consonant with treating the First Instalment as comprising principal alone. It only makes sense if the Tribunal was treating the First Instalment as comprising principal and interest.

[100] What one is then left with is not some tacit agreement that the payment of US\$85.75 million should be applied first to principal, but rather a position that the Tribunal would pay that sum out towards satisfaction or reduction of the composite principal plus interest 'First Instalment', without at that point expressing any decision or view on how it should be allocated.

[101] In my respectful judgment, the Tribunal was leaving the Allocation Issue open, to be resolved, in some appropriate forum, to the extent it might have to be resolved.

[102] The same considerations would appear to apply in respect of payments by JKL. There is no evidence warranting disapplication of s. 329 in respect of such payments.

4.4 Disposition in relation to Allocation Issue

[103] Thus, the Court respectfully disagrees with GHL's position. The Court sees no agreement, whether express or implied, that the US\$85.75 million would be applied first to principal. The Court goes further to say that the balance of evidence does not support a notion that the Tribunal was proceeding on that basis. The Court consequently prefers the Claimants' submissions over those of GHL on the Allocation Issue. In this Court's respectful judgment, the payment of US\$85.75 million must be allocated first to interest and then to principal, in accordance with s. 329.

5. The JKL Issue

[104] The JKL Issue is whether any sum remains due under the JKL Award. This issue can be addressed relatively briefly, in light of this Court's findings on the other issues.

[105] An appropriate starting point is the dispositive section of JKL Award, at paragraph 284. It starts by dismissing CDL's and EFL's claims for payment of 'Shortfalls under the JKL First Instalment'. It then (materially) granted the claimants in the arbitration 'interest on the First Instalment amount under the JKL SPA from 25 September 2015 on the basis of a 15% per annum rate, compounded annually as from 25 September 2016, until payment in full'.

[106] The principal amount of the JKL First Instalment was US\$89.25 million.

[107] As related in the background segment of this Judgment above, CDL and EFL admitted that they had received two payments on 30th November 2015 of US\$44,727,736.58 and US\$15,272,167.78; and on 29th December 2015 a further sum of US\$30,515,375, an aggregate amount of US\$90,515,279.36 which the Tribunal noted exceeded the JKL First Instalment by US\$1,265,179. CDL and EFL had claimed they could appropriate those payments first to interest, thus giving rise to the 'Shortfalls' in relation to the principal (on which could be charged compound interest) (per paragraph 165 of the JKL Award).

[108] The question whether any sum remains due under the JKL Award must next be approached bearing in mind that:

- (1) The Court disallows enforcement of the compound interest element of the JKL Award, leaving simple interest at a rate of 15% to accrue from 25th September 2015 until payment in full;
- (2) The Court finds that pursuant to s. 329 of the CCC, payment must be treated as applied in priority to interest and then to principal and that there has been no agreement derogating from that statutory provision.

[109] Thus, what needs to be done is to calculate the amount of interest due (simple interest at 15% per annum on US\$89.25 million, as of 25th September 2015) as at the dates payments were made to see whether those payments exceeded the interest then due, thereby reducing the principal amount due.

[110] If those payments did not exceed the interest due as at those dates, then the balance of interest accruing from those dates would need to be calculated as at the date of delivery of this Judgment.

[111] This is a matter of arithmetic, which the Court will in the first instance leave to the parties to agree upon if possible.

[112] It is my understanding that this analysis and approach is also that advocated for by the Claimants.

[113] GHJ's position was different. It was based upon a premise that the JKL First Instalment comprised only principal, and not principal and interest. As GHJ put it:

“As there had been payment in full of the First JKL Instalment by the payments on 30 November 2015 of US\$44,727,736.58 and US\$15,272,167.78 and of US\$30,515,375 on 29 December 2015 (an aggregate amount which exceeded the First JKL Instalment by US\$1,265,179) there was only an entitlement to simple interest at 15% from 25 September 2015 on the amount of principal outstanding. On and from 29 December 2015 there was no amount of the First JKL Instalment outstanding and US\$1,265,179 had been paid in respect of interest, which exceeded the amount of simple interest due.

As JKL has no liability to pay any further sum, nor does GHJ as JKL's guarantor.”

[114] As the Claimants observe, GHJ appears to base its assumption that there had been payment in full of the JKL First Instalment upon the dismissal by the Tribunal in respect of claimed 'shortfalls' in payment of the JKL First Instalment. However, as the Claimants' pointed out, the term '*shortfalls*' was coined by the Claimants to refer to both principal and interest compounded on a monthly basis from a certain date, and it was interest compounded at monthly rests that the Tribunal rejected when it dismissed the claims for 'shortfalls'. The Claimants submit it was incorrect of GHJ to see in this any finding that the payments should be applied to principal first. I respectfully agree with the Claimants on this point.

6. GHJ's cross-examination application

[115] For the reasons already given, in this Court's respectful judgment all the issues requiring determination by Court can be decided without requiring further evidence of Thai law from the parties' respective experts. No order for cross-examination will thus be made.

7. The LMN Award

[116] It appears to be common ground that the LMN Award is enforceable at least in part. The parties have updated the Court that substantial payment has been made in respect of the LMN Award, reducing the net amount outstanding to US\$68,522.33, as at about 20th January 2022.

[117] The Court will hear the parties further on costs.

[118] The Court takes this opportunity to thank the parties' learned Counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar

