

**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 for the Applicant

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

2022: July 6, 7, 27
2023: January 27.

JUDGMENT

- [1] **WALLBANK, J. (Ag.):** This is the judgment of the Court in relation to an application to set aside an order enforcing in this jurisdiction (the 'BVI') three arbitration awards made in Singapore (the 'Set Aside Application'). Since the proceedings involve the enforcement of an arbitration awards, to preserve confidentiality this judgment anonymizes the names of the parties and well as other key information.
- [2] This judgment addresses the main issue arising in the Set Aside Application, which can be referred to, for convenience, as the 'Compound Interest Issue'. Three other main issues also arise, as identified below. To an extent, the determination of these other issues is or may be affected by the result of the

Compound Interest Issue. On 27th January 2023, the Court handed down the result of the Compound Interest Issue and these are the written reasons for that decision. A further hearing has been directed to be held to assist the Court in identifying precisely the matters which remain to be decided and to summarize the main points that each side wishes to rely upon in those matters.

- [3] To frame the facts and the issues, I gratefully adopt in large part the following summary set out by the Applicant's learned Counsel, Mr. Stephen Moverley Smith, KC, in his skeleton argument for the Set Aside Application. In this summary, I also leave in the Applicant's principal legal contentions.

1. Introduction

- [4] 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, which I will call JKL, Ltd. (**'JKL'**):

(1) A first partial final award dated 22nd September 2017 in arbitration proceedings in Singapore (ICC Case [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 HIL were ordered to pay the Claimants' legal costs (**'LMN Award'**).

- [5] The GHL Award and JKL Award will also be referred to below together as the 'Phase 1 Awards'.

[6] 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.

[7] 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.

[8] In summary, the Court is 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'**).

- [9] It is the Consequential Issue, the Allocation Issue and the JKL Issue which will be the subject of the further hearing mentioned above.

2. Background

- [10] 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.

- [11] 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.

- [12] 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.]

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

[14] 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. The President of the Tribunal was a Swiss Attorney-at-Law. The other two arbitrators were, respectively, a French Professor of law at the university of Panthéon-Sorbonne in Paris and Attorney-at-Law, and a Korean Attorney-at-Law. None of the arbitrators are from the Anglo-Saxon Common Law tradition, nor Thai lawyers. The procedural decisions they took, in particular in relation to a certain, so-called ‘hot-tubbing’ session, should be viewed with this in mind: it would not be apposite to evaluate their approach against the yardstick of the procedural fairness safeguards in the adversarial legal system of Anglo Saxon Common Law.

[15] 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.

[16] 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.

[17] 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.

[18] I set out below the manner in which the Tribunal's decision came about, because the decision itself is tersely expressed and does not set out clearly how the tribunal reached its determination. The Tribunal itself referred to the transcript of the prior discussion¹, indicating that the reader of the awards should 'see' that part of the transcript, such that I proceed on the basis that it is in order for me to do so as well.

[19] At a certain point during the arbitration hearing on 10th February 2017, the Tribunal chairman spoke as follows:

"Let us move to interest. 15 per cent and then compounded on a monthly basis. If I may say so, for those who have made compound interest computation, that is very heavy. You say this may well be legal under Thai law?"²

[20] The expert for ABL (who I will call Mr. EP), responded saying that there were two parts to this. First, in relation to the rate of 15%, he said that this 'is not the highest rate under the law that you can charge for default'. He went on to explain that there is no limit to such an interest rate, but that the 'court has the discretion to reduce them if they think it is inappropriately high'.³

[21] Mr. EP then added:

"I think for the compound interest Thai law specifically says that it has to be – can only be compounded if the interest become in arrears for one year or more."⁴

[22] He added further, saying:

"I understand that there is a judgment to say that if you agree otherwise it will be void".⁵

¹ At Bundle 2 pages 203 to 204.

² At Bundle 5, Tab 13, Page 1527, internal page 980 lines 17 to 22.

³ At Bundle 5, Tab 13, Page 1527, internal page 981 lines 3 to 6.

⁴ At Bundle 5, Tab 13, Page 1527, internal page 981 lines 7 to 10.

⁵ At Bundle 5, Tab 13, Page 1527, internal page 981 lines 17 to 19.

[23] The expert for GHL (who I will call Professor ES) agreed that compound interest was only allowed annually and not monthly. He said:

“I’d agree with him [Mr. EP] that compound interest is allowed only annually and not monthly so, actually, the agreement on compounded monthly should be void’.”⁶

[24] The debate then moved on to focus on the rate of interest at 15%. One of the arbitrators queried:

“Then how could the 15 per cent apply? The result of the year is – if there is more than 15 per cent interest, whether it is compounded or not, will be null and void under Thai law?”⁷

[25] Professor ES opined (materially) in response that:

“...we have a special law making charging of interest more than 15 per cent a criminal action. So it becomes a public policy on that more than 15 per cent should not be charged.”⁸

[26] He moreover opined that (in the context of a question from the tribunal on the potential treatment of the interest provision as a penalty or, alternatively as liquidated damages):

“In my vision that affect the 15 per cent interest, only that compounded monthly shouldn’t be accorded.”⁹

[27] Mr. EP agreed that ‘the court cannot give more than 15’.¹⁰

[28] In the GHL and JKL Awards, dated 22nd September 2017, the Tribunal subsequently referred to these answers in concluding that interest could be awarded at 15%, compounded annually as from December 2016.¹¹

[29] By way of recap, as at 10th February 2017:

- (1) neither Thai law expert saw any illegality with an agreement, such as in an SPA, for payment of compound interest at 15%; and

⁶ At Bundle 5, Tab 13, Page 1527, internal page 982, lines 16 to 19.

⁷ At Bundle 5, Tab 13, Page 1527, internal page 982, lines 21 to 25.

⁸ At Bundle 5, Tab 13, Page 1527, internal page 983, lines 8 to 12.

⁹ At Bundle 5, Tab 13, Page 1527, internal page 984 lines 8 to 10.

¹⁰ At Bundle 5, Tab 13, page 1527, internal page 984, lines 17 to 18.

¹¹ At Bundle 2 pages 203 to 204.

(2) both Thai law experts were of the view that Thai law does not allow interest to be compounded monthly, as had been agreed in the SPAs, but, in broad terms, that interest was allowed to be compounded annually.

[30] This differed significantly from their view just over a year later, in March and July 2018 respectively, after the GHL and JKL Awards had been made, when they both agreed that Thai law only permits parties to agree upon the payment of compound interest, provided (i) the compound interest is in respect of a loan agreement; **and** (ii) interest has been outstanding for more than one year; **and** (iii) the agreement for payment of compound interest is an agreement in writing. They were then (in 2018) of one mind that the SPAs did not comply with these prescriptions, because they were not loan agreements. We will look more closely at what the Thai law experts said shortly.

[31] The Tribunal did not record that it had considered the relevant Thai legislation or legal authorities and made no reference to them.

[32] In the GHL Award, the Tribunal stated as follows:¹²

“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.

¹² At Bundle 2, page 296.

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.” (Emphasis and italicization as per the original.)

[33] In the JKL Arbitration, the Tribunal stated as follows:¹³

“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.

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.” (Emphasis and italicisation as per the original.)

¹³ At Bundle 2 pages 203 to 204.

[34] In these quotations from the awards, only the immediately relevant footnotes are given.

[35] 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.

[36] 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 First JKL 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).

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

[38] The Tribunal subsequently dismissed the claim for shortfalls in relation to principal, but 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.

[39] Following the conclusion of the first phase of the GHJ 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 First GHL 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.”

[40] 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'**)).

[41] 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.'*

[42] 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.

[43] 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'**).

[44] 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's Fourth Report §89 and 90, dated 26th March 2018, and Mr. EP's report dated 14th July 2018 at §§155-9), Mr. EP explaining his *volte face* by describing his earlier comments as having been made '*on the spot*'.

[45] Professor ES stated as follows:¹⁴

"89. I am instructed that the Claimants are seeking compound interest on payments that the Tribunal found (in the Partial Awards) the Claimants to be entitled to ("**Ordered Payments**"). I have been asked to confirm whether compound interest is permitted under Thai law. The short answer is no, **unless** the case falls within the single exception of Section 655 Thai CCC (*i.e.*, where the terms of a loan agreement expressly provides for the compounding of interest after one year): **Section 655 Thai CCC** Interest shall not bear interest. The parties to **loan** may, however, agree that the interest due for **not less than one year** shall be added on the capital, and that the whole shall bear interest, but such agreement shall be made **in writing**.

Commercial usage for the calculation of compound interest in current accounts as well as in other similar commercial transactions, are not governed by the foregoing paragraph.

90. Apart from cases falling strictly⁴³ within the single exception in Section 655 Thai CCC, provisions stipulating the compounding of interest would be deemed as penalty clauses under Thai law (under Section 379 Thai CCC⁴⁴), which are prohibited.

Footnote 43: The parameters of the single exception under Section 655 Thai CCC must be strictly complied with in order for compound interest to be claimable. Such interest would not therefore be permitted if a *loan* agreement provides for immediate accrual of interest for default upon interest.

Footnote 44: Section 379 Thai CCC provides: "*If the debtor promises the creditor the payment of a sum of money as penalty in case he does not perform it in the proper manner, the penalty is forfeited if he is in default. If the performance due consist in a forbearance, the penalty is forfeited as soon as any act in contravention of the obligation is committed*".
[Emphasis in original.]

¹⁴ At Bundle 4, page 1203.

[46] Mr. EP stated (materially) as follows:¹⁵

155. I note that neither myself, nor Prof. ES were previously asked by respective parties' counsel to thoroughly research and provide our expert views on the validity of Clause 12.9 of the SPAs under Thai law, or, more generally, on the mechanics and limitations on compound interest under Thai law. It is only as part of his Fourth Report, that Prof. ES appears to have been instructed to opine on these matters.

156. With respect to validity of compound interest clauses under Thai law, there are both general provisions that apply to all types of legal relations, and specific provisions that only apply to certain types of legal relations and in particular contracts. The general provisions on interest under Thai law are Section 7 and 224 of Thai CCC that read, in relevant part:

Section 7. Whenever interest is to be paid, and the rate is not fixed by a juristic act or by an express provision in the law, it shall be seven and a half per cent per year.

Section 224. A money debt bears interest during default seven and half percent per annum. If the creditor can demand higher interest on any other legitimate ground, this shall continue to be paid.

Interest for default shall not be paid upon interest.

157. The specific provisions of Thai law that are relevant for my rebuttal of Prof. ES's views are the following:

Thai CCC, Title IX ('Loan'), Chapter II ('Loan for Consumption')

Section 654. Interest shall not exceed 15% per year; when a higher rate of interest is fixed by the contract, it shall be reduced to 15% per year.

Section 655. Interest shall not bear interest. The parties to a loan of money may, however, agree that the interest due for not less than one year shall be added to the capital, and that the whole shall bear interest, but such agreement must be made in writing.

158. I note that my on-the-spot comments on validity of compound interest under Thai law as given at the Geneva Hearing (and confirmed by Prof. ES at the same Hearing) were made with Section 655 of Thai CCC in mind.

159. This being said, the SPAs are, of course, not loan agreements. Therefore, compound interest set in Clause 12.9 of the SPAs is not in conformity with Thai law. ..." [Emphasis in original.]

¹⁵ At Bundle 4 pages 1253 to 1254.

[47] 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 First GHL 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 First GHL Instalment. It accordingly ordered the ICC to release the Escrow Payment into an account designated by ABL for prompt payment of the First GHL Instalment (per §321).

[48] 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*. In the award dated 5th August 2019 recording this decision the Tribunal commented:

“..in the event that a contractual provision for compound interest were found to be prohibited under Thai law, the Tribunal would expect any enforcing body of the Second Partial Award to maintain the findings of that Award, and amending the findings on the interest, especially if the party seeking enforcement (in this case the likely Claimant) would waive its right to the compounding of interest as it effectively does with its Application.”

[49] 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.

[50] Contrary to the Tribunal’s suggestion that the Claimants could waive its ‘right’ to compound interest, and contrary to the Claimants’ own acknowledgement that it had not been open to the Tribunal to award compound interest, the Claimants have nonetheless come to this Court seeking to enforce the Phase 1 Awards.

On one level, this does not sit well with the Claimants' earlier acknowledgement that they could not have compound interest. On another level, since the Phase 1 Awards have not been set aside, the Claimants still have the benefit of those awards. On yet another level again, this does not wreak unfairness on GHL (or JKL), because the latter had in any event agreed to pay an even heavier compound interest burden than the Tribunal had imposed upon them, and both sides had agreed to abide by the Tribunal's decision, subject to ICC arbitration rules and Singapore law. Thus, it can be seen that a 'just' or 'fair' balance as between the parties is not easy to strike in the present circumstances. Fortunately, though, as we shall see, that is not the Court's function in deciding whether or not to set aside the Enforcement Order.

3. The Compound Interest Issue

3.1 The Applicant's submissions

[51] The following summarizes the Applicant's (GHL's) submissions in respect of the Compound Interest Issue. Nothing in this segment of this judgment is to be taken as a finding of the Court, as it merely relates, in summary form, the Applicant's arguments.

[52] The Applicant's argument comes down to this. Whether or not the Tribunal found the underlying agreement for payment of compound interest to be illegal or legal (a matter on which the Applicant takes no firm position), the Court is entitled to refuse enforcement of the awards in the exceptional circumstances of this case and it should do so in the interests of justice.

[53] Section 86(1) Arbitration Act 2013 ('AA' or 'the Act')) states that enforcement of a New York Convention award may not be refused except in the cases mentioned in that section. Section 86(3)(b) provides that enforcement of a Convention award may be refused if it would be contrary to public policy to enforce the award.

[54] It is common ground that the policy of the BVI Court is pro-enforcement of arbitration awards, that good reasons must be shown for the Court not to enforce an award and that an error of law or fact made by an arbitration tribunal is insufficient reason (see **Cukurova Holding A.S (Appellant) v Sonera Holding B.V. (Respondent)**¹⁶).

[55] In considering whether public policy is engaged, regard must be had to the public policy of the enforcing state, here the BVI, that public policy trumps provisions of foreign arbitration law and can be relied on regardless of the law or public policy of the seat of arbitration (see **PT Ventures SGPS v Vidatel Ltd**¹⁷).

[56] One situation where public policy may be engaged is if the contractual provision sought to be enforced is illegal under the law which governs the contract. In **Westacre Investments Inc. v Jugoinport-SPDR Holding Co. Ltd**,¹⁸ a case concerning a consultancy agreement intended to be performed through the bribery of Kuwaiti officials, Colman J stated:¹⁹

“If the issue before the arbitrators was whether money was due under a contract which was indisputably illegal at common law, an award in favour of the claimant would not be enforced for it would be contrary to public policy that the arbitrator should be entitled to ignore palpable and undisputed illegality.”

[57] The issue was revisited shortly afterward by the English Court of Appeal in **Soleimany v Soleimany**.²⁰ In that case a father and son had entered into an agreement to smuggle carpets out of Iran, persuading diplomats to abuse diplomatic immunity to carry them through customs, in breach of Iranian revenue controls and export controls.

¹⁶ [2014] UKPC 15 at paragraphs 4 and 34 (Lord Clarke).

¹⁷ BVIHC 2019/0067 (unreported, delivered 16th March 2020 at paragraph [31] (Jack J)).

¹⁸ [1999] QB 740.

¹⁹ [1999] QB 740 at p. 767 F- G.

²⁰ [1999] QB 785.

[58] In that case Waller LJ recognised that where there was an illegal contract, the court would decline to enforce it, not for the sake of the defendant or the plaintiff but to preserve the integrity of its process and to see that it is not abused.²¹ He made reference to the passage from Colman J's judgment in **Westacre** cited above, but did not consider that the test was so limited. The court, in an appropriate case, might enquire into the issue of illegality even if the arbitrator had jurisdiction and has found there is no illegality.²² He summarised the position as follows:²³

“Finally, under this head, we should state explicitly what may already have been apparent: when considering illegality of the underlying contract, we do not confine ourselves to English law. An English court will not enforce a contract governed by English law, or to be performed in England, which is illegal by English domestic law. Nor will it enforce a contract governed by the law of a foreign friendly state, or which requires performance in such a country, if performance is illegal by the law of that country”.

[59] The Applicant submitted that it will be seen from this passage first, that the English court will not enforce a contract governed by foreign law if it is to be performed in England and that performance is illegal under English domestic law. In such a case what the position is under the foreign law is irrelevant. Entirely separately, it will not enforce a contract governed by the law of a foreign friendly state if performance is illegal by the law of that country. In reaching that conclusion the Court of Appeal did not adopt the formulation of Colman J of ‘palpable and undisputed illegality’ – the test is not so limited.

[60] Further, there is no supervening requirement that, where a contract is governed by the law of a friendly foreign state and performance is illegal by the law of the country, the contract also needs to be illegal under English law.

[61] The Applicant submitted that the court carries out a balancing exercise in considering whether the public policy of not enforcing contracts which are illegal

²¹ [1999] QB 785 at page 800 B-C.

²² [1999] QB 785 at page 803 A-C.

²³ [1999] QB 785 at page 803 H.

under the foreign law by which they are governed outweighs the competing public policy of enforcing Convention awards.

[62] In carrying out that balancing exercise, the Applicant submitted that the following factors are relevant in considering whether the award of compound interest is contrary to public policy for the purposes of section 86:

- (1) The SPAs are governed by Thai law;
- (2) An award of compound interest is a violation of Thai laws concerning public order and good morals and is accordingly illegal, as stated by Prof. ES in his first report at paragraph 36 and following;
- (3) The Tribunal was misled into making the award of compound interest in large part by the expert evidence tendered by the Claimants;
- (4) The Claimants accept that compound interest should never have been awarded;
- (5) The Claimants themselves applied for the Phase 2 Awards to be corrected to delete the award of compound interest;
- (6) The Claimants only discovered that an award of compound interest was in violation of Thai laws concerning public order and good morals after the statutory time limit for applying to set aside the GHL Award had expired;
- (7) The Claimants, in seeking to enforce the award of compound interest, are seeking to take advantage of a mistake they themselves in part engendered in circumstances where they accept that they have no lawful entitlement to compound interest, absent the mistaken award;
- (8) The Court has an overriding obligation to deal with cases justly; an obligation echoed in CPR 1.1;

- (9) It would be manifestly unjust to enforce the award of compound interest in the circumstances described above.

[63] Taking all the circumstances into consideration, the Applicant submitted that the balance weighs in favour of refusing to enforce the compound interest element of the Awards.

[64] The Applicant furthermore relied upon the Privy Council decision in **Betamax Ltd v State Trading Corpn**²⁴ to argue that this Court has jurisdiction to consider the effect of illegality upon enforcement of the award of compound interest.

[65] The Applicant submitted that there are a number of ‘takeaway points’ that derive from **Betamax**:

- (1) It is not an absolute rule that the decision of an arbitral tribunal should be treated as final – there may be unusual circumstances where different considerations apply.
- (2) Where an arbitral tribunal has expressly considered issues and inquired into circumstances suggesting illegality and set out reasons for holding as a matter of fact that there was no illegality, then the tribunal’s finding will be final. Absent vitiating factors, the court will not interfere with that decision, although there may be exceptional circumstances in which it could do so, although the Privy Council did not explain what such exceptional circumstances might be.

[66] The Applicant submitted that in the present case, there are exactly the unusual or exceptional circumstances that provide an exception to the general rule.

²⁴ [2021] UKPC 14.

[67] This is not a case of a party seeking to re-open an issue which was raised by the parties and determined by the Tribunal - the issue of the illegality of compound interest was never raised by the parties.

[68] The Tribunal queried the position in relation to interest, but principally in relation to the rate at which it could be charged compound interest. It was considered by the experts on the spot and the only concern aired was as to whether interest could be compounded monthly or annually, not whether it could be awarded at all.

[69] There was no consideration by the Tribunal of the applicable legislation, in stark contrast to the position in **Betamax**.

[70] The evidence is that compound interest is unlawful under Thai law; section 224 of the CCC expressly outlaws it and the Thai Supreme Court has held that it is contrary to public order and good morals. The Claimants themselves accept that it is unlawful; there is no dispute as to the legal position in Thailand.

[71] The error was in part induced by the answers given by the Claimants' own expert which misled the Tribunal.

[72] The Applicant only discovered that the legal position had been misstated after the time for challenging the award in Singapore had expired and that time limit could not be extended.

[73] It would be an affront to justice for a party which obtained an award for something it was not entitled to, as a result of an admitted mistake made by the Tribunal which that party itself induced, to be able to rely on that mistake to obtain a judgment for tens of millions of dollars.

[74] The Court should therefore conclude that in the entirely exceptional circumstances of the present case it does have jurisdiction to consider the question of illegality notwithstanding the terms of the Awards and notwithstanding the countervailing pro-enforcement policy in relation to arbitration awards.

[75] Upon being satisfied that the Court has jurisdiction to consider the question of illegality, the Court needs to consider whether illegality, in the circumstances of the present case, outweighs the pro-enforcement policy which pertains in respect of Convention awards, such as the awards here.

[76] The position in relation to illegality is explained in the English Court of Appeal decision of **Soleimany**.²⁵

[77] The position in relation to England is that where an underlying contract, governed by English law or performed in England, is illegal by English domestic law, it will not be enforced.

[78] The position is mirrored in relation to friendly foreign states. If a contract is governed by a foreign law and under that law it is illegal, or performance is illegal under the laws of that country, it will not be enforced in England. This approach reflects the court's attitude towards judicial comity.

[79] The BVI has the same approach to judicial comity as England and Wales.

[80] Here one has a contract governed by the laws of a friendly foreign country, Thailand, where performance is illegal under the laws of Thailand.

²⁵ [1999] QB 785.

[81] There is no additional requirement that the contract should equally be illegal under BVI law or performance should be illegal in the BVI. So, the fact that compound interest is not unlawful in the BVI is not a relevant consideration.

[82] The Tribunal has awarded something that is illegal under the law governing the relevant agreements.

[83] Applying the BVI public policy of judicial comity, the Court should refuse to enforce the compound interest element of the Awards.

3.2 The Respondents' Submissions

[84] The Respondents (the Claimants in these proceedings) argued as follows. This segment merely summarises the Respondents' submissions and contains no findings.

[85] The Respondents' arguments come down to this. The Tribunal found that it is legal under Thai law to recover compound interest. This Court cannot revisit that decision. It is final and must be recognised by this Court. The Court therefore has no entitlement to refuse enforcement of the awards. Even if the Court does have such an entitlement, it should not do so because it must see whether enforcing the award of compound interest offends against BVI public policy and BVI public policy has no problem with compound interest. BVI public policy, on the other hand, leans heavily towards enforcement of New York Convention arbitration awards and this Court should give effect to that policy.

[86] The Respondents argued, by way of introduction, that with regard to the enforcement of the Phase 1 Awards, each of the grounds for set aside relied upon by the Applicant (the 'Set Aside Grounds') can be shown to be misconceived. In particular, the public policy ground ('Public Policy Ground') misunderstands the nature of the objection to enforcement under section 86(3)(b) of the Act that *'it would be contrary to public policy to enforce the*

award'. The reference to '*public policy*' in that subsection is to the public policy of **the BVI** (as the enforcing State), not to the public policy forming part of Thai law as the governing law of the SPAs. Since it is not contrary to the public policy of the BVI for an arbitral tribunal to make an award of compound interest in respect of the late payment of contractual debts, it follows that the award of compound interest under the Phase 1 Awards is wholly unimpeachable for the purposes of section 86(3)(b). This ought to be the case *a fortiori* in circumstances where the parties and the Thai law experts expressly agreed during Phase I of the arbitrations that compound interest is recoverable under the Thai law in the context of the SPAs, after the first year of arrears and provided compounding was on an annual basis.

[87] The Court's general approach to the enforcement of a Convention award was usefully summarised by Justice Jack in a decision of 16th March 2020 in **PT Ventures SGPS SA v. Vidatel Ltd**²⁶ ('**PT Ventures**'), at paragraphs [27], [28], [31] and [32]. Justice Jack relied on the well-known decisions of the Privy Council in **Cukurova Holdings AS v Sonera Holding BV**²⁷ ('**Cukurova**') and **IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp**²⁸ ('**IPCO**').

[88] For present purposes, the relevant principles identified in the relevant passages of Justice Jack's judgment in **PT Ventures** are that:

- (1) The general approach to enforcement of a Convention award should be pro-enforcement, and there must be good reasons for refusing to enforce a Convention award.
- (2) Section 86 provides a comprehensive code as to the circumstances in which enforcement of a Convention award may be refused.
- (3) There is no power to refuse enforcement on the grounds that the arbitral tribunal has made an error of law or fact.

²⁶ BVIHCM 2015/0117 (unreported, delivered 16th March 2020).

²⁷ [2014] UKPC 15.

²⁸ [2017] UKPC 16, [2017] 1 WLR 970.

- (4) Refusal of enforcement of a Convention award on the ground (under section 86(3)(b)) that '*it would be contrary to public policy to enforce the award*' requires consideration of '*BVI public policy*'.
- (5) The public policy ground for refusing to enforce is '*narrowly circumscribed*', '*should be approached with extreme caution*', and must be considered whilst taking account of '*the strong public policy in favour of enforcing arbitral awards*'.

[89] The above approach is consistent with that adopted and reiterated more recently by the Privy Council in **Betamax**,²⁹ where it was emphasised that the public policy exception ('Public Policy Exception') to the enforcement of an arbitral award under the UNCITRAL Model Law (the '**Model Law**') – which forms the basis of the Act in the BVI – is to be very narrowly construed and could not be used as a means of reviewing any decision or finding of an arbitral tribunal as to the facts or the law, including its decision on an issue of contractual or statutory interpretation going to the legality of the underlying contract. Issues as to the legality or illegality of the underlying contract or particular contractual provisions are matters that are solely for the arbitral tribunal to determine, not for a supervisory court or an enforcing court to review under the guise of the Public Policy Exception to enforcement.

[90] The English case law has considered specifically whether and when the illegality of an underlying contract may bring into play the Public Policy Exception to enforcement.

[91] It is useful to start with the Privy Council's latest decision on this issue in **Betamax**:

- (1) first, because it is the latest offering of the highest appellate court in the BVI;

²⁹ [2021] UKPC 14.

- (2) secondly, because the Board was considering arbitration legislation closely modelled on the UNCITRAL Model Law, which also forms the basis of the BVI Arbitration Act; and
- (3) thirdly, because the Board in that case elucidated precisely the relationship between illegality of the underlying contract and the Public Policy Exception, in a manner which is particularly relevant to the present case.

[92] The particular point that the Board emphasised in **Betamax** – and which it is critical to appreciate for present purposes – is that there is a critical distinction between two different situations:

- (1) The first situation is where, on the facts and the law, the tribunal has determined the issue of illegality and determined that there was **no illegality** – in this situation, the enforcing court should **not** seek to reopen the tribunal’s decision on illegality in reliance upon the PP exception – this is because of the fundamental importance of the twin principles of the finality of the award and the separability of the arbitration agreement from the underlying contract (which principles are enshrined in the BVI Arbitration Act, at sections 3, 32 and 71). In particular, section 3(2) provides that:

“This Act is founded on the following principles: (a) ... the parties to a dispute should be free to agree how the dispute should be resolved; (b) the Court shall not interfere in the arbitration of a dispute, save as expressly provided in this Act”;

Section 32(1), (relying on Article 16 of the UNCITRAL Model Law), provides that:

“... an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract”;

and section 71 provides that:

“[u]nless otherwise agreed by the parties, an award made by an arbitral tribunal pursuant to an arbitration agreement is final and

binding both on the parties and any person claiming through or under any of the parties”.

The enforcing court cannot be required to review or re-assess the merits of the tribunal's findings on the facts or the law, including any of its findings on the issue of illegality, under the guise of the Public Policy Exception – because to do so would fail to have regard to the principles of finality of the award and separability of the arbitration agreement.

- (2) The second situation is where the tribunal had considered the issue of illegality and determined that the contract **is illegal**, but has nonetheless gone on to award relief in favour of the claimant (e.g. as in **Soleimany** – where the tribunal had found that the underlying contract was illegal, but nonetheless found in favour of the claimant) – in this situation, the enforcing court can rely on the tribunal's positive finding of illegality to go on to determine whether to enforce the award would be contrary to the public policy of the enforcing court.

[93] The over-arching principle is that the enforcing court has to approach the issue of whether enforcement of the award would be contrary to public policy on the basis of the findings of fact or law made in the award (including any finding as to the legality or illegality of the underlying contract or of particular provisions within the underlying contract) – **not** on the basis of the court's own review or re-assessment of the validity of those findings.

[94] Once this critical distinction is understood, the answer in the present case is very simple. The Tribunal specifically addressed and made findings about the legality and recoverability under Thai law of compound interest under the SPAs; and it **decided, on the basis of the undisputed Thai law evidence before it, that compound interest is legally recoverable (i.e. that compound interest is not illegal under Thai law), as long as the underlying debt has been outstanding for more than a year and compounding is done no more frequently than on an annual basis.**

[95] Pursuant to the principles of finality and separability, this Court cannot go behind those findings when considering the application of the Public Policy Exception under section 86(3). Instead, in the context of section 86(3), the Court has to take the Tribunal's findings that compound interest is recoverable (**i.e. not illegal**) as set out in the First Partial Awards as correct – and only then does it ask itself whether there is anything on the face of the awards that is contrary to the public policy of the BVI.

[96] Approaching the matter in this way, it will be seen that there is simply nothing to engage the Public Policy Exception in this case. In light of the above principles, the Public Policy Ground must necessarily fail.

[97] The Respondents urged that the following considerations are particularly pertinent.

[98] First, the reference to '*public policy*' in section 86(3)(b) of the Act is to the public policy **of the BVI** as the enforcing State.

(1) This is how Justice Jack construed the subsection in **PT Ventures**, at paragraph [31].

(2) Justice Jack's interpretation of '*public policy*' in section 86(3)(b) as meaning '*BVI public policy*' is plainly consistent with and supported by the fact that Article V(2) of the New York Convention – which the Model Law and the Act seek to implement – refers to the '*public policy of that country*', namely '*the country where recognition and enforcement is sought*' – in this case, the BVI.

(3) This interpretation is further supported by the language of Article 36(1)(b) of the Model Law (as set out in Schedule 1 to the Act), which refers to the situation where the recognition or enforcement of the relevant award would be '*contrary to the public policy of this State*', and section 2(4) of the Act, which expressly records that a reference to '*this State*' in the provisions of the Model Law is to be construed as '*the Virgin Islands*'.

[99] Secondly, the consequences of the above meaning of the expression '*public policy*' within section 86(3)(b) are as follows:-

- (1) It matters not that the recovery of compound interest under Clause 12.9 of the SPAs may be illegal as a matter of Thai law, as the Thai law experts have agreed since Phase 2 of the arbitrations. In circumstances where the issue is one of enforcement of the Phase 1 Awards in the BVI, considerations of Thai public policy or illegality are irrelevant.
- (2) So far as considerations of BVI public policy are concerned, an award of compound interest on overdue contractual debts is **not** inherently contrary to BVI public policy, as evidenced, e.g., by (i) the contemplation of a discretionary award of compound interest by an arbitral tribunal under section 77 of the Act, and (ii) the availability of an award of compound interest under the general law, whether in the context of claims in equity or for damages at common law, as noted by the BVI Court of Appeal in **Adamovsky v Malitskiy**.³⁰

[100] Thirdly, quite apart from the importance of the proper interpretation of '*public policy*' as '*BVI public policy*' for the purposes of section 86(3)(b) and the implications of that interpretation as described in paragraphs 38 and 39 above, the Court must also bear in mind the principles recently reiterated by the Privy Council in **Betamax**, as set out in paragraph 36 above. In particular:

- (1) The fundamental principle is that the public policy objection to the enforcement of an arbitral award cannot be used as a means of undermining an arbitral tribunal's decision or finding as to the facts and the law, including a decision as to the validity or legality of a contractual claim (such as a contractual claim for compound interest in respect of the late payment of a contractual debt).

³⁰ BVIHCMAP 2014/0022 (unreported, delivered 3rd February 2017), at [23] and [25] (Michel JA).

- (2) In the present case, the Tribunal expressly considered and acceded to the Claimants' claim for compound interest under Clause 12.9 subject to the qualifications that were agreed between the Thai law experts during Phase 1 of the arbitrations, namely, that compound interest was recoverable under Thai law, provided compounding occurred after the first year of arrears and occurred on a yearly rather than (as stated in Clause 12.9) monthly basis.³¹
- (3) There were clear findings and decisions by the Tribunal as to the extent to which compound interest was recoverable under Thai law. Such findings and decisions – whether right or wrong as a matter of Thai law (the governing law of the SPAs) and even if based on relatively brief evidence from the Thai law experts – are simply not reviewable by the Court under the guise of the public policy objection at the enforcement stage.

[101] Fourthly, it would be all the more surprising if the public policy exception to enforcement could be engaged in circumstances where the parties, through their Thai law experts, had **expressly agreed** (even if as a result of an honest mistake) during Phase 1 of the arbitrations that compound interest was recoverable as found by the Tribunal. In light of that agreement, the Tribunal made the only finding that was open to it during Phase 1 of the arbitrations.

[102] For all of the above reasons, the Claimants submitted that the Public Policy Ground must be dismissed as an objection to the enforceability of the award of compound interest under the First Partial Awards.

3.3 Discussion on Compound Interest Issue

[103] For reasons I shall explain, I broadly accept the Claimants' statement of the English law (and by extension BVI law) in relation to the application of public policy, but I differ from the Claimants in respect of its application.

³¹ At paragraphs 288-290 of the GHJ First Partial Award and paragraphs 209-211 of the JKL First Partial Award.

[104] My analysis comes down to this. The Tribunal found that the agreement to pay compound interest at monthly rests was illegal under its governing law, Thai law. The Tribunal then imposed a fresh obligation on GHL, to pay compound interest at annual rests. That award was also illegal under Thai law, as both sides have accepted. Since the Tribunal has found that the agreement was illegal, that decision is final and to be recognised by this Court. Since the Tribunal made awards which were in direct conflict with Thai public policy, this Court is entitled to refuse enforcement of the awards. The reason the BVI Court can do so is because the BVI Court should have regard to the public policy of a friendly foreign state, because comity is part of the public policy of the BVI. Thailand is a foreign friendly State, to which the BVI extends comity. Whilst BVI public policy has no problem with compound interest, monthly or annual or otherwise, comity indicates that the BVI courts should not enforce an award which is illegal under Thai law. Being thus satisfied that the BVI Court is entitled to refuse enforcement, the Court should, in the exercise of its discretion, refuse enforcement for two main reasons: (a) to protect the integrity of this Court's process from the abuse of allowing it to be used to obtain things which a person is not permitted to obtain; and (b) the Claimants have acknowledged that they are not permitted to recover compound interest under the law which governed their contractual relationship with GHL, Thai law. This Court does not base its entitlement or exercise of discretion on exceptional circumstances, a consideration which it does not consider to be necessary to engage here.

[105] In terms of BVI law, I cannot tell where Justice Jack saw in our Arbitration Act that 'BVI public policy trumps provisions of foreign arbitration law'.³² He did not explain the basis for this conclusion, nor take the reader to the applicable provision of the Act, nor delineate the boundaries of this proposition. It is, moreover, a somewhat general statement which does not expressly take account of the fact that comity is also a principle of BVI public policy.

³² BVIHC 2019/0067 (unreported, delivered 16th March 2020 at paragraph [31] (Jack J)).

[106] For the following reasons, I am of the respectful judgment that this Court can and should decline to enforce the compound interest parts of the GHL and JKL Awards.

[107] By way of a general opening remark, it is fair to say that the English courts have found it by no means easy to resolve the ‘tension between the public interest that the awards of arbitrators should be respected, so that there be an end to lawsuits, and the public interest that illegal contracts should not be enforced’.³³ The 2021 Privy Council decision in **Betamax**³⁴ however sets out the applicable legal principles and, helpfully, also a practical guide how to apply them in practice. This was timely, as the principles had undergone a voluminous and tortuous development, and it was easy to lose oneself in the increasingly towering labyrinth. **Betamax** is binding upon this Court. Whilst it concerned enforcement or otherwise on public policy grounds of an arbitration award in the jurisdiction where it was made (Mauritius), in the context of specific Mauritian statutory provisions, and thus not the enforcement or otherwise of a New York Convention arbitral award in another jurisdiction, it is uncontroversial that the principles elucidated apply equally to this latter case more generally, as the Privy Council in effect recognised.³⁵

[108] Before turning to **Betamax** more particularly, I should first allude to two overarching points.

- (1) In **Westacre Investments Inc. v Jugoimport-SPDR Ltd**, the English High Court recognised that ‘...an English court would decline recognition of a foreign judgment “with extreme reserve”’.³⁶ That must also be the approach of the BVI courts. What I understand this to mean, is that our public policy is extremely heavily weighted in favour of enforcement. Put differently, the public policy exception to enforcement of a judgment or arbitration award should be treated as an extremely rare exception, with enforcement being the general rule. It would also appear to be evident that the public policy exception is not to be treated as an open opportunity

³³ *Soleimany v Soleimany* [1999] QB 785 at 800 E (Waller LJ).

³⁴ [2021] UKPC 14.

³⁵ Cf [2021] UKPC 14 at paragraphs 21 and 36 (Lord Thomas of Cwmgiedd).

³⁶ [1999] QB 740 at 765 A-B (Colman J).

for a judge of the BVI courts to side-step the otherwise final nature of an overseas judgment or award; it is by respecting the finality of arbitral awards that the practice of arbitration as a mode of alternative dispute resolution is recognised and promoted. Thereby, arbitral tribunals are accorded a protected space within which they can decide matters of fact and law within the remit of their jurisdiction. Yet this protected space has limits. The public policy exception exists because, as stated in **Soleimany**, '[t]he court...is concerned to preserve the integrity of its process and to see that it is not abused. The parties cannot override that concern by private agreement'.³⁷ We will look more closely at what this means, in the context of the exercise of the Court's discretion, below.

- (2) The second point concerns comity between nations, which our courts promote. As stated by the English Court of Appeal in **Soleimany**:³⁸

"Finally, under this head, we should state explicitly what may already have been apparent: **when considering illegality of the underlying contract**, we do not confine ourselves to English law. An English court will not enforce a contract governed by English law, or to be performed in England, which is illegal by English domestic law. **Nor will it enforce a contract governed by the law of a foreign friendly state, or which requires performance in such a country, if performance is illegal by the law of that country**". [Emphasis added.].

[109] It is the public policy exception pertaining to illegality with which we are presently concerned.

[110] Whilst I agree with the Claimants/Respondents that this Court must apply BVI public policy, and that BVI public policy has no difficulty with agreements or awards of compound interest, I accept that comity is also a consideration of BVI public policy. I accept that this Court can follow **Soleimany** in refusing to enforce a contract governed by the law of a foreign friendly state, or which requires performance in such a country, if performance is illegal by the law of that country.

³⁷ [1999] QB 785 at 800 (Waller LJ).

³⁸ [1999] QB 785 at p. 803H (Waller LJ).

[111] **Betamax** settled the thitherto vexed question of when a court cannot and can refuse to enforce an arbitral award on the public policy grounds of illegality.

[112] At paragraph 39 of the Privy Council's decision, the Board stated:

"It has not been questioned that it is for the court to determine the nature and extent of the public policy of the state; and that, if an arbitral tribunal decides that an agreement is illegal, but makes an award which enforces the agreement, the court is entitled to set aside the award ...as conflicting with public policy. That was the actual position in *Soleimany* [1999] QB 785." [Emphasis added.]

[113] Moreover, the Board recounted at paragraph 40:³⁹

"In rejecting the challenge to enforcement, Hamblen LJ, in giving the judgment of the Court of Appeal [*RBRG Trading (UK) Ltd v Sinocore International Co Ltd* [2019] 1 All ER (Comm) 810], expressed the court's view at para 25(2):

"Where the arbitration tribunal has jurisdiction to determine the relevant issue of illegality and has determined that there was no illegality on the facts the English court should not allow the facts to be reopened, save possibly in exceptional circumstances."

In considering whether and, if so, to what extent public policy was engaged, the Court of Appeal said that **the degree of connection between the claim sought to be enforced and the relevant illegality would be important.** On the facts of the case, the connection between the seller's fraud in presenting forged bills of lading and the enforcement of the award in favour of them was not sufficient to engage public policy or, if public policy was engaged, to justify refusal of enforcement. **The court would not go behind the findings of the arbitral tribunal.**" [Emphasis added.]

[114] The Privy Council at paragraph 49 stated:

"In relation to the issue of whether the award conflicts with public policy, the court's intervention proceeds on the court's application of public policy **to the findings (whether of fact or law) made in the award.**" [Emphasis added.]

[115] Also in the same paragraph:

"The question for the court under [the applicable enforcement statutory provision] is **whether, on the findings of law and fact made in the**

³⁹ [2021] UKPC 14 at paragraph 40.

award, there is any conflict between the award and public policy.”
[Emphasis added.]

[116] Moreover in the same paragraph:

“The effect of [the applicable enforcement statutory provision] is simply to reserve to the court this **limited supervisory role which requires the court to respect the finality of the award**. It cannot, under the guise of public policy, reopen issues relating to the meaning and effect of the contract or whether it complies with a regulatory or legislative scheme.”
[Emphasis added.]

[117] At paragraph 50, the Privy Council observed:

“This conclusion accords entirely with the actual decisions in the four cases which are considered in this judgment. In one (*Soleimany* [1999] QB 785), **the illegality of the contract was made clear in the award; the court therefore was entitled to determine that enforcement should be refused on public policy grounds**. In the other three cases, the arbitral tribunal had determined in the award that there was no illegality; the court did not overturn those determinations.” [Emphasis added.]

[118] At paragraph 52 the Board stated:

“There may be unusual circumstances where different considerations may apply. More likely, as appears from the decided cases and observations made in them, are cases where the arbitral tribunal has expressly considered issues which have required the arbitral tribunal to inquire into circumstances suggesting illegality and set out their reasons for holding as a matter of fact and of law that there was no illegality. In cases of that kind, the arbitral tribunal’s decision on fact and on law is a decision for the arbitral tribunal, if within its jurisdiction; **if it holds that the contract is not illegal, then that decision will be final**, in the absence of fraud, a breach of natural or any other vitiating factor. **There may be some exceptional cases**, where the court under the Model Law provision may be entitled to review the decision on legality, but it is not easy to think of such a case arising in practice. [Emphasis added.]

[119] In **Betamax**, the Board applied these principles and found that because the arbitration tribunal there had held that there was no illegality in respect of the contract in dispute, that decision was final and could not be set aside by the Mauritian Supreme Court.⁴⁰

[120] I now turn to the application of these principles to the present facts.

⁴⁰ [2021] UKPC 14 at paragraph 53.

[121] First, this Court needs to determine whether it is ‘entitled’ to refuse enforcement on public policy grounds. Whether, in the Court’s discretion, it should then do so is a separate question.

[122] In relation to entitlement, the first question the Court has to ask is: **‘Did the arbitral tribunal decide that an agreement is illegal, but make an award which enforces the agreement?’**

[123] If the answer is ‘yes’, then the court is entitled to set aside the award as conflicting with public policy.

[124] If the answer is ‘no’ (i.e., that the contract is not illegal), then that decision will be final and the Court is not entitled to set it aside, absent exceptional circumstances.

[125] The Claimants answered this question with ‘no’. The Claimant’s learned Counsel submitted that:

“the Court has to take the Tribunal’s findings that compound interest is recoverable (i.e. not illegal) as set out in the First Partial Awards as correct... .”

[126] It can be seen from this that the Claimants submitted that the Tribunal made a finding that under Thai law the recovery of compound interest is not illegal.

[127] If this submission is correct, this would mean that the awards presently under consideration would fall into the category of awards that this Court is not entitled to refuse enforcement of, absent exceptional circumstances.

[128] In my respectful judgment, there are two plain flaws in this submission:

- (1) The first is a conceptual flaw. The Claimants seek to have the Court focus upon whether the Tribunal held **compound interest** to be legal, but that is the wrong target. As is made clear in paragraphs 50 and 52 of **Betamax**, the Court has to focus upon whether the Tribunal found **the agreement** between the parties to be legal or illegal. The question is

whether, in the words used in **Betamax**, ‘**the illegality of the contract was made clear in the award**’.⁴¹

- (2) The second is a factual flaw, which flows from the enquiry whether the illegality of the contract was ‘made clear’⁴² in the award. The GHL and JKL Awards show that **the Tribunal found that the agreement as to compound interest in the SPAs was illegal.**

[129] The nub of the Tribunal’s determination on the compound interest aspect of the SPAs was to be found at paragraph 289 of the GHL Award:

“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.”

[130] The footnote reference 197 is a reference to the transcript of that part of the expert witness conferencing session on 10th February 2017 (at pages 981:7 to 982:19), wherein both sides’ Thai law experts explained to the Tribunal that compound interest at monthly rests would be ‘void’.

[131] The Tribunal made the same pronouncement, and same reference to the transcript, at paragraph 210 in the JKL Award.

[132] It can immediately be seen that the Tribunal found that the material compound interest provisions in the SPAs purported to do two things which they were not permitted to do under Thai law. They purported to:

- (1) provide for the immediate accrual of compound interest (this is not permitted since, on the Tribunal’s understanding, there would first have to be a year worth of arrears); and
- (2) provide for interest to be compounded on a monthly basis.

⁴¹ Cf [2021] UKPC 14 at paragraph 50.

⁴² Cf [2021] UKPC 14 at paragraph 50.

[133] The Tribunal ruled that the agreement between the parties for interest to be compounded with monthly rests was impermissible under Thai law. The Tribunal did not rule that that agreement was ‘not illegal’.⁴³ The Awards materially show that the Tribunal treated the agreement in the SPAs that compound interest would accrue on a monthly basis as illegal.

[134] The Claimants did not take the Court down to that level of particularity in the Awards, of looking to see whether the Tribunal had ruled the underlying agreement to be illegal or not illegal. But that is precisely the degree of scrutiny which the Privy Council in **Betamax** mandated at paragraphs 49, 50 and 52. Once one does so, the Claimant’s case is unsustainable.

[135] Although the Tribunal did not go on to enforce the parties’ agreement anyway (as e.g. in **Soleimany**), it imposed a new obligation in different terms upon the parties, which happened to be equally objectionable under Thai law, and equally contrary to Thai public morals. What we have here is the Tribunal **first** treating the material provisions of the SPAs as impermissible under Thai law, and **then** imposing a fresh obligation upon the paying party; an obligation which the parties had not directly agreed upon, had not advocated for, but which was also illegal and contrary to Thai public morals.

[136] There is moreover a high, and indeed intimate, degree of connection between the claim sought to be enforced and the relevant illegality.⁴⁴ That is because the awards themselves, which the Tribunal purported to make applying the substantive provisions of Thai law (such as they understood them to be), awarded something which was illegal and contrary to Thai public morals (upon the evidence of Thai law experts before this Court). This is radically different, for example, from a case such as **RBRG Trading (UK) Ltd v Sinocore International Co Ltd**,⁴⁵ where the illegality sought to be relied upon to resist enforcement in England of a CIETAC arbitration award, made under Chinese law in China, was the forgery of bills of lading. The tribunal there found that the

⁴³ Cf [2021] UKPC 14 at paragraph 52.

⁴⁴ Cf [2021] UKPC 14 at paragraph 40.

⁴⁵ [2019] 1 All ER (Comm) 810.

forgery had not deceived the contractual counterparty and it awarded damages on other grounds. On a set aside application before the English High Court, the latter held that the award had not been tainted by the fraud. The English Court of Appeal dismissed the ensuing appeal, holding that at most this had been an attempt at fraud, not an actual fraud that had caused loss. In short, there was insufficient connection between the illegality and the award.

[137] The Court is thus entitled to set aside enforcement of the awards, as conflicting with public policy.⁴⁶

[138] The next question therefore is whether the Court should refuse enforcement of the awards in the exercise of its discretion.

[139] The starting point in the exercise of the Court's discretion is that the BVI Court will, in principle, not enforce an agreement governed by the law of a foreign friendly state, or which requires performance in such a country, if performance is illegal by the law of that country.⁴⁷ Thailand is a friendly foreign state and the agreement in issue was governed by Thai law.

[140] A factor to be taken into account here is that all parties have accepted that it had not been open to the Tribunal to impose that new obligation, as it was, on the evidence, illegal under Thai law and contrary to Thai public morals. It is also no longer possible for the error to be corrected under the law governing the Arbitrations, Singapore law.

[141] Another consideration is that this 'court...is concerned to preserve the integrity of its process and to see that it is not abused.'⁴⁸

[142] It warrants pausing here to consider what this means. In **Soleimany**⁴⁹ the English Court of Appeal postulated that '[t]he English court would not recognize an agreement between the highwaymen to arbitrate their differences any more

⁴⁶ Cf [2021] UKPC 14 at paragraph 49.

⁴⁷ *Soleimany v Soleimany* [1999] QB 785 at p. 803H (Waller LJ).

⁴⁸ *Soleimany v Soleimany* [1999] QB 785 at page 800 B-C (Waller LJ).

⁴⁹ *Soleimany v Soleimany* [1999] QB 785 at page 797 F-G (Waller LJ).

than it would recognize the original agreement to split the proceeds'. This begs the question (which was not answered in **Soleimany**), precisely why or how recognizing such agreements would harm the integrity of the court's process. Quite simply, it is because the courts are not to be used to obtain things that the law does not permit a person to obtain.

[143] With the deliberately stark example of an agreement between hypothetical highwaymen to divide the spoils of robbery, this is rather obvious. But it also holds good for more nuanced situations. An illustration may be afforded by the facts⁵⁰ of **David Taylor & Son Ltd. v Barnett Trading Co.**⁵¹ There, the defendant entered into an agreement with the plaintiff to supply the latter with Irish steak at a certain price. That price exceeded the sums permitted under price control legislation then in force in the United Kingdom. The defendant did not deliver. The plaintiff claimed damages for non-delivery in arbitration. The arbitrators awarded damages. The English Court of Appeal set aside the award as it had been based upon an illegal contract. For present purposes, it can be seen first of all that there was nothing illegal about selling Irish steak *per se*. The illegality concerned the impermissibly high sale price. It can be seen that the English court did not make its processes available to enable the plaintiff to recover damages for non-delivery of illegal merchandise. As with Irish steak in the United Kingdom in the 1950's, there is no blanket ban on compound interest under Thai law – Thai law allows compound interest up to a point but prohibits it in other circumstances.

[144] In the present case, I approach the matter of protecting this Court's process in this way. My starting point is that BVI public policy is neutral about the application of compound interest. BVI public policy sees nothing in compound interest that the BVI's population, including its corporate 'population', should be protected from. But, as we have seen, comity requires the BVI courts to have regard to whether a foreign law treats agreements that it governs as illegal. Here, the evidence is that Thai law, for reasons that we do not need to know

⁵⁰ NB: the legal analysis involved different issues and protection of the court's process from abuse was not a stated reason for the decision.

⁵¹ [1953] 1 WLR 562.

nor evaluate, seeks to protect those who are subject to it from compound interest, save in narrowly delineated circumstances.

[145] It can thus be seen that this Court should not be used by the Claimants to obtain payment of compound interest which Thai law does not permit a person to obtain.

[146] The Court must be vigilant to protect its processes from being abused in such a way. This should incline the Court away from enforcing an award that is illegal under applicable foreign law.

[147] What, in my respectful judgment, tilts the balance firmly down on the side of setting aside the Enforcement Order in this case, is the fact that both sides have accepted that the Tribunal's award of interest at a rate of 15% compounded annually is illegal under Thai law and contrary to Thai public morals. The Claimants, nonetheless, and inconsistently with its acceptance of that position, are seeking to obtain through the process of this Court something which the law governing their contractual relationship with the Applicant does not permit them to have. The Court should not allow its processes to be used to that end.

[148] For these reasons I conclude that the awards in relation to compound interest should not be enforced. The Enforcement Order, in so far as relating to the enforcement of awards of compound interest, should be set aside.

[149] I should stress that the Court reaches this decision purely through the application of public policy and in order to protect the integrity of its process from abuse. Considerations of justice and fairness as between the parties, including the application of the Overriding Objective in CPR 1.1, are not, in my respectful judgment, relevant to this exercise of discretion. If, contrary to this, they are relevant, then, as I have already explained above, the interplay at various levels of the justice and fairness of the case is so complicated that there is no single right or wrong answer. Various positions in that regard are

defensible, such that I do not take considerations of justice and fairness between the parties to be determinative here.

[150] I should also add that I do not accept the Applicant's submission that the Claimants, through their expert, contributed in part to the Tribunal's error. It is clear to me that no such responsibility or fault is to be attributed to either of the parties in this regard. The error came about because the procedure adopted by the Tribunal favoured an instant answer from foreign law experts, without sufficient advance notice or opportunity to prepare properly, nor indeed to check back and confirm the views expressed later, on a niche area of law which had not been put in issue by the parties themselves. Any legal practitioner, however senior, could have misspoken in such circumstances. It bears saying that certainly this Court thinks no less of Mr. EP and Prof. ES as a result.

[151] 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

