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Can a Tribunal Deviate from the Governing Law in Its Award of Interest? A BVI Court Says No

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As most other arbitration laws, section 86(3)(b) of the British Virgin Islands ("BVI") Arbitration Act 2013 provides that enforcement of arbitration awards may be refused where "it would be contrary to public policy to enforce the award." This provision mirrors Article V(2)(b) of the New York Convention 1958 and section 103(3) of the English Arbitration Act 1996.

It is notoriously difficult to satisfy this standard. This is particularly so in common law countries, with English courts limiting it to cases in which there is some element of illegality or where the enforcement of the award would be clearly injurious to the public good,[1)] and US courts to situations where enforcement would violate the forum state's most basic notions of morality and justice.[2)]

Does this high standard extend to the award of a compound interest where such interest is illegal under the governing law? A recent decision of the judge Gerhard Wallbank of the BVI High Court of Justice ("Court") confirms that it does (*see AB Limited et al v GH Limited*, Claim No. BVIHCM 2021/0192, judgment dated 27 January 2023 ("*AB Limited v. GH Limited*")).

Background

Three claimants ("Claimants"), initiated two sets of Singapore seated arbitration proceedings under the ICC Arbitration Rules against two respondents ("Respondents"). These proceedings arose under two share purchase agreements, governed by Thai law. The cases were heard together by the same tribunal, comprising of three arbitrators ("Tribunal"). None of the arbitrators were Thai lawyers. The Tribunal decided to bifurcate the proceedings into two phases.

The agreements obliged the defaulting party to pay interest of 15% per year, compounded monthly. As the parties later found out, this provision was illegal under Thai law. While the parties did not discuss the issue of legality during the arbitration, the Tribunal addressed it in passing during the cross-examination of their experts on Thai law. The experts erroneously confirmed that award of such interest was legal if it was compounded on a yearly basis.

On 22 September 2017, the Claimants prevailed in the first phase of proceedings. In its awards, the Tribunal ordered the Respondents to pay 15% compound interest ("Phase 1 Awards"). The

Tribunal did not record whether it had considered the relevant Thai legislation, and did not refer to any legal authorities.

In the second phase of the proceedings, Thai law experts reversed their position. The experts said that they made their earlier comments "on the spot" and without having an opportunity to properly consider this issue. They submitted that Thai law prohibited any award of the compound interest except in cases of loan agreements. The parties shared this view, with the Claimants later requesting the Tribunal to substitute compound interest by simple one. Notwithstanding this, by an apparent oversight, the Tribunal awarded compound interest in the second phase of the proceedings ("Phase 2 Awards").

The Respondents subsequently challenged the Phase 2 Awards in the Singapore High Court and were successful in having part of the Phase 2 Awards, including in relation to compound interest, set aside. However, the Phase 1 Awards were not set aside.

The BVI enforcement proceedings

On 1 November 2021, the Claimants applied to enforce the Phase 1 Awards in the BVI. On 29 November 2021, the Court enforced these awards after holding an *ex parte* hearing. On 20 January 2022, GH Limited, one of the Respondents, applied to set aside the Court's enforcement order. It argued that such enforcement offended public policy, particularly where all parties accepted that the Tribunal awarded compound interest in error and contrary to the governing law.

In its 27 January 2023 decision, the Court decided that it was entitled to refuse enforcement of the Phase 1 Awards to the extent that they contradicted Thai public policy. It based its decision on the principle of comity, which is a part of the public policy of the BVI. The Court explained that this principle obliged it to consider the public policy of a friendly foreign State, such as Thailand.

The Court also dismissed the Claimants' argument that BVI public policy trumped provisions of foreign arbitration law. It referred to English courts' decisions in *Westacre v. Jugoimport* and *Soleimany*, which confirmed that the courts should not confine themselves to their national law when considering the illegality of the contract where its performance is illegal under the law of friendly foreign State.

As a result, the Court partially set aside its prior enforcement order in relation to the enforcement of awards of compound interest. In its subsequent judgment dated 13 March 2023, it further amended the enforcement order to substitute the award of compound interest by simple one.

Analysis

It is extremely rare for a BVI or an English court to refuse enforcement of an arbitration award based on the ground of public policy. In *Westacre v. Jugoimport*, the English High Court famously ruled that "outside the field of such universally-condemned international activities as terrorism, drug-trafficking, prostitution and paedophilia, it is difficult to see why anything short of corruption or fraud in international commerce should invite the attention of English public policy" (at 26). Recently, the Privy Council has confirmed this approach in *Betamax v. State Trading Company*. In

Betamex, the Privy Council refused to reopen and reconsider tribunal's findings on alleged illegality of the contract because it could not "go behind" the tribunal's decision in this regard.

Nevertheless, the decision in *AB Limited et al v GH Limited* is consistent with existing case law, including the English High Court's decision in *Soleimany v Soleimany*, where the arbitration dispute arose out of the exportation activities that later turned to be illegal. In that decision, the High Court similarly referred to public policy to justify its refusal to enforce an award arising out of contract that was illegal under the law of a friendly State.

Conclusion

The Court's decision in *AB Limited et al v GH Limited* arose out of an unusual situation, in which the Tribunal made an award against clear principles of the governing law, and contrary to positions of the parties' Thai law experts and the parties themselves. Nevertheless, it clarifies how BVI courts or courts of other common law jurisdictions would approach wrongful application of the applicable law in arbitration awards.

The Court's narrow and targeted approach to the refusal of enforcement of the awards and its subsequent decision to substitute the compound interest rate by a simple one confirms the long established arbitration-friendly reputation of the BVI courts.

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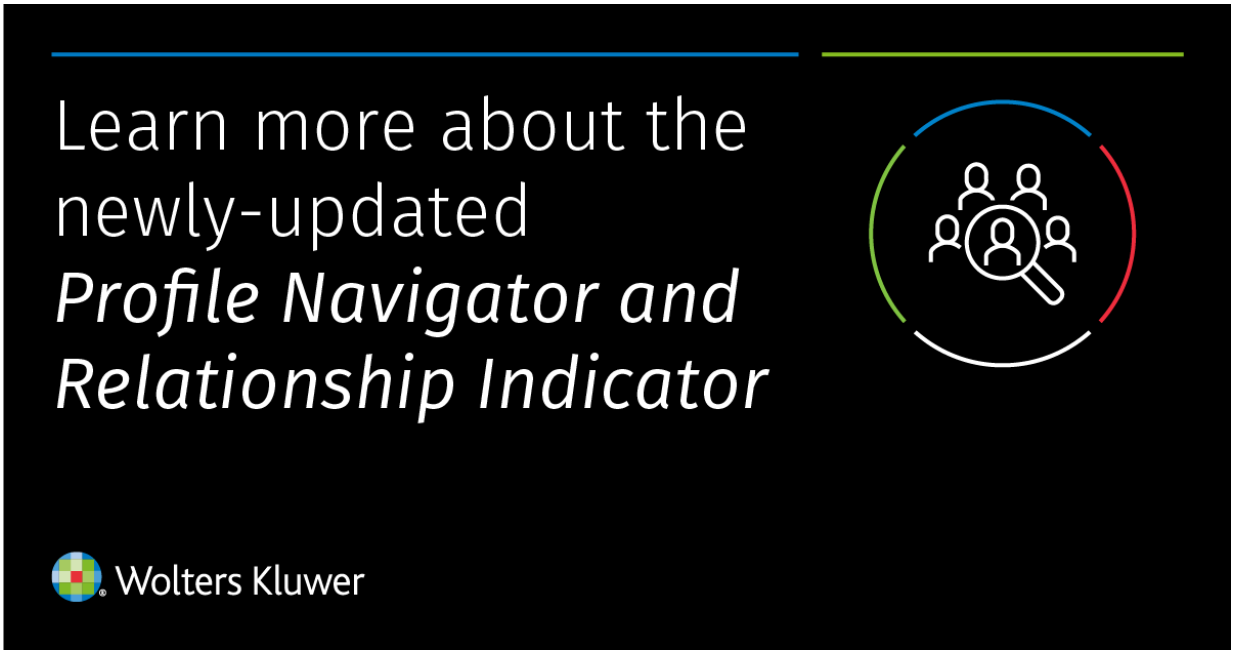

References

?1 *Deutsche Schachtbau-und Tiefbohrgesellscaft mbh v. Ras Al Khaimah National Oil Company* [1987] 2 Lloyd's Rep. 246 at 254.

?2 *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier RAKTA and Bank of America* 508 F. 2d 969 (2nd Cir., 1974).

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