



DREW & NAPIER

**Court of Appeal
Upholds Relief
Fashioned by
Arbitral Tribunal**

*Bloomberry Resorts and
Hotels Inc and another v
Global Gaming Philippines
LLC and another [2021] SGCA
94*

12 October 2021

**LEGAL
UPDATE**

In this Update

In *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] SGCA 94, the Court of Appeal held that a relief fashioned by the arbitral tribunal, which required the appellants to direct their controlling shareholder to facilitate a sale of the respondents' shares, was a pragmatic solution to the realities of the situation and could not be faulted.

Cavinder Bull SC, Director Kong Man Er and Associate Melody Lau successfully represented the respondents, Global Gaming Philippines LLC and GGAM Netherlands BV, as instructed counsel in the hearings before the Singapore Court of Appeal and the High Court.

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INTRODUCTION

Following its finding that Bloomberry Resorts and Hotels Inc and Sureste Properties Inc (collectively, “**Bloomberry**”) were liable to Global Gaming Philippines LLC and GGAM Netherlands BV (collectively, “**GGAM**”) for wrongful termination of a Management Services Agreement (“**MSA**”), the three-member arbitral tribunal (“**Tribunal**”) issued a Remedies Award ordering, *inter alia*, that Bloomberry pay GGAM more than PHP 10 billion (about US\$200 million) in exchange for GGAM’s shares in Bloomberry’s parent company (“**Shares**”).

The Tribunal also fashioned a relief entitling GGAM to sell the Shares on the market and requiring Bloomberry to direct Bloomberry’s controlling shareholder (“**PMHI**”) to undertake steps to facilitate the sale of the Shares, should Bloomberry fail to pay for and take over the Shares from GGAM (“**Relief**”).

Bloomberry applied to set aside the Remedies Award. Bloomberry argued that the grant of the Relief went beyond the scope of submission to arbitration. The High Court rejected Bloomberry’s arguments and the Court of Appeal upheld the High Court’s decision. The Court of Appeal held that the Relief was a pragmatic solution to the realities of the situation, was aimed at facilitating the sale of the Shares, and could not be faulted.

Cavinder Bull SC, Director Kong Man Er, and Associate Melody Lau successfully represented GGAM in this appeal.

BACKGROUND

On 9 September 2011, parties entered into the MSA pursuant to which GGAM was to manage the development and operation of the Solaire Resort and Casino in Manila, Philippines. GGAM was granted the option to purchase up to 10% of the shares in Bloomberry Resorts Corporation. Shortly thereafter, GGAM exercised the option and purchased the Shares.

Subsequently, Bloomberry terminated the MSA and GGAM commenced arbitration proceedings against Bloomberry for wrongful termination of the MSA.

In its partial award dated 20 September 2016 (“**Liability Award**”), the Tribunal found that Bloomberry were liable to GGAM for wrongful termination of the MSA. Bloomberry’s efforts to have the Liability Award set aside were rejected by the Singapore Court of Appeal in [2021] 1 SLR 1045.

Meanwhile, on 27 September 2019, the Tribunal issued a Remedies Award ordering Bloomberry to pay GGAM:

- (a) USD85.2m as damages for lost management fees;
- (b) USD391,224 as damages for pre-termination fees and expenses;

- (c) USD14,998.052 as costs; and
- (d) interest.

As Bloomberg had interfered with GGAM's attempts to sell the Shares after the MSA was terminated, the Tribunal ordered Bloomberg to pay the full value of the Shares based on their value as of 9 December 2014 (assessed to be approximately USD200m) in exchange for GGAM's transfer of the Shares to Bloomberg within 30 days. The Tribunal also fashioned the Relief such that if Bloomberg failed to make payment to GGAM in exchange for the Shares, GGAM would be entitled to sell the Shares on the market and Bloomberg were to direct PMHI to undertake steps to facilitate the sale of the Shares.

Bloomberg applied to the Singapore High Court to set aside the Remedies Award, and alternatively, to resist its enforcement. Bloomberg alleged that:

- (a) the Remedies Award dealt with matters beyond the scope of submission to Arbitration;
- (b) there was a breach of natural justice in the making of the Remedies Award and the Tribunal had denied Bloomberg an opportunity to present its case; and
- (c) the enforcement of the Remedies Award would be contrary to the public policy of Singapore.

The High Court dismissed Bloomberg's application. Dissatisfied, Bloomberg appealed against the High Court's decision.

THE COURT OF APPEAL'S DECISION

The Court of Appeal dismissed Bloomberg's appeal.

The Court of Appeal found that the issue of Bloomberg's interference with the Shares was within the scope of submission to the Arbitration for the following reasons:

- (a) The arbitration clause was broad enough to cover the dispute regarding the Shares as it covered any dispute that "arises out of or is related to" the MSA, and the Shares were acquired pursuant to a right given to GGAM under the MSA.
- (b) Bloomberg did not object to the Tribunal's jurisdiction in respect of the issue of the Shares when the Tribunal was constituted up to the point of the Liability Award, and in fact actively submitted to it.

The Court of Appeal also rejected Bloomberg's argument that the Relief affected the rights of a third party for three reasons:

- (a) the Tribunal had found that PMHI was Bloomberg's agent;

- (b) in any event, the Tribunal did not make any orders that purport to bind PMHI; and
- (c) the Tribunal's orders did not affect PMHI's rights.

As regards Bloomberry's jurisdictional objection on the ground that the Tribunal had purportedly, and impermissibly, sought to enforce its own orders through the imposition of the Relief, the Court of Appeal noted that s 12 of the International Arbitration Act does not confer upon arbitral tribunals the power to grant *all the reliefs* that the High Court can grant and that an arbitral tribunal's power to grant a remedy or relief does not include the High Court's coercive powers of enforcement. The Court of Appeal noted that if the Tribunal had in fact made an award of damages for the appellants' failure to comply with the Tribunal's orders, this would be beyond the pale. It was important to appreciate how the Tribunal arrived at its decision to impose the Relief and to view the Tribunal's reasoning in context.

The Court of Appeal found that the Relief was a compensatory remedy. The Court of Appeal observed that the Tribunal's reasoning demonstrated a clear compensatory methodology employed in awarding damages to GGAM for their losses arising from Bloomberry's interference with the Shares. The Tribunal was not seeking to mandate enforcement of its prior orders. Viewed holistically, the Constructive Remedy was a pragmatic solution to the realities of the situation. Much like a court does, the Tribunal fashioned a remedy *in light of all the circumstances*. It cannot be faulted for doing so.

KEYPOINT

Much like a court does, the arbitral tribunal fashioned a remedy in light of all the circumstances. It cannot be faulted for doing so.

The Court of Appeal rejected Bloomberry's argument that the Relief had deprived Bloomberry of their passive remedy to resist enforcement of the Tribunal's Remedies Award and Bloomberry's argument that the Relief was punitive.

Bloomberry's allegation of breach of natural justice was also rejected by the Court of Appeal. The Court of Appeal held that Bloomberry had adequate opportunity to present their case. The Court of Appeal further held that the Tribunal's decision not to consider evidence relating to alleged fraud and/or corruption only in so far as the evidence related to the issue of liability was entirely unimpeachable as a matter of law. Once an arbitral tribunal has issued an award (be it an interim, interlocutory, partial or final award), the arbitral tribunal is *functus officio* in relation to the specific issues dealt with by the award and its jurisdiction to *substantively* review its award is extinguished once that award is rendered. Additionally, the Court of Appeal

held that there was no evidence to support Bloomberry's allegation that GGAM and their counsel in the Arbitration had unlawfully concealed documents.

Bloomberry's argument that the enforcement of the Remedies Award would be contrary to the public policy of Singapore was also rejected by the Court of Appeal. Bloomberry claimed that in so far as the portion of the Remedies Award granting US\$85.2m in damages to GGAM for lost management fees was interpreted by the Judge as a net or post-tax figure, compliance with the Remedies Award would be contrary to the Tribunal's decision and would require Bloomberry to violate Philippine tax laws because Bloomberry must, as the withholding agent under Philippine law, pay 30% of the monetary damages award to the Philippine Bureau of Internal Revenue. The Court of Appeal held that this argument was a non-starter because nothing in the Remedies Award prevents Bloomberry from performing their alleged duties as withholding agents and paying any taxes due on the award sums.

COMMENTARY

The Court of Appeal's decision recognises that arbitral tribunals have broad remedial powers to fashion practical remedies in each case. The Court will carefully consider the arbitral tribunal's reasoning and the true purpose of the remedy granted by the arbitral tribunal, in determining whether the arbitral tribunal is impermissibly seeking to enforce its own orders, or whether the arbitral tribunal is merely deciding how best to implement a compensatory award of damages.

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If you have any questions or comments on this article, please contact:



Cavinder Bull, SC
Chief Executive Officer

T: +65 6531 2416

E: cavinder.bull@drewnapier.com



Kong Man Er
Director, Dispute Resolution

T: +65 6531 2224

E: maner.kong@drewnapier.com

Drew & Napier LLC
10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315

www.drewnapier.com

T : +65 6535 0733

T : +65 9726 0573 (After Hours)

F : +65 6535 4906

 **DREW & NAPIER**