

Strict Time Limit For Applications To Set Aside

Arbitration Awards

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

9

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LEGAL UPDATE

In this Update

In *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] SGCA 9, the Court of Appeal held that the three-month time limit in Art 34(3) of the UNCITRAL Model Law on International Commercial Arbitration for setting aside an arbitral award is strict and cannot be extended even in cases of fraud.

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

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INTRODUCTION

In the recent decision of *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] SGCA 9, the Court of Appeal upheld the High Court's decision to dismiss an application by Bloomberry Resorts and Hotels Inc and Sureste Properties Inc (collectively, "**Bloomberry**") to set aside and resist enforcement of a Partial Award on Liability ("**Liability Award**") issued by a three member tribunal in favour of Global Gaming Philippines LLC and GGAM Netherlands BV (collectively, "**GGAM**").

The Court of Appeal rejected Bloomberry's allegations that the making of the Liability Award was induced or affected by fraud.

The Court of Appeal further held that Bloomberry was, in any event, not entitled to an extension of time to apply to set aside the Liability Award as the time limit in Art 34(3) of the UNCITRAL Model Law on International Commercial Arbitration ("**Model Law**"), as set out in the First Schedule of the International Arbitration Act ("**IAA**"), is absolute and cannot be extended even in cases of fraud.

Cavinder Bull SC, Director Kong Man Er and Associates Ong Chee Yeow and **Melody Lau** successfully represented GGAM in this appeal and the hearing before the High Court.

BACKGROUND

The dispute between the parties arose out of a Management Services Agreement pursuant to which GGAM was to manage the development and operation of the Solaire Resort and Casino in Manila, Philippines. The arbitral tribunal held, in the Liability Award, that Bloomberry was liable to GGAM for wrongful termination of the Management Services Agreement.

The Liability Award was dated 20 September 2016. More than one year after the Liability Award was issued, and after the three-month time limit in Art 34(3) of the Model Law for setting aside the Liability Award had expired, Bloomberry applied to the Singapore High Court to set aside and resist enforcement of the Liability Award.

Bloomberry alleged that there was evidence of fraud and/or corruption that was not discoverable until months after the Liability Award was issued. Bloomberry argued that a 17 January 2017 Non-Prosecution Agreement ("**DOJ Agreement**") between the US Department of Justice and Las Vegas Sands Corp ("**LVS**") and a 7 April 2016 Order by the US Securities and Exchange Commission instituting cease-and-desist proceedings against LVS ("**SEC Order**") constituted cogent evidence that the Liability Award had been "induced or affected by fraud" within the meaning of section 24 of the IAA. In particular, Bloomberry alleged that the DOJ Agreement and SEC Order (collectively referred to as "**FCPA Findings**") revealed that GGAM

had concealed: (a) fraudulent actions of two of GGAM's principals when they were in the employ of LVS; and (b) the investigations undertaken by the US authorities. Bloomberry claimed that if Bloomberry and the arbitral tribunal had known of the FCPA Findings, the arbitration would have proceeded on a totally different basis and resulted in a materially different outcome.

Bloomberry contended that the time limit stipulated in Art 34(3) of the Model Law for applications to set aside arbitral awards can be extended in circumstances where there has been fraud or corruption, particularly where this is discovered only after the expiry of the time limit. In any event, Bloomberry contended that even if the time limit in Art 34(3) of the Model Law is absolute, section 24 of the IAA constitutes a separate regime for setting aside, and is not subject to the time limit prescribed in Art 34(3) of the Model Law.

THE HIGH COURT'S DECISION

The High Court dismissed Bloomberry's application to set aside the Liability Award on the basis that it had been brought out of time, and that the three-month time limit in Art 34(3) of the Model Law cannot be extended even in cases of fraud.

As regards Bloomberry's application to resist enforcement of the Liability Award, the High Court granted an extension of time for Bloomberry to make this application but ultimately dismissed the application on its merits. The High Court held that Bloomberry's allegations of perjury and concealment of documents were not made out. The High Court also held that, in any event, the FCPA Findings did not constitute material information that would substantially impact the making of the Liability Award or information so material that the earlier discovery of it would have prompted the arbitral tribunal to rule in favour of Bloomberry. The High Court held that, on a balance of probabilities, the FCPA Findings did not prove that GGAM's principals had bribed government officials and state-owned entities while they were with LVS. There were also insufficient factual similarities between the operations in LVS and those of the Solaire Casino.

THE COURT OF APPEAL'S DECISION

On the substantive merits of Bloomberry's case, the Court of Appeal held that allegations of fraud have to be supported by strong evidence and that there must be a causative link between any concealment aimed at deceiving the arbitral tribunal and the decision in favour of the concealing party. The Court of Appeal rejected Bloomberry's proposition that an award can be "tainted" by fraud when fraud was neither an issue in the arbitration nor involved in an external manner in the procurement of the award (eg by bribery of a witness to give false evidence). To satisfy section 24 of the IAA,

the party challenging the award on grounds of fraud must show a connection between the alleged fraud and the making of the arbitral award.

The Court of Appeal upheld the decision of the High Court Judge that the Liability Award was not induced or affected by fraud:

- (a) The Court of Appeal rejected Bloomberry's argument that the Liability Award was affected by fraud because GGAM had not informed Bloomberry or the arbitral tribunal that two of GGAM's principals were involved in the investigations carried out by the US authorities into LVS. The Court of Appeal held that GGAM was not obliged to inform Bloomberry or the arbitral tribunal of this, considering that the arbitration involved entirely different companies and no allegation had been made by Bloomberry in the arbitration that GGAM or its principals had, in relation to the Solaire Casino, been involved in the type of conduct that the US authorities were investigating.
- (b) The Court of Appeal also rejected Bloomberry's argument that the Liability Award was affected by fraud because there were *prima facie* inconsistencies between statements that GGAM's Mr William P. Weidner had made to Bloomberry's representatives in August 2012 (prior to the parties' entry into the Management Services Agreement) ("**2012 Statements**") and the FCPA Findings. The Court of Appeal agreed with the High Court Judge's finding that the FCPA Findings did not prove that GGAM's principals had bribed Chinese government officials and state-owned entities while they were with LVS. Further, the Court of Appeal held that whatever weight may be given to the FCPA Findings, they do not in any way hint, much less show, bribery by GGAM or the GGAM principals at the Solaire Casino. Additionally, the Court of Appeal held that the fact that the 2012 Statements were made outside and before legal proceedings was a key factor in determining whether or not the Liability Award had been induced by fraud in the arbitral proceedings. As the accuracy of the 2012 Statements had not been in issue in the arbitration, the assertion of procedural fraud, in so far as it rested on the 2012 Statements, must be rejected.
- (c) Court of Appeal held that no fraud had been established in relation to the collection or production of documents for the arbitration. There was no non-disclosure or suppression of evidence in the arbitration that was aimed at deceiving the arbitral tribunal.

KEYPOINT

The party challenging the award on grounds of fraud must show a connection between the alleged fraud and the making of the arbitral award.

The Court of Appeal noted that, strictly speaking, having considered the substantive question, there was no need for the Court of Appeal to consider

the procedural question of time-bar relating to the setting aside application. However, the Court of Appeal noted that the time within which an award can be set-aside is an important one for parties and practitioners and therefore gave its views on this issue. The Court of Appeal agreed with GGAM that the three-month time limit in Art 34(3) of the Model Law to apply to set aside an arbitration award is absolute even in cases of fraud and applications made under section 24 of the IAA. The Court of Appeal cited, *inter alia*, the following reasons for its decision:

- (a) Art 34(3) of the Model Law is clear on its face and does not suggest that any carve-out is available for fraud or corruption, or any ground at all.
- (b) The *travaux preparatoire* of the Model Law indicates that the state parties had considered and rejected allowing a different and longer period of time in which to apply for setting aside an award on grounds of fraud on the basis that this would be contrary to the need for speedy and final settlement of disputes.
- (c) Section 24 of the IAA does not form a separate regime, but instead provides additional grounds on which an award might be set aside. The three-month time limit in Art 34(3) of the Model Law therefore applies to section 24 of the IAA.
- (d) The absolute time limit in Art 34(3) of the Model Law would not cause “absurd and unjust results”. Whilst a party that does not act within the time limit will not be able to set aside an arbitration award obtained by fraud, that innocent party would still be able to take action to resist and set aside the enforcement of the arbitration award.

KEYPOINT

The three-month time limit in Art 34(3) of the Model Law to apply to set aside an arbitration award is absolute, even in cases of fraud and applications made under section 24 of the IAA.

COMMENTARY

The Court of Appeal has made it clear that the three-month time limit in Art 34(3) of the Model Law for applications to set aside arbitration awards is absolute and cannot be extended, even in cases involving fraud or corruption, or applications made under section 24 of the IAA to set aside arbitral awards. This is a timely reminder to all parties to make their

applications to set aside arbitral awards within the strict three-month time limit in Art 34(3) of the Model Law.

Where the grounds for setting-aside an arbitration award are only discovered by an innocent party after the three-month time limit in Art 34(3) of the Model Law has expired, that party would not be bereft of a remedy as it may still seek to resist enforcement of the arbitration award.

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