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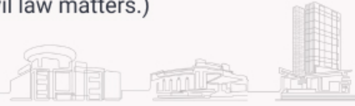

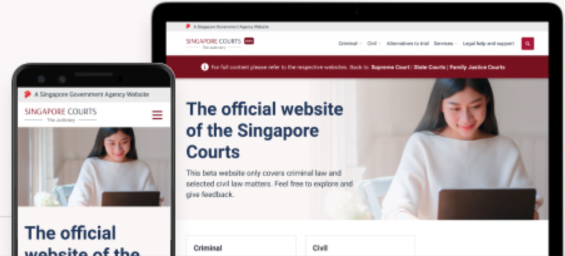

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CASE SUMMARIES

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

SUPREME COURT OF SINGAPORE

16 February 2021

Case summary

Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another [2021] SCGA 9
Civil Appeal No 14 of 2020

Decision of the Court of Appeal (delivered by Judith Prakash JCA):

Outcome: The Court of Appeal upholds the High Court's decision to dismiss an application to set aside an arbitral award and to resist its enforcement on the basis that the making of the award was induced or affected by fraud and was thus contrary to the public policy of Singapore.

Pertinent and significant points of the judgment

- The three-month time limit for setting aside an arbitral award, as stated in Art 34(3) of the UNCITRAL Model Law on International Commercial Arbitration, as set out in the First Schedule of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") cannot be extended even in cases of fraud. The three-month time limit applies to an application to set aside an arbitral award under s 24 of the IAA, as s 24 of the IAA does not create a separate regime for the setting aside of an arbitral award.
- "Fraud" within the meaning of s 24(*a*) of the IAA must include procedural fraud, that is, when a party commits perjury, conceals material information and/or suppresses evidence that would have a substantial effect on the making of the award. There must be a causative link between any concealment aimed at deceiving the arbitral tribunal and the decision in favour of the concealing party.

Background

1 The present dispute arose out of a Management Services Agreement ("Management Agreement") entered into between the appellants and the first respondent on 9 September 2011, under which the first respondent was to manage the development and operation of the Solaire Resort and Casino (the "Solaire Casino"). In July and September 2013, the appellants alleged that the respondents had committed a material breach of the Management Agreement and issued a formal Notice of Termination. The respondents then commenced arbitration proceedings against the appellants for wrongful termination. The arbitration proceedings were bifurcated into liability and damages tranches.

2 On 20 September 2016, the arbitral tribunal issued its partial award on liability (the "Award") and rejected the appellants' claims of misrepresentation, casual fraud or that the termination of the Management Agreement was justified. On 21 December 2017, the appellants applied to the High Court to set aside the Award and alternatively, to resist enforcement of the Award on the basis that the making of the Award was induced or affected by fraud and was thus contrary to the public policy of Singapore.

3 Before the High Court Judge (the "Judge"), the appellants relied on what they claimed was evidence of fraud and/or corruption that was not discoverable until months after the Award was issued. The appellants argued that the arbitration would have proceeded on a wholly different basis and resulted in a materially different outcome if the respondents had not concealed evidence of fraud that was later revealed by investigations carried out in the United States in the activities of an American casino operator, Las Vegas Sands Corp ("LVS"). This evidence took the form of two documents: (a) an Order dated 7 April 2016 issued by the US Securities and Exchange Commission ("SEC") instituting cease-and-desist proceedings against LVS (the "SEC Order"); and (b) a Non-Prosecution Agreement between the US Department of Justice and LVS (the "DOJ Agreement"). These are collectively referred to as the "FCPA Findings".

4 The Judge dismissed the appellants' applications, finding amongst other things, that (a) the application to set outside was brought out of time as it was filed beyond the three-month time limit prescribed by Art 34(3) of the Model Law, which also applied to applications under s 24 of the IAA; (b) that the FCPA did not disclose fraud in LVS, much less in the Solaire Casino, such that the appellants' allegation of perjury was not made out and (c) that there was no unlawful concealment of information by the respondents' counsel in the arbitration. The appellants appealed against the Judge's decision.

The Court of Appeal's decision

Whether the Award was induced or affected by fraud

5 “Fraud” within the meaning of s 24(*a*) of the IAA must include procedural fraud, that is, when a party commits perjury, conceals material information and/or suppresses evidence that would have a substantial effect on the making of the award. There must be a causative link between any concealment aimed at deceiving the arbitral tribunal and the decision in favour of the concealing party. To say that an award is “tainted” by fraud in relation to the arbitration is a mere rephrasing of the trite proposition that fraud in the conduct of the arbitration is not permitted. To say that an award is “tainted” by fraud where there is potentially fraud in the performance of the underlying contract makes no sense because if there was an allegation in the arbitration of fraud in the performance of the underlying contract, then of course that would be an issue determined by the arbitral tribunal, properly within its remit; if no allegation of fraud in performance was made by either party, then fraud would play no part in the proceedings. The word “affected” in s 24(*a*) of the IAA must be understood in a manner similar to “induced” albeit perhaps somewhat more broadly. It would be going too far however, to give the word “affected” such a wide definition as to allow an award to be set aside if the challenging party can merely show some peripheral fraud in the circumstances relating to a case or the parties notwithstanding that that fraud played no part in the conduct of the arbitration or the making of the award. The party challenging the award on grounds of fraud must show a connection between the alleged fraud and the making of the arbitral award. Absent such a connection, s 24(*a*) of the IAA would not be satisfied (at **[41]** and **[42]**).

The FCPA Findings

6 The appellants’ essential point was that the arbitration would have proceeded on a totally different basis and resulted in a materially different outcome if the respondents had not concealed what had been revealed by the FCPA Findings. When it comes to the

involvement of fraud and corruption, a party must tell all. There were three bases to the appellants' contention in this regard (at **[38]** and **[39]**).

7 The appellants' first argument that there was a general duty on the part of a party to arbitration proceedings to act in good faith, particularly when the gaming industry is involved because this particular business attracts strong regulation and thus imposes an obligation of full disclosure in the event of arbitration at least when it comes to fraud or corruption, was untenable. Contracts between casinos and gaming operators are commercial contracts in which each party has the full ability to negotiate terms to protect its own interest, including terms as to the disclosure of the counterparty's previous activities. Such commercial contracts, unlike insurance contracts, operate more on the "*caveat emptor*" principle where disclosure requirements and warranties have to be specifically negotiated. The fact that gaming activities are usually highly regulated by governmental authorities cannot *per se* impose disclosure obligations on commercial parties. The touchstone of disclosure is relevance as understood in the context of the rules governing the proceedings. Matters which are not in issue in the arbitration, no matter how interested one party would be to know about them, need not be disclosed and therefore failure to mention them cannot be regarded as concealment (at **[44]**).

8 The appellants' second argument that the failure to disclose was a breach of cl 11.3 of the Management Agreement, was rejected. It is inherent in cl 11.3 of the Management Agreement that the first respondent agreed to provide information to the governmental authorities *if* such information was requested by the Philippines' gaming authority ("PAGCOR"). However, there was simply no evidence that the Solaire Casino or, for that matter, the first respondent had been asked by the PAGCOR to provide information on the activities of the respondents' principals when they were working for LVS. There was no evidence either that the first respondent had given any incorrect information to PAGCOR (at **[45]** to **[48]**).

9 The appellants' third argument that statements made by one of the respondents' principals, Mr William P Weidner, regarding the SEC's and DOJ's investigation, were lies amounting to fraud that continued into the arbitration, was also rejected. The FCPA Findings did not establish fraud to the degree of proof that a court requires to find fraud. First, the weight of the FCPA Findings was affected by their character: they were not findings of a court, an independent tribunal or a fact-finder who evaluated the sufficiency of the underlying evidence or its appropriateness after a contestation between the parties. It was significant that the respondents' principals were not parties to the findings and were not given an opportunity to participate in the negotiations between LVS and the US authorities which resulted in the FCPA Findings. Further, that no charges were brought by the DOJ nor was any administrative action taken by SEC against the respondents' principals might suggest that such decision was taken as the US authorities did not have sufficient admissible and credible evidence which would prevail in an adversarial proceeding in front of a judge and jury. The FCPA Findings were in respect of violations of Accounting Provisions and not the Anti-Bribery Provisions of the Foreign Corrupt Practices Act. Moreover, the incentives in existence for LVS to accept the FCPA Findings diminished the overall weight to be ascribed to the findings, especially when they were being relied upon as evidence of fraud. Overall, whatever weight may be given to the FCPA Findings, they did not in any way hint, much less show bribery by the respondents or their principals at the Solaire Casino, as the findings related to the misconduct by LVS in China which occurred *four years before* the opening of the Solaire Casino in 2013; there were no striking similarities between the LVS transactions and Mr Weidner's strategies for the Solaire Casino. Finally, Mr Weidner's statements were not statements made in legal proceedings and whether statements are made outside and before legal proceedings is not simply a technical distinction, since this is a key factor in determining whether or not an arbitral award has been induced by fraud in the arbitral proceedings, and is part of what defines perjury (at **[52]**, **[55]** to **[61]** and **[65]**).

Fraudulent suppression of evidence in the arbitration

10 In relation to the appellants' allegation that the respondents and their counsel in the arbitration had violated the tribunal's orders by failing to disclose documents from the respondents' principal, Mr Eric Chiu, the non-disclosure of the e-mails from Mr Chiu's personal e-mail account did not amount to procedural fraud. This is because even if Mr Chiu's e-mails fell within the scope of the tribunal's order, there was no evidence that the decision not to produce the e-mails was made dishonestly, particularly given the number of e-mails that had been produced by the respondent. In order for the non-disclosure or suppression of evidence to warrant allowing the application to resist enforcement, it must be shown that there was *deliberate* (as opposed to innocent or negligent) concealment *aimed at deceiving the arbitral tribunal*. This had not been shown in the present case (at **[71]**).

Whether the application to set aside the Award was time-barred

11 The position taken in Singapore has consistently been that Art 34(3) of the Model Law *prevents* a court from entertaining applications brought under Art 34 after the expiry of the three-month period. It was evident from the reasoning in earlier decisions that the conclusion the court reached turned on a construction of Art 34(3). Thus, the absence of fraud or corruption did not detract from the force of that reasoning. Article 34(3) is clear on its face and *does not* suggest that any carve-out is available for fraud or corruption, or indeed any ground at all. The appellants did not show any basis to depart from the clear terms of Art 34(3), which on its face, applies to *all* applications brought under Art 34. Further, Model Law jurisdictions that considered that the time-limit imposed by Art 34(3) should not apply to fraud have implemented that decision by specific legislation (at **[81], [82], [89]** and **[96]**).

12 The three-month time limit imposed by Art 34(3) of the Model Law applies to setting aside applications under s 24 of the IAA as well. The Explanatory Statement to the International Arbitration Bill

(19 July 1994) suggested that s 24 does not form a separate regime, but instead provides additional grounds on which an award might be set aside. It would be anomalous and absurd if a *subset* of the wider public policy ground in Art 34(2)(*b*)(ii) of the Model Law is subject to *more permissive* procedural requirements (at **[95]**).

13 While the very mention of "fraud" tends to induce an emotive response aimed at avoiding injustice, in the context of arbitration awards, substantial injustice may be avoided despite the existence of fraud. It is true that a party who does not act within the time limit will not be able to set aside an arbitration award obtained by fraud but that does not mean that such party will be forced to satisfy the fraudulent award. The innocent party would be able to take action to resist and set aside enforcement of the award (at **[97]**).

This summary is provided to assist in the understanding of the Court's grounds of decision. It is not intended to be a substitute for the reasons of the Court. All numbers in bold font and square brackets refer to the corresponding paragraph numbers in the Court's grounds of decision.