IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 9

Civil Appeal No 14 of 2020

Between

(1) Bloomberry Resorts and Hotels Inc
(2) Sureste Properties Inc

… *Appellants*

And

(1) Global Gaming Philippines LLC
(2) GGAM Netherlands BV

… *Respondents*

In the matter of Originating Summons No 1432 of 2017

In the matter of
Sections 19 and 24 of the
International Arbitration Act (Cap 143A)

And

In the matter of
Orders 69A, Rule 2(1)(*d*), 6 and Order 3, Rule 4(1) of the
Rules of Court (Cap 322, Rule 5)

Between

(1) Bloomberry Resorts and Hotels Inc
(2) Sureste Properties Inc

… *Plaintiffs*

And

(1) Global Gaming Philippines LLC

(2) GGAM Netherlands BV

… *Defendants*

JUDGMENT

[Arbitration] — [Award] — [Recourse against award] — [Setting aside]
[Arbitration] — [Enforcement] — [Challenge]

Bloomberry Resorts and Hotels Inc and another
v
Global Gaming Philippines LLC and another

[2021] SGCA 9

Court of Appeal — Civil Appeal No 14 of 2020
Sundaresh Menon CJ, Judith Prakash JCA and Woo Bih Li JAD
7 August 2020

16 February 2021 Judgment reserved.

Judith Prakash JCA (delivering the judgment of the court):

1 The present appeal arises out of the decision of the High Court judge ("the Judge") in *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2020] SGHC 01 ("the Judgment") dismissing the appellants' applications to set aside an arbitral award dated 20 September 2016 ("the Award") and to resist its enforcement. These applications were brought 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. 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 into the activities of an American casino operator, Las Vegas Sands Corp ("LVS").

2 In so contending before 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. This evidence took the form of two documents:

(a) the 17 January 2017 Non-Prosecution Agreement (the "DOJ Agreement") between the US Department of Justice ("DOJ") and LVS, an entity which was not involved in either the arbitration or the present proceedings; and

(b) the 7 April 2016 Order by the US Securities and Exchange Commission ("SEC") instituting cease-and-desist proceedings against LVS (the "SEC Order").

Collectively, we refer to the DOJ Agreement and the SEC Order as the "FCPA Findings" and to the DOJ and the SEC as the "US Authorities". The appellants relied in this appeal on the FCPA Findings largely in the same way as they did before the Judge and have put forward similar arguments as a basis for reversing the Judgment.

Background facts

3 The dispute between the parties arose out of a Management Services Agreement ("Management Agreement") entered into between the appellants and the first respondent, Global Gaming Philippines LLC ("GGAM"), on 9 September 2011. By cl 19.3 thereof, the Management Agreement was governed by the law of the Republic of the Philippines. Pursuant to the Management Agreement, GGAM was to manage the development and operation of the Solaire Resort and Casino (the "Solaire Casino"), an integrated

resort and casino located in Manila, Philippines. GGAM subsequently assigned and conveyed all of its rights and obligations under the Management Agreement to the second respondent, GGAM Netherlands BV ("GGAM Netherlands"). GGAM is the sole owner of GGAM Netherlands.

4 At the material time, the respondents had four senior executives who are of relevance to the present appeal (see Judgment at [11]) (collectively, the "GGAM principals"), namely:

(a) Mr William P Weidner ("Mr Weidner"), who was Chairman and Chief Executive Officer;

(b) Mr Bradley Stone ("Mr Stone"), who was President;

(c) Mr Garry W. Saunders ("Mr Saunders"), who was Executive Vice President; and

(d) Mr Eric Chiu ("Mr Chiu"), who was President for Asia.

5 Before GGAM's formation, Mr Weidner was the President and Chief Operating Officer of LVS. He resigned from LVS in March 2009 in acrimonious circumstances. Mr Chiu was a director of LVS during Mr Weidner's tenure.

6 Prior to his resignation from LVS, Mr Weidner and Mr Chiu were involved in three transactions for LVS that were subsequently investigated by the US Authorities and the audit committee of LVS for possible breaches of US law. When the appellants became aware of the investigation, an e-mail was sent to Mr Saunders by Ms Estela Tuason-Occena ("Ms Tuason-Occena") on behalf of the appellants on 14 August 2012 asking him about the status of the

investigation, how he thought it would go, and how it would impact Mr Weidner, Mr Stone, and GGAM.

7 Subsequently, on 15 August 2012, Mr Weidner sent Ms Tuason-Occena a statement that he claimed had been fully vetted by his lawyers. He said in this statement that while he was with LVS, he set a standard that required all business relationships and agreements under his purview to be thoroughly reviewed and vetted by legal and accounting professionals to ensure compliance with both US and foreign law. The appellants responded by noting that Mr Weidner's statement did not address their concerns, including the question as to whether or not he had been involved in the three transactions being investigated. Eventually, on 18 August 2012, Mr Weidner replied with a formal statement which indicated that he had participated at a "strategic level" in many transactions, including those that Ms Tuason-Occena "may have read about". He claimed that:

> … My participation in those transactions was consistent with the role of any Chief Operating Officer and President of a large public company. The transactions were presented to and reviewed thoroughly by the board of directors of [LVS] and thoroughly reviewed and vetted by legal counsel and accounting professionals to ensure the company was complying with both U.S. and foreign law. I was not involved in the transfer or accounting of funds related to the transactions, nor did I structure those transactions. My participation in those transactions and the subsequent course of events at the company ended with my resignation from the [LVS] in March 2009. While I was at [LVS], I was not aware of nor was I complicit in any alleged wrongdoing regarding the referenced transactions.

In their submissions before us, the appellants referred to the 18 August 2012 statement as the "August 2012 Lie" but we prefer to refer to that statement and the earlier one on 15 August 2012, collectively and more neutrally, as the "2012 Statements".

8 The Solaire Casino began operations in mid-March 2013. On 12 July 2013, the appellants wrote to the respondents alleging that the latter had failed to comply with their obligations under the Management Agreement to provide the "required prudent management services". Amongst other breaches, the appellants alleged that the respondents had failed to bring in any foreign VIPs or junket operators in the four months during which the Solaire Casino had been operational. The appellants thus stated that they were exercising their right under cl 15.1(a) of the Management Agreement to terminate it because of a material breach. On 12 September 2013, the appellants issued a formal Notice of Termination of the Management Agreement on the basis of cl 15.1(a), *ie*, that GGAM had committed a material breach of the Agreement that was either incapable of remedy, or, if capable of remedy, had not been remedied within 30 days of notice or such longer period not exceeding 60 days. As the appellants described it before the Judge, the termination was largely due to the respondents' "perceived non-performance with respect to delivering junket operators and foreign VIPs to [the Solaire Casino]".

The arbitral proceedings

9 Practically immediately thereafter, the respondents commenced arbitration proceedings against the appellants for wrongful termination. The arbitration proceedings were bifurcated into liability and damages tranches and the Award pertained only to liability. Among the issues the arbitral tribunal ("the Tribunal") was asked to determine were: (a) whether the respondents had perpetrated "causal fraud" by making false representations to the appellants which induced them into entering the Management Agreement; and (b) whether the appellants' termination of the Management Agreement was justified: see the

Judgment at [59]. The appellants brought counterclaims in the arbitration but these are not relevant for present purposes.

10 In the Award, the Tribunal held that under Philippines' law, "causal fraud" may justify the rescission of a contract where the fraud is serious (meaning that it is sufficient to impress or to lead an ordinarily prudent person into error), is present at the time of "birth or perfection of the contract", and the evidence of it is full, clear and convincing. The appellants relied on a number of representations which had allegedly been made by the respondents, including that the GGAM principals had falsely projected an "image equating [GGAM] with [LVS]", and that through their collective experience at LVS, they had strong relationships with junket operators and data regarding individual foreign VIP players who they would bring into the Solaire Casino: see Judgment at [60].

11 The Tribunal rejected the claims of misrepresentation and causal fraud. Among other things, the Tribunal found that there was no evidence to support the appellants' allegation that the respondents had represented they were the same entity as LVS. The Tribunal also held that, given the standing of the GGAM principals in the gaming industry, they did have access to "high rollers". There was ample evidence that both parties planned not to seek "high rollers" until the Solaire Casino was sufficiently able to provide them with a pleasant experience, but the appellants terminated the Management Agreement before that point arrived. Similarly, the Tribunal *rejected* the appellants' contention that the respondents had represented they had operating policies, procedures and systems ready to be implemented. Rather, the respondents were contractually obliged to formulate the written policies and procedures through and in collaboration with the Solaire Casino. In fact, such policies were prepared by the Solaire Casino's staff in collaboration with the respondents and, in any

event, any representation on the policies and procedures would not have been serious enough to falsely induce the appellants to enter into the Management Agreement.

12 Before the Tribunal, the appellants submitted that the termination of the Management Agreement had been justified because of various irremediable breaches by the respondents. They asserted that even if the breaches were capable of being remedied, the appellants had continued to work with the respondents over the next 60 days in order to reach an amicable parting of ways but GGAM had not responded constructively. In contrast, the respondents asserted that no material breach had been identified and that the appellants had not given them an opportunity to cure their alleged breaches. Instead, as soon as the appellants sent the 12 July 2013 letter (see [8] above), they began to inform the Solaire Casino's management that GGAM's termination was a *fait accompli* and stopped providing it with the necessary access and information to perform its obligations. The grounds on which the appellants justified the termination of the Management Agreement have been summarised in the Judgment at [62(b)]. These grounds included a contention that the respondents failed to perform their obligations "through the Management Team". The Tribunal found that there had been no material breaches by the respondents and, accordingly, that the appellants' termination of the Management Agreement was not justified.

Events post-Award

13 Shortly after the Award was released, the respondents filed proceedings in the High Court to enforce the Award. On 27 September 2016, the High Court made an order ("ORC 6609") which provided that the respondents would be at liberty to enter judgment against the appellants in the terms of the Award upon

expiration of 14 days from the date of service of the order. The High Court entered judgment in terms of the Award on 20 June 2017, after the deadline for the appellants to apply to set aside ORC 6609 expired.

14 On 21 December 2017, the appellants applied in HC/OS 1432/2017 ("OS 1432") to set aside the judgment and resist enforcement of the Award on the basis of the FCPA Findings. While the SEC Order was published on 7 April 2016, *prior* to the issue of the Award on 20 September 2016, the DOJ Agreement was only published *thereafter* on 17 January 2017.

15 It is now necessary to go into some detail regarding the SEC Order and the DOJ Agreement. These documents detailed findings in relation to alleged breaches of the two statutes in force in the United States: the Foreign Corrupt Practices Act 15 USC (US) 1977 ("FCPA") and the Securities Exchange Act 15 USC (US) 1934 ("SECA").

16 According to the SEC Order, until March 2009, LVS's operations in Macau and China were overseen by Mr Weidner, who worked in close concert with Mr Chiu. The SEC Order further stated that Mr Chiu had been introduced to a Chinese consultant ("the Consultant") by a high-level person with the China Liaison Office in Macau. With Mr Weidner's approval, the Consultant was hired to, amongst other things, act as an intermediary or a "beard" to obscure LVS's role in certain transactions. The three transactions referred to in the SEC Order concerned:

(a) the purchase of a professional basketball team in China in 2007, in which the Consultant was used as a "beard" to buy the team through a foreign-owned entity ("the Basketball Team transaction");

(b) the purchase of a building from a Chinese state-owned travel agency, China International Travel Services Ltd ("CITS") again using the Consultant as a "beard"; and

(c) the engagement of a ferry company ("CKS"), which was indirectly owned by, amongst others, the Consultant and the Chairman of CITS, for LVS's high-speed ferry business.

17 The SEC found (a) that LVS violated s 13(*b*)(2)(A) of SECA because its books and records did not, in reasonable detail, accurately and fairly reflect the purpose of the payments; and (b) that LVS had also violated s 13(*b*)(2)(B) of the same Act because it did not devise and maintain a reasonable system of internal accounting controls over operations in Macao and China to ensure that transactions were executed in accordance with management's authorisation and recorded as necessary to maintain accountability.

18 The DOJ Agreement referred to the transactions in [16(a)] and [16(b)] above and the findings made were consistent with, although not identical to, those found in the SEC Order. For example, in relation to the Basketball Team transaction, the DOJ Agreement stated that the Consultant and Mr Chiu had been able to significantly impede the efforts of the accounting firm which had been engaged to review payments to the Consultant in connection with the basketball team. Further, Mr Weidner had given a presentation "of what [he] claimed were the accounting firm's conclusions, namely, that no illegal payments had occurred … [which] omitted nearly all context for these purported findings, including the limitations that had been put on the accounting firm's efforts by [the] Consultant and his associates". The DOJ Agreement concluded that several of LVS's contracts with and payments to the Consultant had no

discernible legitimate business purpose, and that certain senior employees had been repeatedly warned about the Consultant's business practices, but nevertheless continued to engage the Consultant for work on behalf of LVS.

19 On 31 August 2017, after the Award was issued, the appellants requested that the Tribunal reconsider the Award in light of the FCPA Findings. On 22 November 2017, the Tribunal issued its decision on the appellants' request and held that it did not have "authority" under Singapore law, as the law of the seat, to reconsider its findings on liability in the Award. In doing so, the Tribunal went stated that it was "cognisant that in the event a tribunal does not reconsider the award despite issues of fraud, the aggrieved party is not bereft of a remedy … [and] may still apply to a Singapore court". In the Tribunal's view, the court might be a better forum where there are allegations of fraud, as suggested by s 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA").

Decision below

Application to set aside the Award

20 As stated above, the appellants filed OS 1432, applying for the Award to be set aside and, alternatively for enforcement thereof to be refused. As they were out of time for both applications, they also sought the necessary extensions of time to bring the applications. The Judge dismissed the application to set aside the 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 UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), as set out in the First Schedule of the IAA, cannot be extended even in cases of fraud. The Judge referred to the case law on Art 34(3) as being "fairly settled" and held that the words "may not" take on a mandatory meaning of "cannot" in the context of

Art 34(3). Singapore, unlike other jurisdictions, has not expressly allowed for an exception to or extension of the three-month time limit in Art 34(3). The appellants submitted that s 24 of the IAA created a *separate* regime to set aside an award and that the only time limit applicable to s 24 applications is that prescribed by O 69A r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (the "Rules of Court"), which limit is extendable at the discretion of the court. Section 24 of the IAA and Art 34(1) of the Model Law are set out below at [74]. The Judge held that, as a matter of construction, the phrase "[n]otwithstanding Article 34(1) of the Model Law" in s 24 IAA did not exclude the time limit set out in Art 34(3) of the Model Law. The appellants' contention that Parliament must have intended for narrow cases of fraud or corruption under s 24(*a*) of the IAA not to be subject to the time limit in Art 34(3) was untenable as it would make s 24 a "limping provision" where both grounds under s 24(*a*) and s 24(*b*) would be exempt from the time limit even though the policy consideration only applied to s 24(*a*).

Application to resist enforcement

Extension of time

21 The appellants similarly sought an extension of time to apply to set aside ORC 6609 pursuant to O 3 r 4(1) of the Rules of Court and/or the inherent jurisdiction of the court. The Judge observed that the court would generally consider (a) the length of delay; (b) the reasons for delay; (c) the chances of the defaulting party succeeding if the time for setting aside were extended; and (d) the degree of prejudice to the would-be respondent if the extension of time were granted: see *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 at [29]; *AD v AE* [2004] 2 SLR(R) 505 at [10]). In the present case, the main

focus was on reason for the extension, which was the new evidence discovered post-Award.

22 While the SEC Order had been issued on 7 April 2016, the Judge agreed that the DOJ Agreement was the "more important document since it contained critical findings" and carried greater evidential weight as LVS had admitted to facts in the DOJ Agreement but not in the SEC Order. The Judge therefore accepted, for the time extension application to resist enforcement, the contention that the FCPA Findings had to be read together to be properly appreciated. The court had the discretion to extend time and defer matters that are bound up with the merits to the substantive hearing proper. The Judge thus allowed the time extension in the interests of justice, noting that minimal prejudice was caused to the respondents (Judgment at [51]–[54]). The respondents have not appealed against this extension.

The substantive application

23 On the substantive application, the grounds relied upon were Art 36(1)(*b*)(ii) (*ie*, that enforcement would be contrary to public policy) and Art 36(1)(*a*)(ii) (*ie*, that the party against whom the award was invoked was unable to present his case) of the Model Law. Both of these grounds hinged on the appellants' allegations of fraud. The respondents did not challenge the admissibility of the FCPA findings (Judgment at [56] and [102]).

24 The appellants argued that Mr Weidner had "committed perjury by testifying about his strategies but omitting the context which would have led a reasonable person to conclude that these strategies were fraudulent and/or corrupt", and also took issue with the adequacy of the document collection process undertaken by M/s Paul Hastings LLP ("PH LLP"), the respondents'

counsel in the arbitration. The Judge accepted that perjury and the deliberate suppression or withholding of documents in an arbitration can in a proper case amount to obtaining an award by fraud. While there is a distinction between perjury and the concealment of documents, the Judge observed that these matters have three core elements in common: (a) dishonesty or bad faith; (b) the materiality of the new evidence to the decision of the Tribunal; and (c) the non-availability of the evidence during the earlier proceeding. In this regard, proving fraud, dishonest or unconscionable conduct is essential but not sufficient, and there must additionally be a causative link between the fraudulent conduct and the claim for enforcement of the Award to justify interference by the court on public policy grounds (Judgment at [108], referring to *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2010] 1 SLR 573 ("*Swiss Singapore*") at [27]).

25 The Judge identified the material questions to be whether there was "procedural fraud" that engages Art 36(1)(*b*)(ii) of the Model Law, and whether such fraud was so material that it substantially impacted the Award (Judgment at [110]). The Judge held that the appellants' allegations of perjury and concealment of documents were not made out. The appellants relied, in particular, on the 2012 Statements (see [7] above) and the oral testimony of Mr Weidner in the arbitration (Judgment at [112]). The Judge noted that the 2012 Statements, even if untrue, did not constitute perjury as they were not given in a legal proceeding. While there were *prima facie* inconsistencies when juxtaposed against the FCPA Findings, the statements did not disclose a subjective intention to defraud and there were also epistemic issues which diluted the evidential value of the FCPA Findings (Judgment at [126]–[129]). Mr Weidner's evidence in the arbitration, both that given through declarations he filed and his oral testimony, was not dishonest or deceptive given the Judge's

finding that the FCPA Findings do not disclose fraud in LVS, much less in the Solaire Casino (Judgment at [133]).

26 The Judge also rejected the appellants' submission that PH LLP had concealed information in the arbitration by permitting the respondents to make false representations in the course of the parties' relationship or by dishonestly concealing various documents. One category of documents the appellants referred to comprised the documents and e-mails from Mr Chiu's personal files. The Judge held there was no unlawful concealment in that regard. Article 3.1 of the International Bar Association Rules on the Taking of Evidence in International Arbitration (the "IBA Rules") only provides that a party must disclose all documents available to it "on which it relies". Further, the appellants had ample opportunity to submit on the discovery process and the metadata disclosed showing that Mr Chiu was not the custodian of those documents had been available (Judgment at [146] and [150]). The appellants' case on procedural fraud therefore was not made out.

27 In any event, the FCPA Findings did not constitute material information that would substantially impact the making of the Award or information so material that earlier discovery of it would have prompted the Tribunal to rule in favour of the appellants. The appellants contended that the FCPA Findings showed that Mr Weidner and Mr Chiu deployed the same strategies in the Solaire Casino for attracting foreign VIP guests and junket operators, which they had used while they were at LVS. The Judge held that, on a balance of probabilities, the FCPA Findings did not prove that Mr Weidner and Mr Chiu bribed government officials and state-owned entities while they were with LVS. LVS did not admit to the findings in the SEC Order, and the Judge accepted that the FCPA Findings, being negotiated documents, were much less reliable than

findings established through traditional adversarial proceedings. No charges were brought against Mr Weidner or Mr Chiu as would be expected if they had been guilty of bribery. There were various incentives for LVS to enter into these agreements. In any event, the SEC and DOJ only alleged violations of the Accounting Provisions in the FCPA and not its Anti-Bribery Provisions (Judgment at [166], [168], [169], [173], [174] and [180]). In relation to the Solaire Casino, the Judge held that there were insufficient factual similarities between the operations in LVS and those of the Solaire Casino (Judgment at [201]).

28 Additionally, the Judge was not persuaded by the argument that the appellants would not have entered into the Management Agreement if Mr Weidner had not concealed or misrepresented his involvement in the three transactions (Judgment at [203]), or that the FCPA Findings revealed that the respondents did not have strong and direct relationships with junket operators (Judgment at [208]). The appellants also argued that the conduct of Mr Chiu and Mr Weidner would have rendered the respondents unsuitable to participate in the management of the Solaire Casino, and that this would have entitled the appellants to terminate the Management Agreement under cl 15.1(f) thereof. The Judge rejected this contention on the basis that the evidence did not show that Mr Weidner's and Mr Chiu's misconduct would have resulted in a final order from the Philippines' authorities that GGAM was unsuitable to participate in managing the Solaire Casino which was a requirement for invoking the clause. Further, the respondents could have dissociated themselves from these individuals if necessary (Judgment at [214]). The Judge also held that their wrongdoing in LVS was not material for the purposes of the provisions in the Management Agreement setting out the requisite standard of care (Judgment at [216]) and that the FCPA Findings did not show that the respondents had

violated the requirement to perform its obligations through the "Management Team" pursuant to cl 2.4(a) of the Management Agreement (Judgment at [217]).

Inability to present their case

29 The appellants also relied on the distinct ground of being unable to present their case to resist enforcement of the Award under Art 36(1)(*a*)(ii) of the Model Law, relying on the same facts as their claim of procedural fraud. The appellants essentially contended that the deceit and fraud of the respondents and/or PH LLP in concealing evidence constituted a breach of the rule that each party must be given a fair hearing and a fair opportunity to present its case in the arbitration. In this regard, they also referred to PH LLP's conduct in the arbitration, claiming that its counsel had improperly objected to the appellants' questions at various points of the arbitration. Naturally, the respondents' position was that there had been no fraud and no breach of natural justice.

30 The Judge characterised the appellants' case to be, more correctly, one where they were arguably deprived of an opportunity to present a different case rather than that they were unable to present their case *per se*. The *audi alteram parterm* rule therefore had not been breached. There was no foundation to the appellants' allegations of the respondents' interference during the hearings. The instances of interference appeared to be nothing more than the usual cut-and-thrust of oral advocacy. The Tribunal had also invited the appellants to ventilate their complaints at the close of the liability hearing and had comprehensively addressed them. None of these complaints touched on the alleged inappropriate interference by the respondents' counsel. It also bore reiterating that a Tribunal's ruling in accordance with the rules of arbitration on discovery or admissibility of evidence after hearing the parties cannot, *ipso facto*, constitute

evidence that the party was therefore unable to present its case (Judgment at [223] to [229]).

31 The Judge therefore also dismissed the application to resist enforcement.

Parties' submissions

32 The appellants' written submissions on appeal are consistent with those made before the Judge. They contend that the time limit stipulated in Art 34(3) of the Model Law 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 this regard, they emphasise that none of the cases referred to by the Judge concerned fraud or corruption. The *travaux préparatoires* do not indicate otherwise and a strict time limit would lead to absurd and unjust results. The appellants contend that the court should instead construe the phrase "may not" in Art 34(3) as importing a discretion to extend time. In any event, the appellants contend that even if the time limit in Art 34(3) is absolute, s 24 of the IAA comprises a separate regime for setting aside, and is not subject to the time limit prescribed in Art 34(3). This is since s 24 does not set out a time limit and instead provides two additional grounds for setting aside "*notwithstanding* Article 34(1) of the Model Law".

33 On the substantive issue, the appellants' position is that the FCPA Findings represent cogent evidence of and show that the Award had been "induced or affected by fraud", and that if the appellants and the Tribunal had known of the FCPA Findings, the arbitration would have proceeded on a wholly different basis and the decision in the Award would have been materially different. In particular, the appellants rely on three "fraudulent concealments [*sic*] and misrepresentations" which we discuss in detail below.

34 The appellants argue that if the fraud had been known earlier, their case would have been run differently in the arbitration and the Tribunal would have come to a different decision. In particular, they contend that they would have justified their termination of the Management Agreement on the respondents' malfeasance, including (a) its violation of the standard of care imposed by the Management Agreement (which appeared to be a reference to cl 2.5 of the same); (b) the requirement to work through the management team; and (c) on the basis that PAGCOR (*ie*, the Philippines' gaming authority, Philippines Amusement and Gaming Corporation) would have issued a final order, which would have justified termination under cl 15.1(f) of the Management Agreement. The respondents' deception of the appellants and the Tribunal thus prevented the appellants from running this case and enforcement should be refused.

The Issues

35 From the summary above of the submissions made by the parties, the issues before us are much the same as they were before the Judge. They are:

(a) Is the time-bar set out in Art 34(3) of the Model Law applicable to applications to set aside awards which are based on grounds provided by s 24 of the IAA?

(b) Was the Award "induced or affected" by fraud such that the Award should be set aside or enforcement should be refused?

36 In his oral submissions before us, Mr Alvin Yeo SC, counsel for the appellants, focussed on the issue of fraud. This was a recognition of the fact that if the court did not accept that the making of the Award was induced or affected by fraud, it would not matter whether the setting-aside application was time-

barred or not. Further, in that event, there would be no basis on which the court could refuse to grant recognition of the Award. Thus, the substantive issues relating to fraud will be dealt with first before we proceed to deal with the time-bar question.

Was the Award induced or affected by fraud?

37 This discussion falls naturally into two parts as Mr Yeo asserted that there had been two distinct types of fraud that had led to the making of the Award. The first related to the respondents' concealment of (a) the fraudulent actions of their principals when the latter were in the employ of LVS; and (b) the investigations undertaken by the US Authorities. The second was termed "procedural fraud" and referred mainly to the alleged fraudulent suppression of evidence in the arbitration by the respondents' counsel PH LLP.

Fraudulent actions and the US investigations

38 Mr Yeo's 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. His position was that the fact that the arbitration was not based on the FCPA findings, in the sense that neither the respondents' claim there or the appellants' defence to the arbitration proceedings had referenced these findings in any way, was beside the point. He submitted that when it comes to the involvement of fraud and corruption, a party must tell all. His thesis was that Mr Weidner and Mr Chiu, being aware that the US Authorities were looking into the activities of their previous employer LVS and what they themselves might possibly have been involved in during that employment, should have informed the appellants of the same albeit such information might have been used by the appellants to

terminate the Management Agreement or to justify such termination in the arbitration proceedings.

39 Mr Yeo based the assertion recounted above on three points. Firstly, he contended 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. This situation imposes an obligation of full disclosure in the event of arbitration proceedings between the parties and one party has to tell the other all the things it has done wrong, at least when it comes to fraud or corruption. Secondly, he contended that in this case there was a specific contractual duty to disclose all this information as well because cl 11.3 of the Management Agreement required GGAM to provide information that would be reasonably necessary for the appellants to obtain gaming licences for the Solaire Casino from PAGCOR. In that connection PAGCOR would of course want to know whether the applicant for the licence or anyone associated with its business was under investigation by any other authority whether domestic or foreign. He submitted that under cl 11.3, a party's duty to respond to requests from the authorities included the obligation to tell them what they would obviously want to know even if they had not asked specific questions on the matter. And obviously the authorities would have wanted to know about fraud or corruption investigations involving Mr Weidner and Mr Chiu. Thirdly, he contended that Mr Weidner had been specifically asked whether he was involved in the investigations being carried out by the SEC and the DOJ and at that juncture Mr Weidner had told a lie through the issue of the 2012 Statements. Mr Yeo's point was that the 2012 Statements amounted to fraud, which continued into the arbitration notwithstanding that when the same were issued the dispute had not arisen much less had any arbitration proceedings been started.

40 The appellants' case was that at any of these three levels there had been fraud on the part of the respondents which allowed the appellants to allege, in the language of s 24(*a*) of the IAA, that the making of the Award had been "induced or affected by fraud or corruption".

41 In this respect we agree with the appellants' submission that the "fraud" referred to in the section must include procedural fraud, that is, when a party commits perjury, conceals material information and/or suppresses evidence that would have substantial effect on the making of the award: see *BVU v BVX* [2019] SGHC 69 at [47] ("*BVU*"). We further note, however, that in the same paragraph, *BVU* states 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 appellants say that this link relates to the word "induced" in s 24(*a*) of the IAA and that therefore the word "affected" that follows "induced" must necessarily cover different and likely broader situations such as where an award is "tainted" by fraud (a) either in relation to the arbitration; or (b) where there is potentially fraud in the performance of the underlying contract. We comment that these two examples given by the appellants are in fact quite different: the first one is just a rephrasing of the trite proposition that fraud in the conduct of the arbitration is not permitted. The second (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 at all. The appellants produced no authority for the 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). Nor did they give any example of a situation in which an arbitration award was set aside for fraud even though there was no causative link between the fraud and the ultimate award.

42 In our judgment, the word "affected" 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 of the IAA would not be satisfied.

43 What we have stated in the preceding paragraph relates to the first level of Mr Yeo's attack. To reiterate, this was that the award was affected by fraud because GGAM had not informed the appellants or the Tribunal that Mr Weidner and Mr Chiu were involved in the investigations carried out by the US Authorities into LVS. Mr Yeo's premise was that once arbitration proceedings had commenced in relation to the termination of the Management Agreement, GGAM should have disclosed this fact. Assuming for a moment that the investigations did involve these individuals, we find it difficult to understand why disclosure of the fact would have to be made in an arbitration involving entirely different companies and in which no allegation had been made by the appellants 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. During oral argument, we repeatedly asked Mr Yeo to substantiate his contention that in an arbitration proceeding involving a party

against whom certain allegations were made, that party had an obligation to disclose information inimical to his interests even if that information was not relevant to the subject matter of the arbitration, and his further argument that the non-disclosure of the information would amount to fraud affecting the ultimate award. Going further, the proposition proffered by Mr Yeo seemed to be that if party A terminated his contract with party B for a specified reason, then in litigation over the justifiability of that reason, if party B knew of another reason that could have justified termination, he would be bound to disclose it. Mr Yeo was not able to put forward any established legal principle which substantiated that proposition whether in arbitration or court proceedings. Nor was any authority produced for it.

44 Upon further reflection, we see no reason to change the view we expressed during the hearing that the argument is 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 interests, including terms as to the disclosure of the counterparty's previous activities. Such contracts do not have the *uberrima fides* characteristic of insurance contracts where the insurer undertakes the risk only on the basis of full disclosure by the intended insured of all matters relevant to the risk. Insurance contracts are a very special species of contract. Generally, commercial 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. We, of course, wholly uphold the obligations of parties to arbitration proceedings to make full disclosure in those proceedings of all information and documents that are *relevant* to the issues being contested in the arbitration. 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. We therefore have no hesitation in rejecting Mr Yeo's first basis.

45 The second basis on which Mr Yeo relied was breach of a contractual term. The relevant term is cl 11.3 of the Management Agreement which reads as follows:

> 11. **REGULATORY MATTERS**
>
> …
>
> 11.3 **Privileged Licenses**
>
> The Owner and GGAM (i) acknowledge that the other party or its affiliates hold or will hold one or more licenses under gaming laws; (ii) agrees to use commercially reasonable efforts to take, or to refrain from taking, any actions that are necessary to prevent, or that would be reasonably likely to cause, the gaming license of the other party or its affiliates to expire, terminate, or not be renewed; and (iii) *agrees* to cooperate with the other party, as reasonably requested on a confidential basis, and at no out-of-pocket cost or expense to the cooperating party, *to provide information reasonably necessary to enable the other Party and its affiliates to respond to any requests for information in connection with the acquisition or preservation of such gaming licenses or compliance with any gaming regulations applicable to the other party or its affiliates and the other party's internal compliance policies of general applicability relating thereto (including information required in connection with any necessary background checks or other investigations regarding credit standing, character, and personal qualifications).*
>
> [emphasis added]

46 Mr Yeo further noted that under cl 15.1(f) of the Management Agreement, the appellants were entitled to terminate it if GGAM's acts or omissions had resulted in a final order by PAGCOR that GGAM was unsuitable to participate in the management of the Solaire Casino. The clause reads as follows:

> **15. TERMINATION**
>
> **15.1 By Owner for GGAM's Breach**
>
> The Owners may at any time, by written notice addressed to GGAM, give prior notice of intention to terminate the Services under this Agreement, in whole or in part if any of the following have occurred:
>
> …
>
> (f) an affirmative act or failure to act by GGAM that results in a final order by PAGCOR that GGAM is unsuitable to participate in the management of the Facilities, and such order by PAGCOR cannot be remedied within the cure period as may be allowed by PAGCOR, provided no cross-default is triggered thereby.
>
> …

47 The appellants' contention in this regard was that the failure of GGAM and Mr Weidner and Mr Chiu to reveal their involvement in the investigations carried out by the US Authorities constituted a breach of cl 11.3 which could have resulted in termination under cl 15.1(f) of the Management Agreement.

48 We are unable to accept this contention. It is inherent in cl 11.3 of the Management Agreement that GGAM agreed to provide information to the governmental authorities *if* such information was requested by PAGCOR. An allegation of breach of this obligation cannot be made in a vacuum but must be supported by evidence. Here, there was no evidence that the Solaire Casino or, for that matter, GGAM had been asked by PAGCOR to provide information on

the activities of Mr Weidner and Mr Chiu when they were working for LVS. There was no evidence either that GGAM had given any incorrect information to PAGCOR. This lack of evidence is not surprising as the arbitration did not concern allegations by the appellants that there had been a breach of cl 11.3 justifying the invocation of cl 15.1(f) as a basis for termination. While the appellants did rely on cl 15.1(a), the allegations of material breach that they made had all to do with management failures in relation to GGAM's obligation to attract junket operators and high net-worth individuals to the Solaire Casino (see [62] of the Judgment). Without a factual basis for their submissions, the appellants' contention on breach of cl 11.3 cannot stand.

49 We turn now to the third leg of the appellants' contention. The appellants noted that the Judge had accepted that when the 2012 Statements were juxtaposed against the FCPA Findings, there were *prima facie* inconsistencies (Judgment at [127]–[128]). The Judge had gone on, nevertheless, to hold that no procedural fraud existed. The appellants contended that the Judge's rationale for this holding was flawed.

50 First, the Judge had found that the 2012 Statements had to be understood in the context that the investigations by the US Authorities were in their "initial phases" at the time and the FCPA Findings were not reported until years after the 2012 Statements were made. The appellants, however, had not asked questions about the investigations or their findings but instead had asked specific questions about whether Mr Weidner was involved in the transactions under investigation and, if so, whether his actions were thoroughly reviewed by legal counsel/accounting professionals to ensure compliance with US and foreign law.

51 The appellants emphasised that at the time of the 2012 Statements, Mr Weidner was fully aware of his involvement in the transactions under investigation and knew what the truthful answers to the appellants would be. He also knew that Mr Chiu had been involved in those transactions, but he concealed that fact from the appellants. The appellants contended that it is undeniable that Mr Weidner had lied to them in August 2012 thereby inducing the appellants to continue performance of the Management Agreement and preventing them from raising his lies in the arbitration as grounds for termination of the contract. In this regard, the appellants emphasised three points:

(a) Mr Weidner's statement that the transactions were presented to and reviewed by the board of LVS and thoroughly reviewed and vetted by legal counsel/accounting professionals was misleading because the FCPA Findings revealed that Mr Weidner and Mr Chiu actively prevented the transactions from being thoroughly investigated by an outside accounting firm and Mr Weidner had prevented the board of LVS from thoroughly reviewing the transactions.

(b) Mr Weidner's statement that he was not "involved in the transfer or accounting of funds related to the transactions nor did [he] structure those transactions" was false. The FCPA Findings made clear that:

(i) Mr Weidner personally approved many of the fund transfers relating to the impugned transactions;

(ii) Mr Chiu was also intimately involved in these fund transfers; and

(iii) The two men personally structured at least two of the investigated transactions.

(c) Mr Weidner's statement that he was not "aware of nor was [he] complicit in any alleged wrongdoing" was false. The FCPA Findings detailed that Mr Weidner and Mr Chiu terminated the employment of legal/accounting professionals who raised red flags with respect to the investigated transactions and replaced them with less experienced personnel.

52 In view of the above arguments and because allegations of fraud have to be supported by strong evidence, we have to consider the weight of the FCPA Findings. In this regard, we agree with the Judge that these findings do not bear the weight of findings established by a court of law (Judgment [168]). The FCPA Findings did not establish to the degree of proof that a court requires the various assertions that the appellants made and that we have reproduced in [51(a)] – [51(c)] above.

53 The Judge found that the FCPA Findings did not prove, on a balance of probabilities, that Mr Weidner and Mr Chiu bribed Chinese government officials and state-owned entities while they were with LVS. She further held that, at their highest, the FCPA Findings implicated the two men in the conduct of three transactions pertaining to the violation by LVS of the FCPA Accounting Provisions but not its Anti-Bribery Provisions (Judgment [166]). We find no reasoned basis on which we can disagree with the findings of the Judge in relation to the lack of evidence of fraud.

54 Second, the FCPA Findings did conclude that several contracts with and payments to the Consultant had no discernible legitimate business purpose and

that the internal accounting controls in the PRC operations of LVS failed and that its books and records were inaccurate (DOJ Agreement at para 35). Mr Peter B Clark, who submitted an expert opinion on behalf of the appellants, opined that there was a "high probability" that the actions of Mr Weidner and Mr Chiu were in "possible violation" of the Anti-Bribery Provisions of the FCPA. He pointed to the fact that the DOJ Agreement stated that the Consultant had received payments from LVS "without an articulable rationale", that there were e-mails from Mr Chiu about another LVS employee "knowing too much" and "making trouble" for them and that Mr Weidner's presentation to the Board of Directors had improperly characterised the conclusions of the independent accounting firm. In our view, none of these amount to a clear finding of bribery or corruption, but merely allude to this possibility. The finding of the DOJ Agreement that Mr Weidner had omitted nearly all context for the purported findings, including the limitations that had been put on the accounting firm's efforts, in his presentation to the Board, or his removal of various employees, *may* be indicative of some dishonesty, but also does not relate to fraud and/or corruption in LVS's *operations*.

55 The weight of the FCPA Findings is affected by their character. They are not the 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. Instead, they are negotiated documents that contain allegations based on the US government's view of the evidence, even if, as the appellants assert, that view was arrived at following lengthy investigations.

56 It is significant that Mr Weidner and Mr Chiu were not parties to the findings and that they were not given the opportunity to participate in the

negotiations between LVS and the US Authorities which resulted in the FCPA Findings. Mr Weidner was never given an opportunity to respond to any allegation of illegal conduct during his tenure at LVS. He was interviewed once only, in July 2012, in connection with the investigation of LVS.

57 Further, no charges were brought by the DOJ nor was any administrative action taken by the SEC against Mr Weidner and Mr Chiu. On appeal, the appellants were unable to explain why the US Authorities did not take action against the two men. Instead, they made general statements like "[a] number of factors go into the decision whether to charge/prosecute an individual" and, relying on the evidence of an expert witness for GGAM, one Mr Philip Urofsky, asserted that "it is not unusual for the US Government not to charge individuals". It is pertinent that Mr Urofsky commented that the most likely explanation for any decision not to prosecute Mr Weidner and Mr Chiu was that 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. Whilst the appellants may dismiss that comment as speculation, it pertains to a factor which is generally known to be taken into account by prosecutors when deciding whether to mount charges against individuals.

58 Third, as the Judge observed, the FCPA Findings were in respect of violations of the Accounting Provisions of the FCPA, not the Anti-Bribery Provisions thereof. The appellants emphasise that a breach of the Accounting Provisions of the FCPA are no less serious than a breach of the Anti-Bribery Provisions. To the extent that this was an argument made on the basis of Mr Clark's report, the latter in fact only said that a violation of the Accounting Provisions of the FCPA would be "no less" a violation of the FCPA than a violation of the Anti-Bribery Provisions, which is quite a different proposition.

In any event, the severity of the violation is beside the point in so far as the question is instead whether there had been any fraud and/or corruption in LVS's operations. Mr Urofsky stated that the accounting provisions "apply to a broad range of corporate conduct and are not dependent upon there being a violation of the Anti-Bribery Provisions, or of bribery at all". In this connection, we agree with the observation of the Judge that "nowhere in the FCPA Findings is it stated that LVS or its directors themselves were directly involved in bribery" (Judgment at [178]).

59 Fourth, we agree with the reasoning of the Judge as to why the FCPA Findings were likely accepted by LVS. She stated that "on a systemic and practical level, there are various incentives available to LVS for entering into such agreements with the DOJ and SEC" and that a company intent on settlement "would have very little or no incentive to contest the factual assertions contained in the FCPA Findings" or to "seek and include contrary or exculpatory evidence concerning the conduct under investigation" (Judgment at [180]). The Judge concluded that the incentives in existence diminished the overall weight to be ascribed to the FCPA Findings in general, especially when they were being relied upon as evidence of fraud (Judgment at [183]). As the Judge noted, the monetary penalty imposed on LVS was substantially discounted from the bottom of the applicable sentencing guidelines.

60 Not only were Mr Weidner and Mr Chiu not part of the settlement negotiations with the US Authorities, it is common ground that they had severed their connections with LVS in 2009, several years before the investigations commenced. As stated earlier, they took no part in the investigations and were in no position to influence the decision made by LVS to settle with the US Authorities or to accept the FCPA Findings. While we accept the appellants'

point that it would be absurd for the incentives available to cause LVS to admit to a fact it believed to be false or to fail to present exculpatory evidence merely to reach a settlement with the US Government, that point cannot prove that Mr Weidner and Mr Chiu committed fraud. Firstly, the Judge did not find that LVS admitted to facts "believed to be false". What she said and what we agree with is that the presence of the incentives was a relevant consideration that diminished the overall weight to be ascribed to the FCPA Findings. Secondly, the appellants' point rests on the premise that admitting to the facts in a non-prosecution agreement would have serious direct and collateral consequences on the company making the admission. The Judge dealt with this point too in that she noted that if LVS had not cooperated with the US Authorities it would likely have faced harsher penalties and a more severe form of resolution (Judgment at [182]). In this situation, it was in the interests of LVS to reach an accommodation with the US Authorities even if, by doing so, aspersions were cast on the conduct of employees who had left many years earlier in acrimonious circumstances.

61 There is another important point in this regard. 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. The FCPA Findings related to misconduct by LVS in China which occurred *four years before* the opening of the Solaire Casino in 2013. The Judge rejected the appellants' argument that there were striking similarities between the LVS transactions and Mr Weidner's strategies for the Solaire Casino (Judgment at [194]). We agree with her reasoning on this point and see no need to repeat it.

62 The appellants argued that the FCPA Findings showed that the 2012 Statements was false and misleading and therefore amounted to fraud in the

arbitration. For instance, Mr Weidner had personally approved many of the transfers in relation to the impugned transactions, and Mr Chiu was also intimately involved. The two had personally structured at least two of the investigated transactions using the Consultant as a "beard". Mr Weidner's claim to not have been complicit or aware of wrongdoing was also shown to be false. In the appellants' view, it is also relevant that the statement was facilitated by PH LLP, who could not have conducted a reasonably diligent inquiry before approving the 2012 Statements.

63 Further, the appellants submitted that the Judge was wrong to find that Mr Weidner did not have a subjective intent to defraud the appellants (Judgment at [128]). The appellants were granted an option to purchase 10% of Solaire's shares at a small fraction of the market price under the Management Agreement. Mr Weidner therefore would have had a motive to lie to the appellants so as not to jeopardise that contract and the lucrative equity option. The distinction between false information given in a legal proceeding and false statements made outside of the same was highly technical. The 2012 Statements were continued in the arbitration and facilitated by PH LLP.

64 In response, the respondents argued that the Judge correctly found that the 2012 Statements did not constitute perjury. The accuracy of the 2012 Statements was not at issue in the arbitration and the appellants did not rely on any alleged misrepresentation regarding the matters in the FCPA Findings as a basis for terminating the Management Agreement. Under Philippine law, a ground for termination that is not mentioned in the pre-termination letter or termination notice may *not* be considered in determining whether termination is valid. Further, the 2012 Statements had been given in response to inquiries about the status of the LVS investigation, and therefore provided Mr Weidner's

view, and were not dishonest. There difficulties with the FCPA Findings mean that any *prima facie* inconsistencies between the findings and the 2012 Statements would not be probative. Finally, the statements had been drafted with the assistance of lawyers, and therefore did not show fraud on the part of Mr Weidner. There is also no evidence of dishonesty or fraud by PH LLP in the arbitration.

65 In our judgment, the difficulty that the appellants face in relying on the 2012 Statements as evidence of fraud in the arbitral proceedings is that those statements were not statements made in legal proceedings. The appellants asserted that this was a "highly technical" distinction, since the lies and misrepresentations that began outside of the arbitration continued in the proceedings and were facilitated by PH LLP. In this regard, the appellants argued that Mr Weidner's success, experience and contacts in China were a "constant theme" in the arbitration, and nothing relating to the misconduct was ever disclosed despite the fact that this was factually intertwined with the claim that Mr Weidner's and Mr Chiu's experiences in China and Macau brought great value. However, this argument misses the point. The alleged misconduct does not detract from Mr Weidner and Mr Chiu's experience or contacts in China, and on the appellants' own case, Mr Weidner and Mr Chiu had close contacts which could have facilitated their strategies for bringing in VIP players and junket operators. Further, the fact that the statements were made outside and before legal proceedings is not simply a technical distinction, since this is a key factor in determining whether or not the Award had been induced by fraud in the arbitral proceedings, and is part of what defines perjury. In this regard, the respondents asserted that the accuracy of the 2012 Statements had not been in issue at the arbitration, and that they had not taken a position on accuracy.

On this basis alone, the assertion of procedural fraud, in so far as it rested on the 2012 Statements, must be rejected both in relation to Mr Weidner and PH LLP.

66 The evidential issues with the FCPA Findings, discussed above, would also be relevant here. This is particularly since Mr Weidner maintained that the 2012 Statements, which did in fact admit to his participation at a "strategic level" in the transactions, were truthful. Even if the 2012 Statements had been dishonest, to be material the dishonesty must have been intended to cause any person in that proceeding to form an erroneous opinion that touched on any point *material to the result of such proceeding*, and the newly discovered evidence must be decisive in prompting the arbitrator to rule in favour of the applicant instead of the other party (see Judgment at [105], citing *Koh Pee Huat v Public Prosecutor* [1996] 2 SLR(R) 816 at [44] and *Swiss Singapore* at [29]). In this case, neither of these two requirements has been met.

67 Moreover, in relation to the appellants' argument that Mr Weidner and his counsel gave "false information intended to mislead the Tribunal by, for example, objecting to the introduction of articles regarding the DOJ/SEC investigations …" on the basis that they were simply "press reports" not "worthy of being included in the record", the section of the transcript the appellants refer to is unhelpful and does not indicate that this objection was pursued with any particular force. In any event, the objection would have been consistent with the respondents' position before this court, that the FCPA Findings were irrelevant to the issues before the Tribunal, which pertained to the Solaire Casino and not LVS.

Concealment of documents in the arbitration

68 The appellants also contended that the respondents and PH LLP violated the Tribunal's orders by failing to disclose documents from Mr Chiu. Although the Judge also considered the non-disclosure of documents from the respondents' joint venture partner Cantor Fitzgerald and its Chairman and CEO Mr Howard Lutnic, as well as documents of a non-party, Weidner Resorts (see Judgment at [143]), this has not been raised on appeal.

69 The Judge held in relation to Mr Chiu's documents that there had been no unlawful concealment. The disclosure obligation under Art 3.1 of the IBA Rules (that was applicable to the arbitration) only requires that each party submit to the Tribunal and to the other parties all documents available to it on which it relies. The appellants contended that the Judge's conclusion was erroneous since the Tribunal ordered the respondents to produce all documents, communications and information regarding their efforts to drive junket operators and foreign VIPs to the Solaire Casino. This would include Mr Chiu's personal files, including his communications with Chinese government officials and other Chinese and Macanese individuals who were instrumental to the appellants' strategies for the Solaire Casino. The FCPA Findings relied on Mr Chiu's e-mails in documenting violations of the FCPA when Mr Weidner and Mr Chiu were at LVS, but the respondents did not produce a single e-mail between Mr Chiu and any of the Chinese individuals and entities that were involved in the respondents' two corrupt strategies for the Solaire Casino. The appellants had not had reason earlier to suspect deliberate violation of the Tribunal's discovery orders or the significance of the violation. The appellants also alleged that the respondents' counsel had twice lied to them about having searched for and produced Mr Chiu's files: from Mr Michael Nolan's affidavit,

this seems to be because the respondents' current counsel for the arbitration, Hughes Hubbard, first responded to an inquiry about Mr Chiu's documents by saying "claimants searched for and produced all non-privileged documents responsive to respondents' document requests in the possession of … Eric Chiu". When asked again, Mr Weiner then stated that PH LLP's search had focused on documents "housed on services in GGAM's possession, custody or control" and that Mr Chiu "during the period at issue was not on GGAM's payroll", but instead on that of Weidner Resort.

70 In response, the respondents contended that the appellants' submission rested on the unproven assumption that there were undisclosed responsive documents amongst Mr Chiu's personal files. It was reasonable for PH LLP to conclude that any communications concerning the respondents' strategies for the Solaire Casino likely would fall within the e-mails disclosed. Despite the fact that the appellants had access to the FCPA Findings and hundreds of e-mails between Mr Chiu and the GGAM principals (including Mr Weidner), they do not have any evidence of e-mail correspondence between Mr Chiu and any Chinese individual. This is not surprising since the FCPA Findings had nothing to do with Mr Chiu's involvement with the Solaire Casino. The FCPA Findings do not refer to a single e-mail from Mr Chiu to Chinese third parties or government entities, and do not show that Mr Chiu sent such e-mails whilst at LVS or the Solaire Casino. In any event, any omission by PH LLP to produce the e-mails were mere discovery deficiencies that do not rise to the level of procedural fraud.

71 We note that the Tribunal ordered the production of documents in support of Mr Stone's statement that the respondents "provided access to and delivered to [the Solaire Casino] foreign VIP customers and Chinese junket

operators" as well as "documents showing [the respondents'] efforts to deliver foreign VIP premium direct customers to [the Solaire Casino]". We agree with the Judge that the non-disclosure of the e-mails from Mr Chiu's personal e-mail account does not amount to procedural fraud. This is primarily since even if Mr Chiu's e-mails fall within the scope of the Tribunal's order, there is no evidence that the decision not to produce the e-mails had been made dishonestly, particularly given the number of e-mails that had been produced by the respondents. PH LLP explained that while Mr Chiu communicated through a personal e-mail account, (a) his work was performed exclusively at the behest or with the involvement and knowledge of the GGAM principals and all relevant communications relayed to the latter would already have been encompassed in the data sets collected; (b) his communications were almost exclusively in Chinese with other Chinese speakers and assuming the communications related to the Solaire Casino and had not been relayed to the respondents, would have been in Chinese and could not be searched using English search terms; (c) most meetings would have been in person and there was a "low likelihood that there were significant additional emails to locate" beyond what had already been collected; and (d) it would have been time-consuming and expensive to obtain the documents and to translate them. It appears that PH LLP had simply assessed that the resources that would be expended on obtaining Mr Chiu's documents outweighed the likelihood that there would be any "additional relevant emails … uniquely in [his] possession". Whether this decision was correct is not relevant to the present point. As alluded to above, 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 concealment *aimed at deceiving the arbitral tribunal*: see *BVU v BVX* at [47] in the context of setting aside. This has not been shown in the present case, and the

evidence would equally support a finding of, for example, negligent failure to disclose.

72 For completeness, we deal with the respondents' argument that the FCPA Findings lent new significance to Mr Chiu and his e-mails. In our view, however, the centrality of Mr Chiu to Mr Weidner's strategies would have been known to the appellants and the FCPA Findings cannot have shed any light on that since the findings pertained to separate transactions. While the DOJ Agreement might have relied on numerous "damning emails" involving Mr Chiu and Mr Weidner, to the extent that the e-mails had included the latter, these would have been disclosed. As the respondents noted, despite the many e-mails produced, there appears to be no evidence of any e-mail sent by Mr Chiu to Chinese entities/individuals. The appellants would have been aware of this deficiency during the arbitration proceedings but they did not press for disclosure. This is not surprising as their case in the arbitration was simply that GGAM was not fulfilling its obligation in relation to the procurement of "high rollers" and business for the Solaire Casino. In the circumstances, it does not lie in their mouths now to contend that the non-disclosure was fraudulent. Accordingly, no fraud has been established in relation to PH LLP's document collection or production for the arbitration.

Conclusion on fraud

73 For the reasons given above we uphold the decision of the Judge that the Award was not induced or affected by fraud. Accordingly, the Award cannot be set aside on this basis. Similarly, there is no ground on which we can refuse enforcement of the Award. Strictly speaking, having considered the substantive question, there is no need for us to consider the procedural question of time-bar, particularly as it relates only to the setting aside application and has no bearing

on the decision whether enforcement should be refused. However, the time within which an award can be set-aside is an important one for parties and practitioners and we therefore give our views on it below.

Was the application to set aside the Award time-barred?

74 The application to set aside the Award was brought pursuant to s 24 of the IAA and Art 34 of the Model Law. We reproduce below the material parts of these provisions for ease of reference. First, s 24 of the IAA:

> **Court may set aside award**
>
> 24. *Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law,* set aside the award of the arbitral tribunal if —
>
> (a) the making of the award was induced or affected by fraud or corruption; or
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.
>
> [emphasis added]

75 Second, Art 34 of the Model Law provides:

> **RECOURSE AGAINST AWARD**
>
> Article 34. Application for setting aside as exclusive recourse against arbitral award
>
> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.
>
> (2) An arbitral award may be set aside by the court specified in Article 6 only if:
>
> (a) …
>
> (b) the court finds that:

> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
>
> (ii) the award is in conflict with the public policy of this State.
>
> (3) An application for setting aside *may not be made after three months* have elapsed from the date on which the party making that application had received the award or, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal.
>
> (4) The court, *when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings* or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.
>
> [emphasis added]

76 As noted earlier, the Judge held that the three-month limit in Art 34(3) of the Model Law is absolute even in cases of fraud. The Judge made three main points. First, that the Singapore High Court has repeatedly held, including in *ABC Co v XYZ Co Ltd* [2003] 3 SLR(R) 546 ("*ABC v XYZ*") at [9], that the reference in Art 34(3) to "may not" should be construed as "cannot" as the intention was to limit the time during which an award may be challenged, as indicated by the material relating to the discussion amongst the drafters of the Model Law: see also *PT Pukuafu Indah and others v Newmont Indonesia Ltd and another* [2012] 4 SLR 1157 ("*PT Pukuafu*") at [30] and *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others* [2013] 1 SLR 636 at [97]; *BXS v BXT* [2019] 4 SLR 390 ("*BXS v BXT*") at [39]–[41].

77 Second, the Judge rejected the appellants' argument that the court should depart from these decisions and instead adopt the approach of the Hong Kong Court of First Instance in *Sun Tian Gang v Hong Kong & China Gas (Jilin)*

[2016] HKCFI 1611 ("*Sun Tian Gang*"), under which the reference to "may not" in Art 34(3) was read permissively rather than as mandatory. The Judge held that the reasoning in *Sun Tian Gang*, which used the permissive "may" in Art 34(2) to conclude that the "may not" in Art 34(3) was similarly permissive was wrong.

78 Third, as Anselmo Reyes IJ noted in *BXS v BXT* at [31], it is inappropriate to rely on a power derived from the Rules of Court to extend time prescribed in primary legislation (Judgment at [22]–[27]). While *BXS v BXT* did not involve an award the making of which was induced or affected by fraud, the drafters of the Model Law had considered a separate regime with a different time period for cases of fraud, but this was eventually rejected. From this, the Judge reasoned that the drafters chose to favour the finality of arbitral awards.

79 In addition, the Judge held that the Art 34(3) time limit applies to applications under s 24 of the IAA as well. In her view, this was so for four reasons. First, the position in Singapore on the strict time limit in Art 34(3) favours finality of arbitral awards and the drafters of the Model Law also decided that this would include cases of fraud, bribery or corruption. Second, the practice in other jurisdictions has been to modify the time limit in Art 34(3) by legislating for separate time limits in respect of arbitral awards influenced by procedural fraud and subsequently found to have been based on erroneous facts. Singapore has not done this. Third, the grounds in Art 34(2)(*a*)(ii) and Art 34(2)(*b*)(ii) overlap significantly with s 24(*a*) and s 24(*b*) of the IAA. Parliament cannot have intended the absurd result of permitting parties to circumvent the Art 34(3) time restriction by simply resorting to s 24 of the IAA. Fourth, while applying the three month time limit to s 24 might mean that fraudsters and corrupt parties profit from their own misdeeds on a procedural

technicality, most breaches of natural justice ought to be apparent and discoverable at the arbitration hearing and prior to the issue of the award such that recourse may be had within the three month period. This policy reason therefore would not apply to s 24(b), which overlaps substantially with Art 34(2)(*a*)(ii) in any event (Judgment at [42] to [45]).

80 The Judge framed two questions that she had to consider: (a) whether the time limit stipulated in Art 34(3) of the Model Law can be extended in exceptional circumstances like fraud, bribery or corruption; and (b) whether applications to set aside awards brought under s 24 IAA are subject to the three-month time limit in Art 34(3) of the Model Law. The same questions arise in the appeal and we address them in turn.

81 The appellants' arguments on Art 34(3) of the Model Law hinge on a permissive as opposed to mandatory reading of the words "may not" in the provision. The position taken in Singapore has consistently been that Art 34(3) *prevents* a court from entertaining applications brought under Art 34 after the expiry of the three-month period. The appellants contended that these cases did *not* concern fraud or corruption. However, it is evident from the reasoning in the earlier decisions that the conclusion the court reached turned on a construction of Art 34(3). Thus, the absence of fraud or corruption does not detract from the force of that reasoning. Specifically, the decisions have referred to the fact that:

(a) the permissive nature of the word "may" is not a helpful guide to how the contrary "may not" should be interpreted;

(b) the court's jurisdiction to hear the setting aside application arises from Art 34, which does not provide for the power to extend time;

(c) the strict interpretation of Art 34(3) was supported by material relating to the discussions amongst the drafters of the Model Law; and

(d) neither the High Court's power under para 7 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") nor the Rules of Court extend to granting an extension of time for an Art 34 application.

(drawing from *ABC v XYZ* at [9]; *PT Pukuafu* at [30]; *BXS v BXT* at [25]–[41]).

82 While the appellants' emphasis on fraud and corruption may provide a strong policy reason in favour of the courts' retention of discretion to extend the time limit where such grounds are present, the fact is that 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 indeed any ground at all. The appellants' position that the time limit in Art 34(3) should *only* be extendable in circumstances where there has been fraud or corruption in fact highlights the key weakness of their case, which is that the article simply does not distinguish between cases involving fraud and corruption and those which do not; it would follow that the time limit is either extendable, subject to the court's discretion, in *all* cases, or not at all.

83 In support of their argument, the appellants cited s 29(1) of the Limitation Act (Cap 163, 1996 Rev Ed) ("Limitation Act") which expressly provides for the postponement of a limitation period in cases where the right of action is concealed by fraud until such time as the fraud is discovered or could be discovered with reasonable diligence. However, it is clear that s 29(1) of the Limitation Act does not in fact apply to Art 34 of the Model Law, since s 29(1) states clearly that it applies to an action "for which a period of limitation is

provided by this [Limitation Act]". That does not describe the present case and does not provide a basis on which to suggest that there might be an exception to the time limit in Art 34(3). The absence of a provision in the IAA that is similar to s 29(1) of the Limitation Act, despite the clear language of Art 34(3), would seem to indicate that there was no intent to legislate a distinct timeline where fraud, concealed or otherwise, is concerned.

84 Further, in so far as the appellants referred to the "principles" that (a) timelines should not be imposed so rigidly as to cause injustice in a situation where the fresh evidence uncovers fraud on the part of the other party; and (b) that the requirement of due diligence similarly should not shut out evidence of fraud not adduced at the time of the trial, with respect, these do not address the preliminary question as to whether the time line in Art 34(3) is a permissive one which would allow for these considerations. For instance, while the appellants referred to *Ching Chew Weng Paul v Ching Pui Sim* [2011] 3 SLR 869 at [41] for the former principle, this does not assist them since the court was there considering the setting aside of a *judgment*, which, as the Judge accepted, the court has discretion to do.

85 The appellants contended that the Judge was wrong in adopting the reasoning in *BXS v BXT* at [38]–[39] in holding that Art 34(4) is a "written law relating to limitation" and therefore not subject to the court's power to extend time conferred by para 7 of the First Schedule of the SCJA. Paragraph 7 reads:

> **ADDITIONAL POWERS OF THE HIGH COURT**
>
> …
>
> **Time**
>
> 7. Power to enlarge or abridge the time prescribed by any written law for doing any act or taking any proceeding, whether the application therefor is made before or after the expiration of

> the time prescribed, but this provision shall be without prejudice to any *written law relating to limitation*.
>
> [emphasis added]

86 As the court held in *BXS v BXT* at [38] (referring to *Obegi Melissa v Vestwin Trading Pte Ltd* [2008] 2 SLR(R) 540 at [32]), whether a law "relates to limitation" depends on whether it extinguishes a right of action or merely imposes a deadline for the taking of a procedural step. In *ABC v XYZ* at [19] (cited in *BXS v BXT* at [39]), the court held that an application to set aside an arbitral award is akin to the bringing of a cause of action. The appellants submitted that the Judge's interpretation was incompatible with s 29(1) of the Limitation Act, which is evidently a "written law relating to limitation" providing for the possibility of an extension of time in cases involving concealed fraud. However, this submission is misguided. Section 29(1) is a written law *specifically providing* how the limitation period is to be computed in cases involving concealed fraud, and any "extension" thereunder is not an extension granted by an exercise of the court's powers under the SCJA.

87 The Judge also referred to the *travaux preparatoire* of the Model Law. The appellants contended that there is *nothing* in the *travaux* that indicates the time limit in Art 34(3) could not be extended in the circumstances. Section 4(1)(*b*) of the IAA provides that, for purposes of interpreting the Model Law, reference may be made to the documents of its working group for the preparation of the Model Law. The *travaux* 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 the grounds of fraud on the basis that this would be contrary to the need for speedy and final settlement of disputes: see Judgment at [28], citing the Report of the UNCITRAL on the work of its Eighteenth Session (A/40/17, 3-21 June 1985) at paras 299–300. The suggestion

from this is that the intent was for cases involving fraud to be treated in the *same* manner. There was no mention of extension of any time limit imposed.

88 The observations on extension of time in *Sun Tian Gang*, which the appellants relied on, were, strictly speaking, made *obiter*. The question before that court was whether the Notice of Arbitration and the Award had properly been served on the defendant, who sought to set aside the Award. On the defendant's case, he had only received the Award in May 2015, although the proceedings to set aside the Award would, even on his case, have been commenced out of time as they were only brought on 16 October 2015. However, the court went further to find that the forwarding of the Award to the defendant in May 2015 could not have "the effect of [the defendant] being deemed to have received the Award and the Reasons" (*Sun Tian Gang* at [78]), and therefore that the three month time limitation period under Art 34(3) did not begin to run (*Sun Tian Gang* at [81]). It was in the context of this finding that the court went on to consider whether, in any event, the period of three months provided in Art 34(3) could be extended. The court reasoned that (a) the time limit in Art 34(3) was a procedural one and that the court had jurisdiction and discretion to extend such time; (b) the Singaporean case law could be distinguished on the basis that the time limit was "mandatory by way of the applicable domestic rules [namely, the Rules of Court]"; and (c) that the phrase "may not" should be read permissively, in line with the permissive nature of the word "may" in Art 34(2). In contrast, the decision in *BXS v BXT* which the Judge followed in the present case was that it would be inappropriate to reason from the word "may" in Art 34(2) in interpreting the phrase "may not". Further, it would be incorrect to say that the Rules of Court render the time limit mandatory and the basis on which the court in *Sun Tian Gang* sought to distinguish Singaporean case law is therefore unpersuasive.

89 The appellants have not shown any basis to depart from the clear terms of Art 34(3), which on its face, applies to *all* applications brought under Art 34.

90 The next question is whether s 24 of the IAA is subject to the same time limitation. Essentially, the question is whether the phrase "[n]otwithstanding Article 34(1) of the Model Law" means that s 24 simply introduced new grounds for setting aside (apart from those set out in Art 34) to which the Art 34 time limit would similarly apply, *or* whether it means that s 24 introduced a *distinct remedy* unconstrained by the limitations in Art 34 for more egregious cases involving fraud or breaches of natural justice.

91 On this point, we agree with the Judge's conclusion that the three-month time limit applies to s 24 of the IAA. We note that the Explanatory Statement to the International Arbitration Bill (19 July 1994) stated that "[t]he list of reasons for setting aside an award in paragraph (2) is *supplemented* by clause 24 of the Bill" [emphasis added]. This suggests that s 24 does not form a separate regime, but instead provides additional grounds on which an award might be set aside.

92 The appellants observed that the previous draft of s 24 read:

> Without prejudice to *Article 34(**2**)* of the Model Law, the High Court may on the application of any party to an arbitration set aside the award of the arbitral tribunal if…
>
> [emphasis added in bold italics]

93 They argued that it is significant that the reference to Art 34(2) was changed to Art 34(1), since Art 34(2) only sets out the grounds for setting aside, and the previous wording made clear that Parliament was only setting out additional grounds in s 24(1) of the IAA. In contrast, the current s 24, with its

reference to Art 34(1) which states setting aside applications may only be made "in accordance with paragraphs (2) and (3)" of Art 34, means that the provisions of s 24 are applicable *notwithstanding Art 34(3)* (*ie*, the three-month time period) as well. This argument is not persuasive as it ignores the fact that the phrase "[w]ithout prejudice to Article 34(2)" was replaced with "[n]otwithstanding Article 34(1) of the Model Law, the High Court may, *in addition to the grounds set out in Article 34(2) of the Model Law*" [emphasis added]. Read in totality, the change is, at best, equivocal as to whether Parliament intended for the three-month limit to apply to s 24 as well. Further, the Law Reform Committee's *Report on Review of Arbitration Laws* published in August 1993 makes clear that s 24 of the IAA was adapted from s 36(3) of the Draft New Zealand Arbitration Act:

> … As a further safeguard the Committee would recommend that there should also be provisions to set aside or refuse enforceability of awards obtained by corruption, fraud or the partiality of the arbitrators. In this regard **the Committee recommends an adaptation of Section 36(3) of the Draft New Zealand Arbitration Act**.
>
> [emphasis in original]

94 In turn, s 36(3) of the Draft New Zealand Arbitration Act reads:

> (3) For the avoidance of doubt, and without limiting the generality of paragraph (1)(b)(ii) [materially similar to Art 36(2)(*b*)(ii) of the Model Law], it is declared that an award is contrary to the public policy of New Zealand if:
>
> (a) The making of the award was induced or affected by fraud or corruption; or
>
> (b) a breach of the rules of natural justice occurred in connection with the making of the award.

95 The Committee opined that it would be neither wise nor possible to define the scope and extent of "public policy" and instead proposed s 24 of the IAA. The New Zealand provision was intended to expound upon what would

be contrary to public policy. It is very similar to s 24 IAA. This, in our view, underscores the fact that the s 24 grounds would in fact be a *subset* of the public policy ground in Art 34(2)(*b*)(ii), and does not suggest that s 24 was intended to create a separate regime. Given this, it would be anomalous and absurd if a *subset* of the wider public policy ground is subject to *more permissive* procedural requirements. In this regard, it might also be relevant to note that O 69A r 2(1) of the Rules of Court states that an application to set aside an award under s 24 of the IAA or Art 34(2) "may not be made more than three months after" either the date on which the plaintiff received the award, or if under Art 33, the date on which the request is disposed of by the arbitral tribunal. This again is consistent with the view that s 24 does not form a separate regime and is *also* subject to the three-month time limitation imposed by Art 34(3) of the Model Law.

96 It is worth mentioning that 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. Examples of common law jurisdictions that have taken this step include Malaysia, New Zealand and Ireland. Similar steps have been taken by civil law jurisdictions such as Italy.

97 The appellants argued that the absolute time limit in Art 34(3) of the Model Law would cause "absurd and unjust results". We do not agree. 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. It will not be bereft of a remedy. The innocent party would

be able to take action to resist and set aside the enforcement of the award, like the appellants in this case did.

Conclusion

98 For the reasons given above, we find no merit in the appellants' submissions and dismiss the appeal. The respondents must have the costs of the appeal. Unless the parties are able to agree on quantum, they shall file written submissions limited to five pages each within ten working days of the issue of this judgment.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

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