IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 01

Originating Summons No 1432 of 2017

Between

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

… *Plaintiffs*

And

(1) Global Gaming Philippines LLC
(2) GGAM Netherlands B.V.

… *Defendants*

JUDGMENT

[Arbitration] — [Enforcement] — [Singapore-seated award]
[Arbitration] — [Award] — [Recourse against award] — [Setting aside]
[Civil procedure] — [Extension of time]

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

[2020] SGHC 01

High Court — Originating Summons No 1432 of 2017
Belinda Ang Saw Ean J
19–20 September, 24 October 2018; 21–23 May, 24 July 2019

3 January 2020 Judgment reserved.

Introduction

1 Bloomberry Resorts and Hotels Inc. ("Bloomberry"), and Sureste Properties, Inc ("Sureste"), the first and second plaintiffs in Originating Summons 1432 of 2017 ("OS 1432"), are challenging a Partial Award on liability issued by a three-member arbitral tribunal ("the Tribunal") on 20 September 2016. The first and second defendants in OS 1432 were the claimants in a Singapore-seated arbitration that was commenced in 2013 and governed by the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules 2010 ("the Arbitration"). The plaintiffs were the respondents in the Arbitration. The Tribunal found in favour of the first and second defendants, Global Gaming Philippines LLC ("GGAM"), and GGAM Netherlands B.V. ("GGAM Netherlands") respectively, for wrongful termination of the Management Services Agreement dated 9 September 2011 ("the MSA").

2 By the Partial Award, the Tribunal found, *inter alia*, that there were no misrepresentations by the defendants that induced the plaintiffs to enter into the MSA. The Tribunal noted that to justify rescission of the MSA on account of causal fraud under Philippines Law, the fraud must be serious, and must have operated at the time of the making of the MSA. In addition, evidence of fraud must be "full, clear and convincing" (see [127] of the Partial Award). The Tribunal also held that the plaintiffs' grounds for termination of the MSA were not made out and thus, their purported termination of the MSA was wrongful.

3 In OS 1432, the plaintiffs refer to evidence of fraud and/or corruption, which they assert were not discoverable until months *after* the Partial Award was issued on 20 September 2016. The argument here as regards the basis of the fraud allegations is that evidence was adduced in the Arbitration by the defendants which has now been shown to be false – not merely in the sense that it was incorrect, but in the sense that it was known by the defendants to be false – and had therefore been submitted fraudulently. According to the plaintiffs, the evidence of fraud and/or corruption was eventually revealed through the findings in two orders: (a) the 19 January 2017 Non-Prosecution Agreement between the US Department of Justice ("DOJ") and Las Vegas Sands ("LVS") ("the DOJ Agreement"); 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"). The DOJ Agreement and the SEC Order are collectively referred to hereafter as the "FCPA Findings". The plaintiffs characterise their fraud allegations as procedural fraud (*eg*, fraud by a party, suppression of documentary evidence or perjury) constituting a ground for setting aside and a bar to the enforcement of the Partial Award. They also characterise the FCPA Findings as "new evidence" of the defendants' fraud even though the new evidence came into existence after the Partial Award was

rendered. The new evidence was discovered, subsequently, post-award and the plaintiffs argue that the new evidence serve to establish that the Partial Award was based on wrong or incomplete facts owing to deliberate suppression or concealment of evidence and the new evidence would have influenced the way the plaintiffs' case was presented to the Tribunal ("the new evidence argument"). On either characterisation, this court should set aside the Partial Award and refuse enforcement since the procedural fraud and new evidence argument would have affected the Tribunal, the arbitral proceedings and/or the Partial Award.

4 Basically, the plaintiffs' substantive applications in OS 1432 are:

(a) To set aside the Partial Award under s 24 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") and Art 34(2) of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") as set out in the First Schedule of the IAA;

(b) Alternatively, to resist the enforcement of the Partial Award in Singapore. The challenge to enforcement of the Partial Award is on the main ground that the Partial Award is contrary to Singapore public policy under Art 36(1)(*b*)(ii) of the Model Law. The secondary ground that is relied upon is Art 36(1)(*a*)(ii), *ie*, the plaintiffs were unable to present its case by reason of the fraud committed by the defendants in the conduct of the arbitral proceedings in multiple respects such as the suppression of critical evidence and deception of the Tribunal.

5 The first substantive issue concerns the validity of the Partial Award in that the Partial Award was induced or affected by fraud or the way in which it was procured is contrary to public policy in that the defendants had concealed

documentary evidence or committed perjury with the dishonest intention to deliberately mislead the Tribunal and/or the plaintiffs. The alternative substantive issue for this court in the present proceedings to determine is whether, if the plaintiffs' fraud allegations are established on the new evidence (*ie,* the FCPA Findings), it would be contrary to Singapore public policy to permit enforcement of the Partial Award in this jurisdiction.

6 OS 1432 was commenced out of time after the expiry of the three-month time limit in Art 34(3) of the Model Law. In addition, the permissible time limit to set aside HC/ORC 6609/2016 dated 27 September 2016, which is the order made in Originating Summons No 979 of 2016 ("OS 979") granting leave of court to enforce the Partial Award in Singapore, had also expired. Consequently, on 20 June 2017, HC/JUD 355/2017 was filed against the plaintiffs in terms of the Partial Award (hereafter referred to as "the Enforcement Judgment"). HC/ORC 6609/2016 and the Enforcement Judgment are collectively referred to hereafter as "the enforcement orders". The plaintiffs now seek an extension of time: (a) to set aside the Partial Award; and (b) to set aside the enforcement orders. In both instances of delay, the plaintiffs rely on the common ground that the fraud that induced or affected the making of the Partial Award was only discovered after the relevant timelines had expired.

7 I propose to deal with the extension of time applications before considering the applicable legal principles, the details of the evidence before the court on the substantive applications and my decision on the issues. It is fair to state that the time extensions to set aside the Partial Award and challenge to the enforcement orders, if granted, will shape the grounds of challenge in the present application.

8 Mr Alvin Yeo, SC ("Mr Yeo") represents the plaintiffs and Mr Cavinder Bull, SC ("Mr Bull"), represents the defendants.

Background Facts

9 A brief outline of the parties and the procedural history is helpful before turning to consider the extension of time applications.

Parties

10 The first plaintiff, Bloomberry, and second plaintiff, Sureste, are the owners of the Solaire Resort & Casino ("Solaire"), a luxury hotel and gaming resort located in Manila, Philippines. The second plaintiff is wholly owned by Bloomberry Resorts Corporation, a listed company in the Philippines.

11 The first defendant, GGAM is the sole owner of the second defendant, GGAM Netherlands. During the period in issue, the defendants had four senior executives: Mr William P. Weidner ("Mr Weidner") as the Chairman and Chief Executive Officer ("CEO"), Mr Bradley Stone ("Mr Stone") as the President, Mr Garry W. Saunders ("Mr Saunders") as the Executive Vice President and Mr Eric Chiu ("Mr Chiu"), President for Asia.

12 In turn, GGAM is a wholly-owned subsidiary of Global Gaming Asset Management LP, a firm that develops, invests, manages and advises hospitality companies and projects, with an emphasis on the casino sector. Global Gaming Asset Management LP is a joint venture between an entity owned and controlled by Mr Weidner, Mr Stone and Mr Saunders, and a subsidiary of Cantor Fitzgerald LP ("Cantor Fitzgerald"), a global financial services firm.

Procedural history

13 The plaintiffs and GGAM entered into the MSA on 9 September 2011 "to provide management and technical services in the development and construction, and to manage the operation of" Solaire for a period of 10 years.[1] GGAM subsequently transferred all its rights, titles, benefits, privileges, obligations and interest under the MSA to GGAM Netherlands, the second defendant, under an Assignment and Assumption Agreement dated 8 March 2013. For ease of reference, GGAM, where used in the judgment below, is taken to refer to GGAM Netherlands as well as no distinction needs to be made between the two for the present case.

14 Subsequently, for reasons that will be explained below, the plaintiffs sought to terminate the MSA. The defendants duly commenced arbitration against the plaintiffs pursuant to cl 19.2 of the MSA. On 20 September 2016, following the hearings on liability in October 2015, the Tribunal decided in the Partial Award that, *inter alia,* there was no causal fraud or misrepresentation by the defendants in relation to the MSA and that the plaintiffs' termination of the MSA was not justified and constituted a breach of the MSA.

15 The SEC Order was published on 7 April 2016 and the DOJ Agreement was published on 17 January 2017.

16 As highlighted earlier, HC/ORC 6609/2016 was made in OS 979 on 27 September 2016. HC/ORC 6609/2016 was served on the second plaintiff and the first plaintiff on 4 January 2017 and 10 March 2017 respectively. The defendants filed the Enforcement Judgment in terms of the Partial Award on 20 June 2017.

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[1] First affidavit of Michael Nolan, para 8.

17 On 21 December 2017, the defendants filed OS 1432 seeking to, *inter alia*, set aside the Partial Award or, in the alternative, to challenge the enforcement of the Partial Award.

Time extension applications

18 As mentioned earlier, OS 1432 was filed out of time after the expiry of two different and separate timelines. The first concerns the three-month time limit in Art 34(3) of the Model Law, and the second relates to the fourteen-day timeline stipulated in HC/ORC 6609/2016. In both instances, the plaintiffs seek the necessary time extensions before proceeding with the merits of the substantive matters in OS 1432. I propose to consider the application to extend the three-month time limit in Art 34(3) of the Model Law before turning to the plaintiffs' non-compliance with the timeline stipulated in HC/ORC 6609/2016.

Time extension for setting aside the Partial Award

19 OS 1432 was filed on 21 December 2017, approximately one year after the three-month time limit to set aside the Partial Award expired on 20 December 2016. The plaintiffs' application to set aside the Partial Award is made under s 24 of the IAA and/or Art 34(2) of the Model Law. Other than the three-month time limit in Art 34(3), there is no express provision in s 24 of the IAA stipulating the time within which applications to set aside arbitral awards on s 24 grounds must be made. Before dealing with the court's powers, if any, to extend time, there are two anterior questions that must first be answered:

(a) Whether applications to set aside awards brought under s 24 of IAA are subject to the three-month time limit in Art 34(3) of the Model Law ("Question (a)"); and

(b) Whether the time limit stipulated in Art 34(3) of the Model Law is an absolute time limit that favours the finality of arbitral awards or, is it extendable in exceptional circumstances like fraud, bribery or corruption ("Question (b)").

20 I propose to answer Question (b) first because the case law on Art 34(3) is now fairly settled. Article 34(3) of the Model Law states:

> (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.

21 The words "may not" in Art 34(3) have been held to be mandatory in meaning by setting an absolute time limit of three months beginning from the date of receipt of the award, after which all recourse against the award is barred. Such an absolute time limit recognises the need for finality and legal certainty.

22 Specifically, the rulings of the Singapore High Court on Art 34(3) of the Model Law in *ABC Co v XYZ Co Ltd* [2003] 3 SLR(R) 546 ("*ABC v XYZ*") at [9], *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 ("*Astro Nusantara (HC)*") at [97], is that the time limit prescribed in Art 34(3) Model Law is strict. It is clear that Art 34 is meant not only to limit the grounds for setting aside an arbitral award, but it also prescribes that any challenge made on Art 34 grounds must be brought promptly within the period specified: see *Astro Nusantara (HC)* at [97]. This legal position is followed in two recent decisions of the Singapore International Commercial Court ("SICC") in *BXS v BXT* [2019] SGHC(I) 10 ("*BXS v BXT*") at [39]–[41] and *BXY and others v BXX and*

others [2019] SGHC(I) 11 ("*BXY v BXX*") at [83] that were published after the hearings for OS 1432 were completed.

23 Mr Yeo submits that this court should depart from the reasoning in *ABC v XYZ* and *PT Pukuafu* and he urges this court to instead adopt the approach of the Hong Kong court in *Sun Tian Gang v Hong Kong & China Gas (Jilin)* [2016] HKCFI 1611 ("*Sun Tian Gang*"). The plaintiffs' position remains the same (*ie*, the time limit in Art 34(3) is extendable) after parties were invited on 18 July 2019 to address the court on, *inter alia,* the decision of *BXS v BXT* where Anselmo Reyes IJ in that case analysed the reasoning of the judge in *Sun Tian Gang*. Both sides responded on *BXS v BXT* in writing on 24 July 2019.

24 *Sun Tian Gang* held that the Model Law does not preclude the court from regulating the procedure of applications to set aside awards, and therefore the court has the discretion to grant an extension of time under Art 34(3) (at [90]). Like Reyes IJ, I am unpersuaded by the court's reasoning in *Sun Tian Gang* which starts with and draws support from the court's permissive interpretation of the word "may" in Art 34(2) of the Model Law to give a similar permissive interpretation to the words "may not" in Art 34(3). Such an interpretation cannot be correct. A different meaning is convey by the single word "may" in Art 34(2) as compared to the words "may not" in the context of Art 34(3). As rightly analysed by Reyes IJ in *BXS v BXT* at [31]:

> …the discretion conferred by the word "may" in Article 34(2) merely refers to the court's discretion not to set aside an award even where one or more of the conditions in Article 34(2)(*a*)(i) to (iv) or (*b*)(i) to (ii) have been established. The word "may" in Article 34(2) accordingly cannot have any logical bearing on one's understanding of the expression "may not" in Article 34(3). There is the additional problem that Mimmie Chan J appears to be using subsidiary legislation (Order 73 of the Rules of the Hong Kong Court ("RHC")) to construe the extent to which a deadline imposed by primary legislation (Article 34(3) of the

> Model Law as enacted by s 81 of the HKAO) can be extended. No explanation is given as to why such a mode of interpretation is permissible.

25 In the context of Art 34(3), the words "may not" take on a mandatory meaning of "cannot". As Judith Prakash J (as she then was) held in *ABC v XYZ* (at [9]):

> All [Art 34(3)] says is that [an] application [to set aside] may not be made after the lapse of three months from a specified date. Although the words used are 'may not' these must be interpreted as 'cannot' as it is clear that the intention is to limit the time during which an award may be challenged. This interpretation is supported by material relating to the discussions amongst the drafters of the Model Law. It appears to me that the court would not be able to entertain any application lodged after the expiry of the three-month period as art 34 has been drafted as the all-encompassing, and only, basis for challenging an award in court. It does not provide for any extension of the time period and, as the court derives its jurisdiction to hear the application from the article alone, the absence of such a provision means the court has not been conferred with the power to extend time.

26 Hence, starting with the decision of *ABC v XYZ* and, more recently, the decisions of the SICC, the legal position in Singapore is that the time limit in Art 34(3) of the Model Law is strict, favouring the policy of finality of arbitral awards (see *BXS v BXT* at [40]) and legal certainty.

27 Mr Yeo in his written response of 24 July 2019, firstly, disagrees with Reyes IJ that Art 34(3) operates as a limitation provision, and secondly, he distinguishes *BXS v BXT* from the present case. On the first point, I am not persuaded by Mr Yeo that the court in *BXS v BXT* incorrectly held that Art 34(3) is a written law relating to limitation within the meaning of paragraph 7 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed). I agree with Reyes IJ's comment on the inappropriateness of relying on the court's power derived from procedural rules of court to extend time prescribed

in a primary legislation (at [31] of *BXS v BXT* quoted in [24]) above). As rightly noted by Roger Giles IJ in *BXY v BXX* at [88], "a power to extend time under a Rule cannot overcome a time limitation in primary legislation" and the time limitation under Art 34(3) of the Model Law still supersedes the court's general discretion under the Rules of Court.

28 In distinguishing *BXS v BXT,* Mr Yeo argues that *BXS v BXT* did not involve an award whose making was "induced or affected" by fraud. His argument leads me to the second part of Question (b), namely, whether the usual time limit of three months is extendable where fraud as a ground is raised to set aside an arbitral award. Mr Yeo contends that the time limit in Art 34(3) of the Model Law should be extendable in cases of fraud and, more so, where the fraud is discovered only after the expiry of the time limit. Mr Bull takes a contrary position arguing that the time limit in Art 34(3) is, without exception, strict. He referred to materials from the 18th session of UNCITRAL's working group for the preparation of the Model Law. At that session, there was a proposal to establish a separate regime that provided for a considerably longer period of time than in Art 34(3) for the setting aside of an award on the grounds of fraud, or where evidence was false or only discovered later. The Report of the UNCITRAL on the work of its Eighteenth Session (A/40/17, 3–21 June 1985) at paras 299–300 states:

> 299. Thus, considering whether any ground should be added, divergent views were expressed as to the need for such addition. Under one view, there was a need for adding wording to subparagraph (a)(ii) which would cover instances of serious departure from fundamental principles of procedure. Under another view, there was a need for establishing a separate regime, providing for a considerably longer period of time than the one set forth in article 34(3), for such cases as fraud or false evidence which had materially affected the award.
>
> 300. Under yet another view, there was no need for any addition in view of the understanding agreed to by the Commission as

> regards the ground set forth in subparagraph (b)(ii). In reply to the suggestion for allowing a considerably longer period of time in which to apply for setting aside an award on the grounds of fraud, or that evidence was false or discovered only later, it was stated that such extension was contrary to the need for the speedy and final settlement of disputes in international commercial relationships.
>
> [emphasis added]

This proposal of a separate regime with a different time period to apply to setting aside applications brought on grounds of fraud or corruption was considered but eventually rejected because Art 34(3) was drafted as it is. It is plain that the drafters chose to favour the finality of arbitral awards. The time limit in Art 34(3) is absolute in that all recourse against arbitral awards outside the three-month period (starting from the time of receipt of the award) are barred.

29 Mr Yeo accepts that national legislation may modify the time limit in Art 34(3). Unlike Malaysia, New Zealand and Ireland (all are Model Law States), Singapore has not expressly allowed for an exception to or extension of the three-month time limit in Art 34(3). There is no provision in the IAA that computes the time limit in Art 34(3) from the date of discovery of the fraud or withheld evidence or discovery of new facts or evidence post-award. The legislative approach taken in New Zealand is to modify the time limit in Art 34(3) to exclude the application of the three-month time limit in specific cases of fraud or corruption. Article 34(3) of the Arbitration Act 1996 (NZ) sch 1 ch 7 reads as follows:

> An application for setting aside may not be made after 3 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. **This paragraph does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.** [emphasis added]

30 In Malaysia, s 37(5) of the Malaysian Arbitration Act 2005 (Act 646) expressly states that the three-month limit will not apply to setting aside applications based on grounds that the award was induced or affected by fraud or corruption. The relevant sub-sections of s 37 read as follow:

> …
>
> (4) An application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award or if a request has been made under section 35, from the date on which that request had been disposed of by the arbitral tribunal.
>
> (5) Subsection (4) **does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.**
>
> [emphasis added]

31 In Ireland, s 12 of the Arbitration Act 2010 modifies Art 34(3) of the Model Law as such:

> **Notwithstanding Article 34(3)**, an application to the High Court to set aside an award on the grounds that the award is in conflict with the public policy of the State shall be made within a period of 56 days **from the date on which the circumstances giving rise to the application became known or ought reasonably to have become known to the party concerned.** [emphasis added]

This modification means that the timeline of 56 days for setting aside of the award only starts from the time when fraud as a public policy ground is discovered or ought reasonably to have been discovered.

32 It is now an appropriate juncture to consider Question (a), which is whether s 24(*a*) of the IAA is a separate regime with no express time limit for setting aside of arbitral awards on grounds of fraud or corruption. Question (a) also poses the additional query, which is whether, as a matter of construction of s 24, the three-month time limit in Art 34(3) is applicable to applications to set

aside arbitral awards based on s 24 grounds. It is not surprising that Mr Yeo and Mr Bull construe the phrase "[n]otwithstanding Article 34(1) of Model Law" in the opening sentence of s 24 of the IAA differently. If Mr Bull's construction of the phrase is preferred over Mr Yeo's, then applications brought under subsections (*a*) and (*b*) of s 24 of the IAA are subject to the time bar in Art 34(3) of the Model Law.

33 Section 24 of the IAA states:

> **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]

34 Article 34(1) of the Model Law states:

> 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.

35 Mr Yeo does not dispute that s 24(*a*) and s 24(*b*) of the IAA are additional grounds to set aside an arbitral award. The debate centres on whether s 24 of the IAA creates a regime to set aside an award that is separate from the grounds listed in Art 34 of the Model Law. While Mr Yeo acknowledges the overlap in the grounds of "breach of natural justice" in s 24(*b*) of the IAA and "otherwise unable to present its case" in Art 34(2)(*a*)(ii) of the Model Law, he submits that this overlap does not undermine his position that s 24 of the IAA

is a separate regime with no express statutory time limit, and that the only applicable time limit is prescribed by O 69A r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"). Furthermore, the procedural timelines set by the ROC are extendable at the discretion of the court.

36 Mr Bull takes the opposite view: there is only one regime and Art 34(3) of the Model Law applies to the two grounds in s 24 of the IAA. He reasons that in the absence of any legislative exclusion or extension, the time limit in Art 34(3) of the Model Law is applicable to applications to set aside arbitral awards on the ground that the award was induced or affected by fraud or corruption.

37 The real issue in the debate is whether, as a matter of construction, the opening words "[n]otwithstanding Article 34(1) of the Model Law" in s 24 of the IAA excludes in effect the time limit set out in Art 34(3) of the Model Law from applications to set aside arbitral awards under s 24. Another perspective is to ask the question whether the three-month time limit in Art 34(3) is incorporated into s 24 by the phrase "[n]otwithstanding Article 34(1)" in s 24.

38 On Mr Yeo's interpretation of "[n]otwithstanding Article 34(1) of the Model Law", applications for setting aside based on s 24 for both fraud and breach of natural justice derogate from both Art 34(2) and Art 34(3). This is because s 24 provides an entirely separate regime for applications to set aside brought under exceptional circumstances such as fraud, corruption, and prejudicial breaches of natural justice, for which Parliament chose not to include an express time limit within which such an application must be brought. According to Mr Yeo, Parliament intended to introduce a distinct remedy in s 24 unconstrained by the limitations in both Art 34(2) and Art 34(3) of the Model Law. This separate, flexible remedy would be available for more egregious cases such as where there had been fraud or corruption in the making of an

arbitral award or breaches of natural justice that prejudiced the rights of a party and impugned the arbitral process.

39 Mr Bull interprets the phrase "[n]otwithstanding Art 34(1) of Model Law" as referring to s 24 of the IAA being in spite of the grounds for setting aside enumerated in Art 34(2) of the Model Law, and not with reference to the time limit in Art 34(3) of the Model Law. Section 24 provides for additional grounds to set aside arbitral awards, in spite of the grounds listed under Art 34(2) of the Model Law. In particular, Mr Bull explains that the phrase "[n]otwithstanding Art 34(1) of Model Law" must be read with the key words expressed in s 24 of the IAA, "in addition to the grounds set out in Art 34(2)", which is consistent with Mr Bull's construction: courts may apply s 24 of the IAA in spite of the grounds set out in Art 34(2) of the Model Law, and not in spite of the time limitation set out in Art 34(3) of the Model Law. Hence, an application to set aside an arbitral award on a ground set out in s 24 of the IAA is still subject to the three-month time limitation under Art 34(3).

40 I digress to mention my earlier *obiter* views expressed in *Astro Nusantara (HC)* on the time limit in s 24. In that case, I foreshadowed the possibility of reviewing the o*biter* views on a future occasion at [120]:

> If FM's case had been one of fraud which had only been discovered after the expiry of the applicable time bars, I have no doubt that this would be a case of "prevent[ing] injustice" which would warrant a court's exercise of its powers under O 92 r 4 of the ROC to remedy the procedural breach under O 69A r 2(4) of the ROC. It cannot be the case that mere procedural irregularity under the ROC forces a court to accept that an arbitration agreement is not impeached by fraud, or to accept the consequences of that fraud. Another instance where O 69A r 2(4) is not likely to apply is where a court in the country which is the seat of the arbitration, raises on its own motion a public policy objection at the enforcement stage. In this situation, the court's power is unfettered by time limits. Until a case comes squarely before the Singapore court for determination, I do not

> have to decide the procedural points and will say no more about the matter.

Needless to say, I am open to reviewing the *obiter* views taken in *Astro Nusantara (HC)* on this matter.

41 That said, with the benefit of counsel's arguments and materials now placed before me, I find that Mr Bull's interpretation is preferred for the following cumulative reasons.

42 First, the legal position in Singapore with reference to the time limit in Art 34(3) of the Model Law militates in favour of Mr Bull's interpretation. As explained above, the three-month time limit in Art 34(3) is strict, favouring the policy of finality of arbitral awards and legal certainty. The drafters of the Model Law decided that cases of fraud, bribery or corruption should be subject to the strict time limit in Art 34(3) of the Model Law.

43 Second, I disagree with Mr Yeo's contention that the phrase "[n]otwithstanding Article 34(1) of the Model Law" in s 24 of the IAA effectively modified both Art 34(2) and Art 34(3) of the Model Law. As stated earlier, Mr Yeo explains the modification as follows: in the case of Art 34(2), additional grounds to set aside arbitral awards are introduced in s 24; and Art 34(3) is modified in the sense that the three-month time limit does not apply to s 24 grounds. I again refer to the statutory position adopted in Malaysia, New Zealand and Ireland that expressly provide for the exclusion of the three-month time limit in cases of fraud or corruption (see [29]–[31]). This is consistent with the book chapter, Nathalie Voser and Anya George, "Revision of Arbitral Awards" in Pierre Tercier, *Post Award Issues* (ASA Special Series No. 38, 2012) ch 3, cited in Mr Bull's bundle of authorities. As the Chapter shows, it is left to national laws to decide whether to adopt the time limit set out in Art 34(3)

or to provide separate time limits for setting aside of fraudulently obtained arbitral awards and/or for the situation where there is subsequent discovery of new facts or evidence post award (at p 47). The authors' comparative law review in continental Europe reveals that if there is to be modification of the time limit in Art 34(3), the approach adopted is to legislate for separate time limits in respect of arbitral awards subsequently found to have been based on erroneous facts or to have been influenced by procedural fraud.

44 Third, Mr Yeo's construction of the phrase "[n]otwithstanding Art 34(1) of the Model Law" rests on the assumption that both s 24(*a*) (*ie* fraud) and s 24(*b*) of the IAA (*ie,* breach of natural justice) are exempt from the time limit in Art 34(3) despite significant overlaps in the scope of the grounds listed in s 24(*a*) and s 24(*b*) of the IAA, and Art 34(2)(*a*)(ii) and Art 34(2)(*b*)(ii) of the Model Law. It is not disputed that cases of fraud, bribery or corruption fall within the ambit of public policy as a ground for setting aside under Art 34(2)(*b*)(ii) and there is no exception to the three-month time limit for this ground. The upshot of Mr Yeo's construction is an internal inconsistency within the legislation: (a) there is a **non-extendable** three-month time limitation if recourse against an arbitral award is brought under Art 34(2)(*a*)(ii) and Art 34(2)(*b*)(ii); and (b) the applicable time limit for an application to set aside an arbitral award under s 24 of the IAA is governed by O 69A r 2(4) of the ROC and this procedural time limit is **extendable** subject to the court's general discretion under O 3 r 4(1) and O 92 r 4 of the ROC to prevent injustice. The inconsistency as described will result if the opening words "[n]otwithstanding Article 34(1) of the Model Law" in s 24 of the IAA are construed to have the effect of carving out the time limit in Article 34(3) for s 24 grounds. Parliament could not have intended for such an incongruous and absurd result whereby parties restricted by the non-extendable three-month time limitation under Art

34(2) of the Model Law would be able to circumvent the time bar requirement by resorting to the grounds set out in s 24 of the IAA.

45 Finally, Mr Yeo's contention that Parliament must have intended for special and narrow cases of fraud or corruption under s 24(*a*) of IAA (which could at times be discoverable only three months after the receipt of the award) not to be subject to the three-month time limit in Art 34(3) of the Model Law is untenable. Whilst he has a point that such a construction would prevent fraudsters and corrupt parties from profiting from their own misdeeds on a procedural technicality, his contention runs into difficulty for two reasons when applied to s 24(*b*) of the IAA for the breach of rules of natural justice. First, most breaches of natural justice ought to be apparent and discoverable at the arbitral hearing, and are thereafter discernible from the award so that any recourse against the award would be within three months of receipt of the arbitral award. Second, the lack of harmonisation within the two limbs of s 24 creates an unsatisfactory situation: s 24 of the IAA becomes a limping provision, where both grounds under s 24(*a*) and s 24(*b*) of the IAA are exempt from the non-extendable time limitation even though the aforementioned policy reason only justifies such an exemption in the case of s 24(*a*). I can find no reason for this, especially where the s 24(*b*) of the IAA ground for breach of rules of natural justice has such a broad scope and substantially overlaps with the "otherwise unable to present its case" ground in Art 34(2)(*a*)(ii) of the Model Law.

46 For the above reasons, Mr Bull's construction of the phrase "[n]otwithstanding Art 34(1) of the Model Law" is preferred over Mr Yeo's. To answer both Questions (a) and (b), applications brought under s 24 of the IAA are subject to the three-month time limit in Art 34(3) of the Model Law, which is an absolute one that favours finality of arbitral awards. The plaintiffs'

application to set aside the Partial Award under s 24 of the IAA and Art 34(2) of the Model Law was filed out of time and it is therefore dismissed with costs.

Time Extension for setting aside the enforcement order

47 In OS 1432, the plaintiffs seek an extension of time for the plaintiffs to apply to set aside HC/ORC 6609/2016 granting leave to the defendants to enforce the Partial Award in the same manner as a Judgment or Order of this court. The application for time extension is made pursuant to O 3 r 4(1) of the ROC and/or under the inherent jurisdiction of this court. The plaintiffs did not apply to set aside HC/ORC 6609/2016 within fourteen days of service of the same as stipulated therein. The defendants filed the Enforcement Judgment in terms of the Partial Award on 20 June 2017.

48 Order 3 r 4(1) of the ROC provides:

> The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these Rules or by any judgment, order or direction, to do any act in any proceedings.

49 The words "such terms as it thinks just" gives the court discretion to grant time extension in order to achieve justice in the circumstances of the case. Generally, the factors the court takes into consideration in deciding whether to grant an extension of time are: (a) the length of delay; (b) the reasons for delay; (c) the chances of the defaulting party succeeding on appeal if the time for appealing 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]) with the courts generally focusing on the first two: *Falmac Ltd v Cheng Ji Lai Charlie and another matter* [2014] 4 SLR 202 at [14]. The first two factors are relevant to the present application for time extension.

50 In *Astro Nusantara International B.V. and others v PT First Media TBK* [2018] HKCFA 12 ("*Astro Nusantara International B.V.*"), the Court of Final Appeal of Hong Kong allowed an extension of time notwithstanding the fact that the order granting leave to enforce was set aside 14 months out of time. While the court noted that the delay of 14 months was substantial, it took into consideration the fact that the opposing party had not suffered any substantial prejudice (other than costs) and to refuse extension would be to "deny First Media a hearing where its application has decisively strong merits" (at [87]).

51 In this case, there was a delay of approximately 11 months and 9 months after the relevant deadline had expired for the second plaintiff and the first plaintiff respectively.

52 Whilst the length of delay is a factor, the main focus here is on the reason for the extension. The application for an extension is based on new evidence that was discovered post-award. The plaintiffs explained that the FCPA Findings were made after the liability hearing, and they discovered from the FCPA Findings new evidence of the alleged fraudulent and corrupt conduct of Mr Weidner and Mr Chiu and their significance could only be fully appreciated after the relevant timeline had expired. Thereafter, the plaintiffs went to the Tribunal with a Request for Reconsideration of the Partial Award. After that avenue failed, the plaintiffs filed OS 1432 on 21 December 2017.

53 Specifically, the fourteen-day timeline in HC/ORC 6609/2016 to set aside the same expired on 18 January 2017 and 24 March 2017 for the second plaintiff and the first plaintiff respectively, while the DOJ Agreement was only published on 17 January 2017. While I note that the SEC Order was issued on 7 April 2016, I agree with the plaintiffs that the DOJ Agreement is a more important document since it contained critical findings. As shall be seen in the

later part of this judgment, the DOJ Agreement also carries greater evidential weight, especially since LVS admitted to facts in the DOJ Agreement, while LVS neither admitted nor denied the facts in the SEC Order. The DOJ Agreement quotes specific e-mails involving Mr Weidner and Mr Chiu regarding the termination of an LVS finance employee. For the time extension application, I am prepared to accept at face value the plaintiffs' contention that the FCPA Findings had to be read together to be properly appreciated.

54 The plaintiffs' reasons for the delay and allegations of fraud are closely connected in that the allegations of fraud are bound up with the merits of the application to challenge enforcement of the Partial Award. As I see it, it is within the court's discretion to extend time and defer matters that are bound up with the merits to the substantive hearing proper. Put another way, given the circumstances of the present case, the plaintiffs ought to be allowed to assert the allegations of fraud as put forward in the application for time extension without reference to the further point of whether they are likely to succeed or not at the substantive hearing. This approach is in the overall interest of justice having regard also to the minimal prejudice caused to the defendants. Accordingly, I allow the time extension to the plaintiffs' application to set aside HC/ORC 6609/2016 and the Enforcement Judgment made in default of the plaintiffs' non-compliance with the relevant timeline. The plaintiffs are to pay the defendants costs of the time extension application.

Overview of the application to resist enforcement of the Partial Award

55 The next section of this judgment will cover the application in OS 1432 to resist enforcement of the Partial Award under Art 36(1)(*b*)(ii) of the Model Law (*ie,* contrary to public policy), and Art 36(1)(*a*)(ii) of the Model Law (*ie,* "otherwise unable to present his case"). In this regard, it is necessary to touch

on the events leading to the Arbitration, the Tribunal's findings in the Partial Award as well as explain the FCPA Findings in some detail.

56 Before that however, it bears noting that the Partial Award is final and binding on the plaintiffs since it has not been set aside. On the face of the Partial Award, the findings of the Tribunal are that the MSA is not contrary to Philippines Law and thus, in that sense, there is no finding that the MSA and its performance, being lawful, is contrary to the public policy of the Philippines. In this case, the only purpose of the plaintiffs' allegations of fraud is to use fraud under public policy considerations as a defence to resist the recognition or enforcement of the Partial Award and to set aside the enforcement orders. Whilst public policy exception exists to prevent enforcement in appropriate cases, proving the defence of violation of public policy based on the ground of fraud presents legal and evidentiary challenges that require the court to go behind a valid award. At any rate, the court will not disturb the principles of finality in arbitration without good reason; the court has to be satisfied that some form of reprehensible or unconscionable conduct that is within the spectrum of gravity of public policy considerations had contributed in a material way to procuring the Partial Award or had an important influence on the result. In this case, the public policy question under Art 36(1)(*b*)(ii) of Model Law hinges on the plaintiffs' allegations of fraud. If fraud is not proved, that is the end of the inquiry and the application to resist enforcement of the Partial Award fails. Likewise, the outcome of the plaintiffs' reliance on Art 36(1)(*a*)(ii) (*ie*, no opportunity to present their case), which also hinges of the same allegations of fraud, would be the same if fraud is not proved.

The Arbitration

57 On 12 September 2013, the plaintiffs issued a Notice of Termination of the MSA to the defendants affirming "the termination of the [MSA] with GGAM because of material breach of the MSA under Clause 15.1(a) of the MSA".[2] Clause 15.1(a) of the MSA states:

> **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:
>
> (a) GGAM has committed a material breach of this Agreement that is either incapable of remedy or, if capable of remedy, has not been remedied within 30 days of the Owner's notice or such longer period not exceeding 60 days as is reasonably necessary to effect the remedy;

58 GGAM's material breach of its obligations are recounted in the Arbitration and they are briefly set out in [62(b)] below. On the same day, the defendants commenced the Arbitration as claimants, arguing, *inter alia,* that the plaintiffs, the respondents in the Arbitration, had materially breached their obligations under the MSA and sought damages for the same.[3]

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2 First affidavit of Michael Nolan, p 186.

3 First affidavit of Michael Nolan, p 161.

Arguments before the Tribunal

59 The Tribunal was broadly faced with two key issues – one relating to whether the defendants had perpetrated causal fraud on the plaintiffs in inducing them into entering the MSA (the "Causal Fraud Issue"); the other being whether the plaintiffs were justified on any ground in terminating the MSA (the "Termination Issue").

60 The Causal Fraud Issue was concerned with allegations of various misrepresentations purportedly made by the defendants to the plaintiffs ([72] of the Partial Award), which led the plaintiffs into entering the MSA. The misrepresentations related to, *inter alia,* the following matters: (a) that GGAM could be equated with LVS; (b) that GGAM had pre-existing relationships with junket operators and guest data; (c) that GGAM was supposed to prepare proprietary documentation for the performance of services under the MSA to be furnished to the plaintiffs; (d) that the directors of GGAM would provide a "hands-on approach" to the management of Solaire; and (e) that the role of Cantor Fitzgerald (one of the owners of the holding company of GGAM) was not fully disclosed.

61 As to the Termination Issue, the question was whether the plaintiffs had wrongfully terminated the MSA based on the defendants' purported material breaches, particularly the defendants' failure to deliver junkets or VIPs to Solaire. Notably, Mr Weidner gave evidence that the defendants had two unique strategies for attracting the junkets and foreign VIPs to Solaire: (a) a "government-led, top-down junket approach"; and (b) a "cross-border trading platform to promote business and gaming visitations between China and the Philippines". This evidence was intended to refute the plaintiffs' case that the

defendants had failed to perform their obligations under the MSA.[4] In OS 1432, Mr Yeo submits that Mr Weidner's two strategies came up for the first time and belatedly at the Arbitration. In other words, the so-called strategies were an afterthought.

62 As such, the plaintiffs sought a declaration that they had rightfully ended the MSA due to GGAM's material breach of its obligations thereunder. The plaintiffs' key arguments in the Arbitration can be summarised as follows:

(a) The misrepresentations and/or conduct of GGAM amounted to causal fraud under Philippines Law that led the plaintiffs to enter into the MSA (*ie*, the Causal Fraud Issue);

(b) The plaintiffs' termination under cl 15.1 of the MSA (see [211] below) was justified because of the various breaches of the MSA committed by the defendants (*ie*, the Termination Issue). These breaches include:

(i) The failure to perform its obligations "through the Management Team";

(ii) The failure to submit business and marketing plans that met prudent industry practice under various clauses of the MSA;

(iii) Breach of the obligation to establish policies and procedures critical to the successful operation of an integrated casino as required under Annex A to the MSA;

(iv) Failure to use commercially reasonable efforts in the performance of its obligations pursuant to cl 2.5 of the MSA; and

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4 First affidavit of Michael Nolan, p 470, para 88.

(v) Breach of the obligation to provide "hands-on management" as promised by Mr Weidner.

Tribunal's findings

63 The Tribunal dismissed the Causal Fraud Issue on the ground that to the extent that any representations were made by the defendants, they were not false or fraudulent at the time they were made. Under Philippines Law which governed the MSA, the Tribunal noted that causal fraud is fraud "present or employed at the time of the birth or perfection of the contract" ([124] of the Partial Award). The fraud in question had to be sufficiently serious and there must be "full, clear, and convincing evidence, and not merely by a preponderance thereof" ([126] of the Partial Award).

64 Amongst other things, the Tribunal found that:

(a) There was no evidence that the defendants represented themselves as being the same entity as LVS.

(b) The alleged representations about the defendants' access to junket operators was made after the MSA had been signed, and thus could not constitute inducement ([131] of the Partial Award). In any case, given the standing of Mr Weidner and Mr Chiu in the gaming industry, it was likely that the defendants did have access to the junket operators or "high rollers" that were to be brought to Solaire;

(c) There was simply no evidence of the defendants' alleged representation that they would prepare proprietary documentation for the plaintiffs ([133] of the Partial Award).

(d) As for the representations about the "hands-on approach" to be provided by the defendants' directors, the Tribunal found that these were statements of intention that were true at the time they were made and there was insufficient evidence to show the contrary ([138] of the Partial Award). In any case, the plaintiffs themselves had altered the management structure subsequently, which meant that there could not have been any reasonable reliance on those previous statements.

(e) Finally, the Tribunal found that the plaintiffs did not establish that any false statement was made as regards Cantor Fitzgerald's role. In any event, the plaintiffs have also not demonstrated any legal basis mandating disclosure of information relating to the partnership between GGAM and Cantor Fitzgerald ([147] of the Partial Award).

65 With respect to the Termination Issue, the Tribunal dismissed all of the plaintiffs' purported grounds for termination and found that the plaintiffs had wrongfully terminated the MSA. Specifically, the Tribunal found, *inter alia,* that:

(a) GGAM did perform its obligations through the Management Team in accordance with the MSA.

(b) GGAM fulfilled its obligation to prepare, through the Management Team, the Business and Marketing Plans under cl 2.10 of the MSA, and through the Management Team, started to implement them.

(c) Again, GGAM fulfilled its obligation to produce policies and procedures under Annex A of the MSA, which were done through the Management Team headed by Mr French.

(d) The evidence was insufficient to substantiate a material breach of the obligation to make commercially reasonable efforts to comply with the standard of care enshrined in cl 2.5 of the MSA.

(e) The defendants had provided the necessary hands-on management and in any case, the purported representations in this regard could not have been justifiably relied upon because the management structure of Solaire had been revised.

(f) The above grounds for termination relied on by the plaintiffs do not qualify as material or "substantial and fundamental" violations of the MSA that would justify rescission or annulment of the MSA.

Events that are post-Arbitration

66 The fraud now alleged by the plaintiffs to resist the enforcement of the Partial Award is premised on the FCPA Findings. On 31 August 2017, the plaintiffs filed a Request for Reconsideration of the Partial Award to the Tribunal in the light of the FCPA Findings. In the request, the plaintiffs sought, *inter alia,* for the Tribunal to reconsider its Partial Award and make an award finding that the plaintiffs had "rightfully ended the [MSA] due to GGAM's material breach of its obligations thereunder".[5]

67 The Tribunal issued its decision on the Request for Reconsideration on 22 November 2017 ("Decision on the Request"). The Tribunal opined that it did not have the jurisdiction under Singapore law, being the law of the seat,[6] to reconsider its findings on liability in the Partial Award. In summary, this was

5 First affidavit of Michael Nolan, p 1899.

6 First affidavit of Michael Nolan, p 1902.

because s 19B of the IAA provided that the award was final and binding on the parties, subject only to the provisions in Art 33 and 34(4) of the Model Law. The Tribunal found that none of the exceptions applied in the present case.

68 Nevertheless, the Tribunal made the following observations:[7]

> 73. In any event, the Tribunal is cognisant that in the event a tribunal does not reconsider an award despite issues of fraud, the aggrieved party is not bereft of a remedy. Such a party may still apply to a Singapore court, *"(a) to set aside the Singapore Judgment; and (b) for leave to apply to set aside the Singapore Order of Court (as was done in Astro)".*
>
> 74. The Tribunal believes that, **where there are allegations of fraud, the Courts might be the better forum not least because of the seriousness of an allegation of fraud and its potential criminal consequences. Further, section 24 of the IAA provides the right to make an application to the Singapore High Court to set aside an award on the ground of fraud.**
>
> [emphasis added in bold]

69 After receiving the Decision on the Request and taking legal advice, the plaintiffs commenced OS 1432 on 21 December 2017.

The FCPA Findings

70 I turn then to consider in detail the contents of the FCPA Findings.

71 Both the DOJ Agreement and SEC Order pertain to three transactions involving the defendants' principals, Mr Weidner and Mr Chiu, which took place between 2006 and 2011, before the present parties entered into the MSA. At the period in question, Mr Weidner and Mr Chiu were directors of LVS, the entity in question in the FCPA Findings. The transactions were found to be in

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7 First affidavit of Michael Nolan, p 1924–1925.

violation of the US Foreign Corrupt Practices Act ("FCPA") and the plaintiffs' contention is that they "directly implicate Mr Weidner and Mr Chiu as the key protagonists in each of these transactions, and their activities were at the heart of the wrongful conduct".[8]

72 It is undisputed that the "LVSC President and Chief Operating Officer" mentioned in the SEC Order and the "Sands Executive 1" in the DOJ Agreement refers to Mr Weidner. It is also undisputed that the "VML Executive" in the DOJ Agreement and the "LVS President of Asian Development" in the SEC Order refers to Mr Chiu.

SEC Order

73 The SEC Order dated 7 April 2016 was issued by the SEC to LVS, as the respondent. The order is entitled "Order Instituting Cease-and-Desist Proceedings pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order".

74 The preamble to the SEC Order reads:[9]

> In anticipation of the institution of these proceedings, Respondent [LVS] has submitted an Offer of Settlement (the "Offer") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and **without admitting or denying the findings herein,** except as to the Commission's jurisdiction over it and the subject matter of these proceedings, which are admitted, Respondent [LVS] consents to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below. [emphasis added]

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8 Plaintiffs' written submissions ("PWS") dated 17 September 2018, para 28.

9 First affidavit of Michael Nolan, p 1342.

75 The conduct by LVS is summarised as follows:

> 7. This matter concerns the **failure of LVSC to devise and maintain a reasonable system of internal accounting controls** over its operations in the People's Republic of China ("PRC" or "China") and the Macao Special Administrative Region of the People's Republic of China ("Macao") from 2006 through at least 2011. As a result, **funds totalling [*sic*] more than $62 million were transferred to a consultant in China** over a series of transactions under circumstances that frequently lacked supporting documentation or appropriate authorization. Moreover, most of the transfers occurred **despite knowledge by senior LVSC management that they could not account for significant funds previously transferred to the consultant in an environment where significant bribery risks were present.** This lack of controls impacted other transactions, such as gifts and entertainment for foreign officials, employee and vendor expense reimbursements, and customer comps. The company also kept inaccurate books and records.
>
> 8. As a result of this conduct, **LVSC violated the internal controls and books and records provisions of the Foreign Corrupt Practices Act ("FCPA").**
>
> [emphasis added]

76 According to the SEC Order, until March 2009, the operations in Macau and China were overseen by Mr Weidner, who worked in close concert with Mr Chiu. In 2006, Mr Chiu was introduced to a Chinese consultant (the "Consultant"), who claimed to be a former Chinese government official with political connections, through a high-level person with the China Liaison Office ("CLO") in Macau. The Consultant was supposed to assist the company with its activities in China. With Mr Weidner's approval, the Consultant was hired to liaise with governmental bodies, provide assistance with approval processes and served as an intermediary or "beard" to obscure LVS' role in certain transactions.

77 The SEC Order then goes on to explain the three transactions, which I will summarise below.[10]

78 The first transaction concerns a basketball team. In early 2007, Mr Weidner sought to purchase a professional basketball team in China with the purported purpose of improving LVS' image in China and increasing customer flow to the casinos ("the Basketball Team transaction"). Due to regulations by the Chinese Basketball Association, neither LVS nor its subsidiaries could purchase a team. Hence, the Consultant was used as a "beard" to buy the team through a wholly foreign-owned entity, while LVS entered into "what was ostensibly a sponsorship agreement for the team." Funds were repeatedly transferred to the Consultant without any supporting documentation. Payments to the Consultant were also falsely recorded in the company's books and records. In total, between March 2007 and January 2009, pursuant to a series of sponsorship and advertising contracts, approximately US$14.8m was paid to the Consultant in connection with the basketball team. Over one-third of the funds were paid after the accounting firm engaged by LVS to review the transaction had identified significant funds that were unaccounted for, and approximately US$6.9m was transferred without appropriate authorisation or supporting documents.

79 The second transaction relates to an Adelson Centre in China. Beginning in 2006, Mr Weidner sought to develop a non-gaming resort in Hengqin Island, China ("the Adelson Centre transaction"). Such a development would require the approval of government authorities and the Consultant introduced to LVS a Chinese state-owned travel agency, China International Travel Services Ltd ("CITS"), whose Chairman was believed to have "particular influence in

[10] First affidavit of Michael Nolan, pp 1345–1349.

connection with Hengqin". Mr Weidner authorised using the Consultant as a "beard" to purchase a building in Beijing from CITS and it was named the Adelson Center. Mr Weidner gave little or no thought to agreeing to purchase the Beijing building. Between July 2007 and February 2008, approximately US$43m was transferred to one of the Consultant's entities for the purchase of the real estate, but none of the payments were approved by an LVS employee with sufficient authorisation.

80 In August 2007, while significant concerns were raised that the Consultant intended to obtain the basement title to the building by making improper payments to government officials, the company proceeded to lease the basement from the Consultant. However, no documentation was obtained to prove that the Consultant had obtained the title legally or that his entity purchased the basement from CITS.

81 Among other things, in September 2008, Mr Chiu signed contracts that cancelled the transfer of shares from the Consultant's entity and agreed to receive in exchange from the Consultant a promissory note for approximately US$43m, which far exceeded Mr Chiu's authority. The project for the Adelson Centre was shuttered at about the same time. In total, LVS transferred approximately US$61m in connection with the real estate transaction and ultimately received approximately US$44m in settlement from the Consultant.

82 Third is a transaction concerning the Macau Operations. In 2007, LVS set up a high-speed ferry business to transport customers from China and Hong Kong to Macau ("the Macau Operations transaction"). Under pressure from Mr Weidner, the LVS employees selected a recently-formed ferry company, Chu Kong Shipping ("CKS"), which was indirectly owned by, amongst others, the Consultant and the Chairman of CITS. Mr Weidner stated in an e-mail that the

selection of CKS would be politically advantageous to LVS. CKS was also "spending the majority of the entertainment expense on government officials", providing them meals and giving them "red envelopes containing cash around the Chinese New Year", which was known to LVS. LVS also did not enforce policies and procedures regarding purchasing and employees were able to use cash advances and expense reimbursements to circumvent them.

83 The relevant provisions of the Securities Exchange Act 15 USC (US) 1934 ("Securities Exchange Act") that were engaged are outlined in the SEC Order under the sub-heading of "Legal Standards and FCPA Violations":[11]

> 46. Under Section 13(b)(2)(A) of the Exchange Act, issuers are required to make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and disposition of the assets of the issuer. 15 U.S.C. § 78m(b)(2)(A).
>
> 47. Under Section 13(b)(2)(B) of the Exchange Act, issuers are required to devise and maintain a system of internal accounting controls …
>
> 48. As a result of the conduct described above, LVSC violated Section 13(b)(2)(A) because its books and records did not, in reasonable detail, accurately and fairly reflect the purpose of the payments. LVSC violated Section 13(b)(2)(B) because it did not devise and maintain a reasonable system of internal accounting controls over operations in Macao and China to ensure that access to assets was permitted and that transactions were executed in accordance with management's authorization; in addition, that transactions were recorded as necessary to maintain accountability for assets, particularly with regard to the accounts payable process, the purchasing process, due diligence, and controls surrounding contracts.
>
> [emphasis added]

84 As a result, the SEC Order stipulated that LVS cease and desist from committing any violations of the Securities Exchange Act and issued a civil

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[11] First affidavit of Michael Nolan, p 1350.

penalty of US$9m. It also mandated the respondent to comply with a list of undertakings concerning the retention of an independent consultant for a period of two years to, *inter alia,* help ensure LVS' compliance with the FCPA.

DOJ Agreement

85 As with the SEC Order, the DOJ Agreement dated 17 January 2017 was issued against LVS, which is referred to as "the Company" therein. The agreement states that:[12]

> The Company **admits, accepts, and acknowledges that it is responsible for the acts of its then-officers, directors, employees, and agents as set forth in the Statement of Facts and incorporated by reference into this Agreement, and that the facts described in the Statement of Facts are true and accurate.** The Company expressly agrees that it shall not, through present or future attorneys, officers, directors, employees, agents or any other person authorized to speak for the Company make any public statement, in litigation or otherwise, contradicting the acceptance of responsibility by the Company set forth above or the facts described in the Statement of Facts. [emphasis added]

86 The summary of conduct found in the Statement of Facts annexed to the DOJ Agreement states, *inter alia,* that:[13]

> 10. Between in or around 2006 and 2009, [LVS], through its Macao- and PRC-based subsidiaries, transferred approximately $60 million to Consultant for the purpose of promoting [LVS'] business and brands.
>
> 11. Several of [LVS'] contracts with and payments to Consultant had no discernible legitimate business purpose, [LVS] senior executives were repeatedly warned about the Consultant's dubious business practices and the high risk of [LVS'] transactions with Consultant, and by at least early 2008, certain senior [LVS] executives knew that over $700,000 paid to Consultant by [LVS] subsidiaries had simply disappeared.

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12 First affidavit of Michael Nolan, p 1358.

13 First affidavit of Michael Nolan, p 1366.

> 12. Nevertheless, [LVS] continued to engage Consultant for work on behalf of [LVS], with knowledge of the same [LVS] senior executives, and did not take steps to provide reasonable assurances about the Company's use and disbursement of funds and assets. In particular, [LVS] failed to carry out enhanced due diligence on all of Consultant's myriad companies, and did not insist on the appropriate documentation, approvals, or justifications for the payments to Consultant, even after [LVS] had become aware of Consultant's failure to account for sums of over $700,000 paid by [LVS] and Consultant's business practices.

87 The Statement of Facts in the DOJ Agreement goes on to outline two out of the three transactions highlighted in the SEC Order earlier, being the Basketball Team transaction and the Adelson Centre transaction. It suffices to note that while the DOJ Agreement and SEC Order are not mirror images, they do overlap in substance to a large extent and are consistent with each other.

88 The main body of the DOJ Agreement also provides, *inter alia,* that the Fraud Section of the DOJ enters into the agreement based on the individual facts and circumstances including:[14]

> (a) the Company did not receive voluntary disclosure credit because it did not voluntarily and timely disclose to the Fraud Section the conduct described in the Statement of Facts …;
>
> …
>
> (d) **the Company no longer employs or is affiliated with any of the individuals implicated in the conduct at issue in the case;** engaged in extensive remedial measures, including revamping and expanding its compliance and audit functions and programs and making significant personnel changes…;
>
> (e) the Company has committed to continue to enhance its compliance program and internal controls…;
>
> (f) the Company resolved with the U.S. Securities and Exchange Commission (the "SEC") through an Administrative Proceeding filed on or about April 7, 2016, regarding conduct **substantially overlapping with that at issue here** (the "SEC Resolution"), and agreed to pay a civil penalty of $9 million;

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14 First affidavit of Michael Nolan, p 1357–1358.

> (h) the nature and seriousness of the offense, in particular a [wilful] failure by then executives of the Company to implement adequate internal accounting controls in connection with significant payments to companies associated with a consultant in a region known to be high risk for corruption, without appropriate due diligence of certain entities, consistent monitoring of or justifications for payments, and proper approvals and documentation, even after certain then-senior executives of the Company had been notified about the consultant's business practices and failure to account for over $700,000;
>
> (i) accordingly, after considering (a) through (h) above, the Company received an aggregate discount of 25% of the bottom of the U.S. Sentencing Guidelines fine range.
>
> [emphasis added]

89 The consequence of the DOJ Agreement is that LVS would pay a monetary penalty of US$6.96m and the DOJ agreed "not to bring any criminal or civil case…against [LVS] or any of its present or former subsidiaries relating to any of the conduct described in the attached Statement of Facts". Moreover, LVS was also required to implement or continue a corporate compliance programme with reporting obligations.

Parties' cases

The plaintiffs' case

90 Mr Yeo relies on two provisions for resisting enforcement of the Award under Art 36 of the Model Law. First, that enforcement in such situations "would be contrary to the public policy of Singapore" under Art 36(1)(*b*)(ii) of the Model Law; and second, that the party to an award was "unable to present his case" under Art 36(1)(*a*)(ii) of the Model Law.

91 The plaintiffs' attack of the Partial Award is a wide-ranging one. At one level, the plaintiffs argue that in the light of the FCPA Findings, Mr Weidner "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".[15] This is the procedural fraud argument. In their view, the defendants have perjured themselves by putting forward a positive case of performance without disclosing the true facts involved in bribing Chinese state officials as a key part of their strategy to deliver those junket operators. This perjury or concealment of evidence, the plaintiffs add, was perpetrated in part by the defendants' counsel in the Arbitration, Paul Hastings LLP ("Paul Hastings"), which was the same law firm that was representing Mr Weidner with respect to the US government's investigations into LVS. In this vein, the plaintiffs took issue with the adequacy of the document collection process undertaken by Paul Hastings in the Arbitration.

92 Alongside the argument on procedural fraud, Mr Yeo argues that "new evidence" in the FCPA Findings show that the Partial Award was "tainted by the fraudulent and/or corrupt nature of Mr Weidner's strategies [in LVS] because… these strategies were deployed in performance of the MSA".[16] The basis of the plaintiffs' allegation is the purported striking similarity in the entities implicated in the LVS investigations and those in the MSA. The plaintiffs and the Tribunal were prevented from discovering the fraudulent and/or corrupt nature of Mr Weidner's strategies deployed in performance of the MSA due to the defendants' procedural fraud as outlined above. Thus, quite apart from the concealment and perjury that allegedly transpired in the course of the Arbitration (*ie*, procedural fraud), the plaintiffs argue that the new evidence shows that the defendants had committed actual fraud.

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15 PWS dated 17 September 2018, para 99.

16 PWS dated 17 September 2018, para 124.

93 The purported consequence of both the procedural fraud and the new evidence argument (which in my view are inextricably intertwined) on the plaintiffs' case is broadly twofold: (a) the Tribunal's decision would have been different on a variety of issues (particularly the Causal Fraud Issue and the Termination Issue) if it had known about the purported fraud disclosed in the FCPA Findings; and (b) the Arbitration would have proceeded on an entirely different basis *ie*, focusing on different matters altogether. Pausing here, the plaintiffs' allegation that they did not have an opportunity to present their case was also due to the procedural fraud perpetrated by the defendants. I will deal with this variant of procedural fraud in the context of breach of the rules of natural justice separately in a later part of this judgment.

The defendants' case

94 The defendants, on the other hand, argue that neither the DOJ Agreement nor the SEC Order provide the plaintiffs a basis for resisting enforcement of HC/ORC 6609/2016 under Art 36 of the Model Law. Mr Bull submits that (a) the DOJ Agreement and SEC Order do not disclose any evidence of fraud or corruption by the defendants in their management of Solaire;[17] (b) the plaintiffs were aware or should have been aware of the matters that eventually formed the contents of the two documents prior to the Arbitration;[18] and (c) in any event, the FCPA Findings do not affect the Tribunal's findings in the Partial Award, whether with regards to the Causal Fraud Issue or the Termination Issue or otherwise.[19]

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17 Defendants' written submissions ("DWS") dated 29 January 2019, para 55.

18 DWS dated 29 January 2019, para 94–98; 104.

19 DWS dated 29 January 2019, para 112.

The relevant legal principles

95 I begin with the decision of *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 where the Court of Appeal held that the grounds in Art 36(1) of the Model Law are available to an award debtor seeking to resist enforcement of a domestic international arbitral award under s 19 of the IAA (at [84]). Art 36(1)(*b*)(ii) of the Model Law states that:

> Article 36. Grounds for refusing recognition or enforcement
>
> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
>
> …
>
> (*b*) if the court finds that:
>
> …
>
> (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

96 While the term "public policy" appears open-ended and is undefined in either the Model Law or the IAA, case law on the scope of the public of policy of Singapore is that it should be construed narrowly and consequently, the threshold for resisting enforcement of an award is a high one. The Court of Appeal in *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") held that the public policy ground is invoked when the upholding of the award would "shock the conscience" or is "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public" or "where it violates the forum's most basic notion of morality and justice" (at [59]). While *PT Asuransi* concerns a setting aside application under Art 34 of the Model Law, the definition and principles therein also apply to the present case of resisting enforcement under Art 36 of the Model Law. A similar observation has been made by the Court of Appeal in

AJU v AJT [2011] 4 SLR 739 ("*AJU v AJT*") where it was stated that the question of public policy under both the setting aside regime and the enforcement regime for foreign arbitral awards is the same (at [34]). Likewise, there should be no difference in the enforcement regime for domestic international arbitral awards under Art 36(1)(*b*)(ii) of the Model Law.

Fraud under public policy considerations

97 Fraud, corruption and bribery would generally fall within the rubric of being "contrary to public policy": *PT Asuransi* at [59] citing the Commission Report (A/40/17), at para 297 (referred to in *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at p 914):

> In discussing the term "public policy", it was understood that it was not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice… It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, **instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside.** [emphasis added]

98 The same point was noted in *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd* [2014] 1 SLR 814 ("*Beijing Sinozonto*") at [41]:

> Public policy is capable of covering a wide variety of matters. Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of s 31(4)(*b*). However, in the present case, the argument advanced is that the forum state's most basic notions of morality and justice would be violated if an arbitral award procured through fraud was enforced there; and "**fraud" in this context encompasses a showing of bad faith during the arbitration proceedings,**

> **such as bribery, undisclosed bias of the arbitrator, or wilful destruction or withholding of evidence …** [emphasis added]

It thus clear that fraud, whether substantive or procedural, would fall within the ambit of Art 36(1)(*b*)(ii) of the Model Law.

99 Where fraud is alleged, strong and cogent evidence has to be adduced and the court will not infer a finding of fraud: *Swiss Singapore Overseas Enterprises Pte Ltd v Exim Rajathi India Pvt Ltd* [2010] 1 SLR 573 ("*Swiss Singapore*") at [64] cited in *BVU v BVX* [2019] SGHC 69 ("*BVU v BVX*") at [46]. In this regard, the court in *Beijing Sinozonto* considered whether the grounds under s 31(4)(*b*) of IAA have been made out. The first inquiry is whether the preliminary facts making out the grounds relied upon have been proven to the satisfaction of the court on the balance of probabilities. If this standard of proof has been satisfied, the court should then embark on the second inquiry, which is whether to make a final order refusing the applicant leave to enforce the foreign arbitral award. In *Beijing Sinozonto*, the court found Goldenray's allegations – specifically that there was an improper arrangement between the respondent and the tribunal based on various e-mails – improbable and unsupported by cogent evidence. The standard of proof remains that of a balance of probabilities and the touchstone is one of dishonesty: *BVU v BVX* at [46]; *Beijing Sinozonto* at [70].

100 The plaintiffs rely on the case of *Soleimany v Soleimany* [1999] 3 All ER 847 ("*Soleimany*") where the English Court of Appeal refused to enforce an arbitral award that upheld an illegal contract; the award was tainted with illegality and was found to be contrary to the public policy of England. The plaintiffs submit that just as an arbitral award can be tainted with illegality by virtue of *the underlying illegal contract* and hence affected by fraud or corruption, a party should be able to resist the enforcement of an arbitral award

for being tainted by illegality where the underlying contract was *performed* using fraudulent or corrupt means. As the Court of Appeal noted in *AJU v AJT* at [62] with reference to *Soleimany*, where the law applicable to the impugned contract is Singapore law, "the court cannot abrogate its judicial power to the Tribunal to decide what the public policy of Singapore is and, in turn whether or not [the agreement] is illegal". The court is entitled to decide whether an underlying contract is illegal and refuse to enforce an award that is tainted by the illegality as such. This broad legal proposition is to be understood in its context: that public policy is a question of law for the enforcing court to determine based on its domestic law (at [67]).

101 The plaintiffs are seeking denial of enforcement of the Partial Award against them on grounds of violation of public policy based on fraud. Hence, short of establishing fraud as alleged, the public policy ground is not engaged. The strictness of this approach is consistent with the view that a court should not be quick to interfere under Art 36(1)(*b*)(ii) of the Model Law and a line is drawn at where the court should observe the principles of finality in arbitration.

102 An interesting aspect of this case is the new evidence argument explained earlier. The FCPA Findings represent the new evidence that was not in existence at the time of the Arbitration. In my view, the new evidence of fraud needs to be admitted; if it is incontrovertible, the new evidence of fraud could be "accepted" in the interest of saving time and costs. In this case, the defendants did not challenge the FCPA Findings on admissibility. Instead, the dispute was over what the FCPA Findings said and their effects.

Perjury and concealment of evidence during arbitral proceedings

103 The law concerning perjury and the concealment of evidence has been canvassed in a number of decisions – notably, *Swiss Singapore* and *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel Gmbh* [2008] 3 SLR(R) 871 ("*Dongwoo*") and more recently considered in *BVU v BVX*. I will outline the key principles herein.

104 Perjury and the deliberate suppression or withholding of documents in an arbitration can in a proper case amount to obtaining an award by fraud: *Swiss Singapore* at [29] and *Dongwoo* at [139]. Broadly speaking, this means that there has to be fraud in the arbitration itself.

105 Specifically, where the fraud alleged is **perjury by a party** in the arbitration, the applicant must prove that:

(a) False evidence is given in a legal proceeding (and similarly in arbitration) which is intended to cause any person in that proceeding to form an erroneous opinion that touches any point material to the result of such proceeding (*Koh Pee Huat v Public Prosecutor* [1996] 2 SLR(R) 816 at [44]);

(b) The new evidence demonstrating fraud could not have been discovered or produced, despite reasonable diligence, during the arbitration proceedings; and

(c) The newly discovered evidence must be decisive in that it would have prompted the arbitrator to have ruled in favour of the applicant instead of the other party (*Swiss Singapore* at [29] approving *DDT*

Trucks of North America Ltd v DDT Holdings Ltd [2007] 2 Lloyd's Rep 213).

106 If the fraud concerns **non-disclosure or concealment of material documents**, the applicant must prove that (*BVU v BVX* at [47], *Swiss Singapore* at [25] approving *Elektrim SA v Vivendi Universal SA* [2007] 1 Lloyd's Rep 693 ("*Elektrim*")):

(a) There is deliberate (as opposed to innocent or negligent) concealment aimed at deceiving the arbitral tribunal or the other party/parties to the arbitration. In other words, there must *not* have been a good reason for the non-disclosure (*Dongwoo* at [133], *BVU v BVX* at [96]).

(b) There is a causative link between the deliberate concealment and the decision in favour of the concealing party (*ie*, the concealment must have substantially impacted the making of the award). The document (or information) concealed must be so material that earlier discovery would have prompted the arbitrator to rule in favour of the applicant.

(c) There must not have been a good reason for the non-disclosure.

107 Where new evidence is being introduced to demonstrate fraud, the applicant would have to demonstrate why it was not available or could not have been obtained with reasonable diligence at the time of the arbitration (*BVU v BVX* at [106] affirming *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd* [1999] 2 Lloyd's Rep 65 at 77).

108 While there is a distinction between perjury and concealment of documents (espoused in *Swiss Singapore*), three core elements are common to

either form of procedural fraud: (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 It is clear that proving fraud, dishonest or unconscionable conduct is essential but not sufficient (*Swiss Singapore* at [27] and [29] affirming *Thyssen Canada Ltd v Mariana Maritime SA* [2005] 1 Lloyd's Rep 640). There must be a causative link between the fraudulent conduct and the claim for enforcement of the Partial Award to justify interference by the court on public policy grounds.

109 While some decisions such as *Swiss Singapore* are concerned with concealment of documents, the same principles would generally apply to the concealment of *information* (whether contained in documents or otherwise) as well. For convenience, I will use the term "concealment of information" to refer to both perjury and concealment of information or documents as has been alleged by the plaintiffs in respect of procedural fraud.

110 With the principles set out above in mind, in the context of the plaintiffs' application to resist enforcement of the Partial Award under Art 36(1)(*b*)(ii), the key questions to be examined are as follows:

(a) Is there procedural fraud that engages Art 36(1)(*b*)(ii) of the Model Law?

(b) Was the fraud so material that it substantially impacted the award? Put differently, is there a requisite causative link between the alleged fraud and the Partial Award?

111 As stated, the FCPA Findings were not in existence at the time of the Arbitration. Admissibility of the FCPA Findings was not an issue before me. Thus, as discussed below at [220], the non-availability of evidence requirement

does not really arise taking the plaintiff's case at its highest. The central debate in the present case is on the scope and effect of the FCPA Findings.

Is there procedural fraud?

112 For the reasons explained below, the plaintiffs' allegations of concealment of information against either the defendants or Paul Hastings are not made out. In any case, the procedural fraud allegation is short on the materiality requirement *ie*, it is not so material that it would have substantially affected the Partial Award. Consequently, it cannot be said, as the plaintiffs have so asserted, that Tribunal's decision would have been different on the Causal Fraud Issue or the Termination Issue, or that the Arbitration would have proceeded on an entirely different footing altogether.

113 I will deal first with the plaintiffs' allegations against the defendants before turning to those against Paul Hastings.

Alleged concealment by the defendants

114 With respect to the plaintiffs' allegations of concealment of information against the defendants, Mr Yeo argues that the defendants had deliberately concealed the matters disclosed in the FCPA Findings. This deliberate concealment substantially impacted the making of the award in the sense that that their fraud resulted in an award in which the Tribunal's findings would have been materially different absent GGAM's fraud.[20] Attention was drawn particularly to (a) a statement given by Mr Weidner on 18 August 2012 ("the 18 August 2012 statement"); and (b) the oral testimony of Mr Weidner in the Arbitration.

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20 Letter from Plaintiffs' counsel to Court dated 24 July 2019, para 6.

The 18 August 2012 statement

115 The 18 August 2012 statement stems from e-mail correspondence between representatives of the plaintiffs and defendants in August 2012. This correspondence began with the plaintiffs' encounter with a news article reporting the LVS investigation. According to the plaintiffs, the said statement represents the "start of the lie that perverts the whole arbitration".[21]

116 It is necessary to set out the correspondence between the parties to understand the basis of the plaintiffs' present complaints. In an e-mail from one Ms Estela Tuason-Occena ("Ms Tuason-Occena") from the plaintiffs on 14 August 2012, states that:[22]

> …By the way, I came across an article…that mentioned **[Mr Weidner] and [Mr Stone] concerning the scrutiny by the [DOJ], the [SEC] and the audit committee of Sands Corp of the following transactions for possible violations of the [FCPA]**: a US$50 million payment for real estate for Adelson Center in Beijing, Sand's sponsorship of a Chinese basketball team, and a contract for ferry services between Macau and Hong Kong. It all happened in 2007 according to the article. Could you please advise us of the status and how you think the investigation will go? How will this impact [Mr Weidner], [Mr Stone] and GGAM? … [emphasis added]

117 Mr Saunders, one of the principals from GGAM, replied to the email on the same day stating what the plaintiffs consider to be one of many lies:[23]

> … this refers to activities that are old news and [Mr Weidner] considers them to be totally without merit. It is more of a distraction created by LVS as part of lawsuits and other investigations in a number of other matters. I also seriously doubt that those other LVS charges have any merit. My experience with the company and executives that continue to work there only supports that no one within the company would

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21 Transcript, 21 May 2019, p 102.

22 First affidavit of Daniel Weiner, p 3304.

23 First affidavit of Daniel Weiner, p 3303.

> do something that put the company (or their personal licenses) in jeopardy.

118 Ms Tuason-Occena replies thereafter asking:

> …When the news hit the Philippine papers and SEC and [Philippine Stock Exchange] inquired [*sic*] about it i.e., deny or confirm and explain the news article, what do you want us to say in the letter response to SEC and PSE?
>
> …

119 Then, Mr Weidner replies Ms Tuason-Occena on the same day, copying Mr Saunders in the same e-mail, promising a "full response/explanation from my lawyers tomorrow to share with you and any others". The response from Mr Weidner to Ms Tuason-Occena dated 15 August 2012, with the subject heading "WSJ & NYT Articles" states:

> …Attached is a statement that has been **fully vetted** by my lawyers.
>
> Unfortunately, I have been dragged into this current investigation relating to events of 6 years ago that emanate from LVS's dismissal of Steve Jacobs on July 23, 2010, former CEO of Sands China, which resulted in allegations that led to the current investigation.
>
> The attached comments have been **carefully researched by my legal team** and authorized for sharing with you and others.
>
> [emphasis added]

120 This first statement referenced reads:

> "You may have seen recent news coverage of issues related to my former employer, Las Vegas Sands, and its business activities in Asia. **Although I had serious disagreements and concerns with company leadership**, which I voiced to the board and ultimately led to my decision to resign, I am proud of the work during my tenure to build our presence in Asia. I am equally satisfied that under my watch, I **set a standard that required all business relationships and agreements under my purview to be thoroughly reviewed and vetted by legal counsel and accounting professionals to ensure the company was complying with both U.S. and foreign law**. I

> value our business relationship and our friendship and look forward to continuing to create value with my many partners around the world." [emphasis added]

I pause to note that this vetted statement is the basis upon which the plaintiffs accuse Paul Hastings of concealing material information or assisting GGAM in doing so, which I will address in the next section: [135(b)] below.

121 The plaintiffs and their lawyers found that the vetted statement did not address the questions and concerns raised and as such, sought further clarification from Mr Weidner. Mr Weidner replied Ms Tuason-Occena, promising a more detailed response.

122 Finally, on 18 August 2012, the formal response from Mr Weidner was sent to Ms Tuason-Occena with the subject heading "NYT & WSJ Articles Revised Comment". This statement bears quoting:

> …
>
> Below is the revised statement. Please ask [plaintiffs' lawyers] if he could review the statement for compliance of our Philippine regulators and let me know if there are any further comments.
>
> "During my more than 13 years at [LVS], I believe I played an important role in guiding the company to successful growth and expansion, and to the creation – and preservation – of significant shareholder value. **In the course of that work, I participated at a strategic level in many transactions, including certain transactions you may have read about in recent Wall Street Journal and New York Times articles.** 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 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 those transactions and the subsequent course of events at the company ended with my resignation from [LVS] in March 2009. While I was a [LVS], I was not aware nor was I complicit in any alleged wrongdoing regarding the referenced transactions".
>
> [emphasis added]

123 Based on the 18 August 2012 statement (which was referred to as the revised statement), when compared with the DOJ Agreement and SEC Order, the plaintiffs submit that Mr Weidner had lied[24] and concealed information about the investigations, which would otherwise have constituted valid grounds for terminating the MSA.[25] The central lie according to the plaintiffs is that Mr Weidner had said he was not involved in the impugned transactions and did not reveal that both Mr Chiu and he were the subject of investigations.[26]

124 The plaintiffs identify three key inconsistencies between the 18 August 2012 statement and the FCPA Findings: (a) the accuracy of Mr Weidner's presentation to the board of LVS; (b) Mr Weidner's involvement in the transfer and accounting of funds at LVS; and (c) Mr Weidner's knowledge or awareness of any wrongdoing at LVS. Hence, the plaintiffs submit that "if the plaintiffs had known in 2012 and/or the Tribunal had known what the [FCPA Findings] have now revealed regarding Mr Weidner's false statement in 2012, the plaintiffs would have been found to have sufficient cause to terminate the MSA for, *inter alia*, material breach of the MSA's Standard of Care and [the Philippines Amusement and Gaming Corporation] suitability requirements".[27]

125 In my view, there is no procedural fraud on the part of Mr Weidner or the defendants that was disclosed by the 18 August 2012 statement as considered against the FCPA Findings.

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24 Transcript, 21 May 2019, p 100 to 103.

25 Transcript, 21 May 2018, p 100.

26 Transcript, 23 May 2019, p 108, lines 25 to 31.

27 PWS dated 17 September 2018, para 44.

126 Firstly, to establish perjury or concealment of information for that matter, false information must be given in a *legal proceeding* which is *intended* to cause any party in that proceeding or the tribunal to form an *erroneous opinion* that touches any point material to the result of such proceeding: *Koh Pee Huat v Public Prosecutor* [1996] 2 SLR(R) 816 at [44]. The threshold problem that the plaintiffs encounter by predicating their allegation of procedural fraud on the 18 August 2012 statement is that there is nothing therein that can be remotely said to be given as part of a legal proceeding. Between then and the Arbitration which commenced in September 2013, Solaire was officially opened in March 2013. It was only in July 2013 that the plaintiffs sent a letter to the defendants outlining issues with their execution of the MSA.

127 Secondly, notwithstanding that preliminary hurdle, I am inclined to accept the defendants' submission that the 18 August 2012 Statement was not dishonest or fraudulent. I accept that when the statement is juxtaposed with the FCPA Findings, there are *prima facie* inconsistencies, which the plaintiffs have been quick to highlight. However, the circumstances surrounding the statement must be appreciated.

128 As just noted, the statement was made in August 2012, more than a year before the notice of arbitration was even filed by the defendants. In addition, while it appears that LVS was already undergoing investigations by the DOJ and SEC in August 2012, it was not until 2016 and 2017 that any findings were reported by these US government authorities. I do not think it can be seriously contested that at that time, investigations were more likely than not in their initial phases and Mr Weidner's 18 August 2012 statement (and his *mens rea* for the purposes of making out a case of procedural fraud) must thus be understood in that context. The test for procedural fraud is not merely inconsistencies or even obvious inconsistencies. It is trite that the linchpin of

fraud of any kind is dishonest intention at the material time. I do not see how anything in the 18 August 2012 statement discloses a subjective intent to defraud on the part of Mr Weidner or the defendants.

129 Thirdly, I note that the statement was drafted with the assistance of Mr Weidner's solicitors and indeed the evidence suggests that the plaintiffs were also advised by their own solicitors at the material time. In OS 1432, Mr Weidner maintains that the statement "truthfully described [his] participation in the transactions under the [LVS] investigation".[28] Even then, as shall be seen in the later part of this judgment, there are also fundamental epistemic issues that dilute the evidential value of the FCPA Findings, which the plaintiffs' entire case hinges on, in the present proceedings. Therefore, in my view, there is simply insufficient evidence, much less strong and cogent evidence of fraud on the part of the defendants.

The Arbitration Declarations

130 Apart from the 18 August 2012 statement, Mr Weidner also made four declarations expressly for the Arbitration ("Weidner's Arbitration Declarations"). These declarations were filed between April 2014 and October 2015. Notably, in one of these declarations filed on 14 June 2015 and in the course of the oral testimony given in the Arbitration itself, Mr Weidner refers to two strategies for managing Solaire as mentioned earlier: (a) developing "a sophisticated and unique government-led, top-down junket approach" and (b) directing "VIP play, by helping to establish a cross-border trading platform to promote business and gaming visitation between China and Philippines".[29] It is

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28 First affidavit of William Weidner, para 20.

29 Transcript, 21 May 2019, p 107.

evident from the transcript of the Arbitration that the subject of the defendants' relationships with various Chinese entities such as the CLO, CITS and Chu Kong Shipping, which were involved in the three impugned transactions outlined in the SEC Order (see [78]–[82] above) was raised. The defendants also highlight that in the Arbitration, Mr Weidner had specifically stated that he wanted the business in Solaire to be legitimate and he "[did not] want to just do beards".[30]

131 The plaintiffs' case is that Mr Weidner's evidence belies the truth disclosed in the FCPA Findings, that the defendants had been sending money to consultants and "beards".[31] Mr Weidner himself conceded in the Arbitration that the aforementioned strategies were never put in writing or told to the plaintiffs.[32] Indeed, it also appears that nothing concerning a "government-led, top-down approach" was mentioned in the defendants' Statement of Claim or *memoires* submitted in the Arbitration.[33] Therefore, the plaintiffs submit that the defendants were putting forward the "justification that they had performed their obligations under the MSA, *without revealing* that actually they were corrupt because they were bribing the CLO through the consultant".[34]

132 I am not persuaded that Mr Weidner's evidence before the Tribunal, whether given in his Arbitration Declarations or in the course of the hearings, was dishonest or deceptive. Let me elaborate.

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30 Transcript, 22 May 2019, p 86; Transcript, 23 May 2019, p 19.

31 Transcript, 21 May 2019, p 110-114.

32 Transcript, 21 May 2019, p 111; First affidavit of Daniel Weiner, p 894.

33 Transcript, 21 May 2019, pages 90-92; Transcript, 23 May 2019, p 115.

34 Transcript, 21 May 2019, p 113.

133 The assumption that resides in the plaintiffs' reasoning is that whatever was disclosed in the FCPA Findings must have been practised in the context of the MSA as well. For reasons that will be detailed in a subsequent part of this judgment about the evidential value (or lack thereof) of the "new evidence" disclosed in the FCPA Findings, it is clear to me that such an assumption is unfounded (see [187]–[201] below). It suffices for now to state that the FCPA Findings are plainly and exclusively concerned with activities undertaken by an entity different from Solaire – that is, LVS. They are also concerned with a different time frame. In fact, I find that the FCPA Findings do not disclose fraud (*ie*, no bribery or corruption) in the defendants' management of LVS, much less Solaire under the MSA (see [201]). In the absence of strong and cogent evidence of fraud, the evidential leap that the plaintiffs invite this court to make and conclude is untenable.

Alleged concealment by Paul Hastings

134 The plaintiffs also argue that Paul Hastings had failed to disclose to the plaintiffs or the Tribunal the involvement of Mr Weidner and Mr Chiu in the LVS investigations. This alleged concealment of information by Paul Hastings is two-pronged: (a) how it dishonestly allowed the defendants to make certain false representations in the course of the parties' relationship; and (b) how it dishonestly concealed various documents, the result of which essentially prevented the plaintiffs from presenting their case in the Arbitration. Thus, the plaintiffs argue that Paul Hastings' conduct constitutes deceit and misrepresentation "in violation of professional ethic rules and undermined the integrity of the adversarial process".

Permitting the plaintiffs' misrepresentations

135 I deal first with the allegations that Paul Hastings permitted the defendants to make certain incorrect representations. The plaintiffs refer to two particular episodes:

(a) Paul Hastings permitted the defendants to falsely represent and warrant various terms in the MSA including representing that there were no investigations that could affect the defendants' ability to perform their obligations even though when the MSA was being negotiated, investigations by US government authorities into LVS were already ongoing;

(b) Paul Hastings "fully vetted" the first statement made by Mr Weidner on 15 August 2012 (see [119] above), which is wholly inconsistent with the FCPA Findings, and this constitutes white-washing.

136 I find that there is no dishonest concealment of information by Paul Hastings in relation to the 15 August 2012 statement that amounts to procedural fraud. The several assertions by the plaintiffs that the solicitors of Paul Hastings were in breach of their ethical duty fall short of fraud.

137 In relation to the allegation that Paul Hastings permitted the defendants to misrepresent themselves in the MSA, weight was primarily placed on cl 10.2(G) of the MSA which states that:

> 10.2 GGAM
>
> GGAM represents and warrants as of the Effective Date that:
>
> …

> (G) there is no litigation or proceedings pending or threatened against GGAM that could adversely affect the validity of this Agreement or the performance of GGAM of its obligations under this Agreement

138 The argument here essentially is that the DOJ Agreement and SEC Order show that there were investigations into LVS, which contradicts the defendants' representation that there were no legal proceedings threatened. I do not accept that there was any breach of cl 10.2(G) of the MSA. The plain and unequivocal language of cl 10.2(G) of the MSA shows that the only entity whose conduct is of concern is GGAM. No mention is made of the conduct of LVS. Further, the LVS investigations (and the FCPA Findings) have nothing to do with the MSA, which is concerned with the management of Solaire. Therefore, it is patently unclear what litigation or proceedings were pending or threatened against the defendants (as legal entities) at the time it executed the MSA in September 2011. In any case, I accept that the lawyers from the Paul Hastings team that handled Mr Weidner's representation in connection with the LVS Investigation ("PH Weidner Team") had received specific assurances from the US government authorities conducting the LVS investigation that Mr Weidner was not a *target* of the investigation, prior to the vetting of the abovementioned statement. Thus, it cannot be said that there is any fraudulent misrepresentation on the part of Paul Hastings (simply on account of the apparent inconsistencies between the first statement dated 15 August 2012 and the FCPA Findings).

139 Essentially, the defendants' submission is that prior to vetting the 15 August 2012 statement, Paul Hastings had received reliable information from the authorities and concluded thereon that Mr Weidner was not a subject of that investigation and was being treated solely as a cooperating witness.[35] The

[35] Third affidavit of Charles Patrizia, para 5.

evidence in this regard was furnished via affidavit by Mr Patrizia, an attorney from the team at Paul Hastings that represented the defendants (and Mr Weidner) at the Arbitration ("PH Arbitration Team"). In his third affidavit, Mr Patrizia states that:

> …I wish to clarify that (A) the United States government authorities have confirmed that they did in fact provide specific assurances that Mr. Weidner was not a "target" of the LVS investigations, and (B) the United States government authorities did **not** directly state that Mr. Weidner was not a "subject" of the LVS investigations. Instead, **this was a conclusion drawn by the Paul Hastings Weidner Team** on the basis of all the information available to the Paul Hastings Weidner Team, including their communications with those involved in the investigations, including the United States government authorities.
>
> The conclusions of the Paul Hastings Weidner Team included their understanding of the requests to interview Mr. Weidner and other available information. That conclusion is ultimately confirmed by the fact that once Mr. Weidner was interviewed by the United States government authorities, he was not requested to provide further testimony, and was never charged, either civilly or criminally, with wrongdoing by the United States authorities.
>
> [emphasis added]

The parties do not contest that a "target" refers to "a person as to whom the prosecutor has substantial evidence linking the person to a commission of a crime" while a "subject" is a person whose "conduct is within the scope of the investigation".[36]

140 I pause to make two observations with regard to the evidence of alleged fraud by Paul Hastings. First, according to the defendants, the assurance received by Paul Hastings was premised on a conversation that Mr Patrizia (from the PH Arbitration Team) had with Mr Sullivan (from the PH Weidner

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36 Second affidavit of Charles Patrizia, para 23.

Team) in 2014 in preparation for the Arbitration. It is regrettable that Mr Sullivan did not file an affidavit to attest to the assurance received from the US government authorities and the conclusion that was reached. Specifically, I find that the reasons furnished in Mr Patrizia's affidavit for the conclusion that Mr Weidner was not a "subject" of the LVS investigations to be rather oblique. Second, I also note that Mr Patrizia's evidence shifted in the course of the present application. His initial position in his first and second affidavits was that the US government had provided assurances that Mr Weidner was *neither a target nor a subject*. However, he clarified in his third affidavit that the assurance pertained only to Mr Weidner not being a target.

141 Nevertheless, the issues above do not rise to the level of strong and cogent evidence of fraud, or even evidence of fraud for that matter. The burden of proof remains with the plaintiffs to demonstrate procedural fraud by Paul Hastings. I should add that the plaintiffs' own evidence also left much to be desired. For example, the following evidence of the plaintiffs' expert, Mr Thomas Mason, is telling of the paucity of its allegation against Paul Hastings:[37]

> Paul Hastings had the requisite knowledge of falsity under these rules. By August 2012, Mr. Sullivan of Paul Hastings had been retained by Mr. Weidner, and his function was to represent Mr. Weidner with respect to the on-going investigations…**While the exact date of Mr. Sullivan's retention is not provided by Mr. Patrizia, it is a fair inference that Mr. Sullivan would have been retained prior to August 2012, given that the investigation commenced no later than March 2011. That Mr. Sullivan would be unaware of the falsity of Mr. Weidner's statements is not credible**: A lawyer's duty of competence under ABA Model Rule 1.1 requires "thoroughness" and "preparation."… [emphasis added]

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37 First affidavit of Thomas Mason,p 52, para 85.

No countervailing evidence has been furnished by the plaintiffs suggesting that Mr Sullivan and his team had not received the above reassurances or that there has otherwise been some form of dishonesty by the counsel at Paul Hastings. Also, as alluded earlier, the breach of any ethical duty, which is not the enquiry before me, is distinct from fraud – while the same set of facts that give rise to a finding of fraud (the central issue here) would more likely than not also support a finding of breach of ethical duty, the same cannot be said in the reversed situation.

142 On the balance, I find that the conclusion that Mr Weidner was not a "subject" but rather a cooperating witness is neither unreasonable nor dishonest. In this regard, I am reminded that in assessing if there was dishonest concealment, the material question is whether at the time around 15 August 2012 when the first statement was released after having been reviewed by Paul Hastings, it can be said that Paul Hastings had dishonestly concealed information relating to Mr Weidner's involvement in the LVS investigations or assisted the defendants in doing so. In the light of the evidence before me, the answer must be in the negative.

Documents

143 I turn next to the allegation of concealment of documents by Paul Hastings. The plaintiffs argue that the FCPA Findings reveal that the defendants have committed fraud through the concealment of documents in the Arbitration by Paul Hastings.[38] As noted earlier, the plaintiffs rely on the same set of facts to challenge the award on the ground of breach of natural justice, which I will consider at the end of this judgment separately. The plaintiffs refer to three

[38] First affidavit of Michael Nolan, para 63; p 1452; DWS dated 29 January 2019, para 220.

categories of documents which they purport were withheld from them and/or the Tribunal: (a) a subset of documents of Mr Chiu; (b) documents of a non-party, Weidner Resorts; and (c) a subset of documents of GGAM's joint venture partner, Cantor Fitzgerald and its Chairman and CEO, Mr Howard Lutnick ("Mr Lutnick"). It submits that Paul Hastings had "deliberately limited the search for documents in a way that subverted the Tribunal's orders, standard arbitration practice, and the parties' agreement to arbitrate". This non-disclosure of documents constitutes "deceit and misrepresentation" by Paul Hastings.[39]

144 The plaintiffs' accusations are without basis. There is no concealment of information by either Paul Hastings or GGAM aimed at deceiving the plaintiffs or the Tribunal, applying the principles set out in *BVU v BVX*, *Swiss Singapore* and *Dongwoo* as distilled earlier (see [106]). There are also no material deficiencies in the GGAM and/or Paul Hastings' document production in the Arbitration. It is patently unclear how, if at all, the FCPA Findings provide any foundation for the plaintiffs to impugn Paul Hastings' exercise of its discovery obligations in the Arbitration. Any connection is tenuous at best. Having regard to the circumstances, the plaintiffs' arguments are complaints that either should have been raised or were indeed raised before the Tribunal, which are now being camouflaged as grounds of procedural fraud.

145 First, in relation to Mr Chiu's documents, the plaintiffs' allegation is that while e-mails that were authored by or sent to Mr Chiu were produced in discovery, the defendants had not searched or produced documents and e-mails from Mr Chiu's personal files. Instead, the defendants produced documents only from the files of GGAM's other executives. The defendants do not deny that they have not searched Mr Chiu's personal files or produced them in discovery.

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39 First affidavit of Thomas Mason, p 59, para 98.

They argue that it was Paul Hastings' understanding that Mr Chiu performed his work in relation to Solaire exclusively at the behest and direction of GGAM's principals.[40] Accordingly, in respect of Mr Chiu, Paul Hastings collected the e-mails of persons at GGAM which sent to, received from or copied Mr Chiu. Paul Hastings believed it was unnecessary to collect documents from Mr Chiu's personal e-mail account as these would most likely be duplicative. The defendants also highlight the prohibitive cost of searching, collecting and translating Mr Chiu's communications, which would have been in Chinese and could not be effectively searched for using the English search term review database employed in the Arbitration.

146 I do not see how there was any unlawful concealment by Paul Hastings in this regard. As noted in *Arbitration in Singapore: A Practical Guide* (Sundaresh Menon CJ *et al*) (Sweet & Maxwell, 2nd Ed, 2018), at para 11.031, the disclosure obligations in arbitration are not as wide as those in common law style litigation proceedings, where parties are under a continuing obligation to disclose all documents that are relevant and material to the case, including documents which have the potential to adversely affect the party's own case or support the other party's case. This comports with the International Bar Association rules on the Taking of Evidence in International Arbitration ("the IBA Rules"), which applied to the present Arbitration. Article 3.1 of the IBA Rules states that "each Party shall submit to the Arbitral Tribunal and to the other Parties all Documents available to it *on which it relies*". This distinction between disclosure obligations in litigation and arbitration has also been recognised in *BVU v BVX* at [61].

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40 First affidavit of Charles Patrizia, para 32.

147 In *BVU v BVX*, the plaintiff and defendant were in a supplier and purchaser relationship as part of a food supply project. The plaintiff-supplier commenced arbitration against the defendant-purchaser for breach of the agreement. The majority of the tribunal held in favour of the defendant. After the award was rendered, an employee of the defendant agreed to provide evidence on the facts and circumstances surrounding the formation of the agreement in question, which would go towards showing that the defendant had "deliberately put forward a false case in the [a]rbitration by concealing the true facts and withholding and suppressing crucial evidence" including the testimony of the said employee and key documents corroborating his testimony (at [33]).

148 The plaintiff applied to set aside the award on the grounds of fraud and public policy and also issued a subpoena to the said employee to attend court to produce the key documents. The central issue identified by Ang Cheng Hock JC (as he then was) was whether the defendant's deliberate decision not to call certain witnesses to give evidence and disclose certain internal documents, which it did not consider relevant to its case in the arbitration (but would have supported the plaintiff's case), render the award liable to be set aside.

149 The court held *inter alia* that there was no deliberate concealment aimed at deceiving the tribunal and also there was no requisite causative link between the alleged concealment and the decision. Notably, in holding that there was no deception by the defendant, Ang JC highlighted the following. First, there was no obligation on the defendant to call the employee as a witness or to adduce the key documents, as is consistent with the IBA Rules that governed the arbitration (at [61]). Second, the tribunal had thoroughly considered the question as to whether the employee should be called as a witness to the arbitration (at [62]). Third, the plaintiff could have requested for the documents

that were the subject of the subpoena during the arbitration if it truly believed that those documents were crucial, but instead, its requests for production had been considerably narrower in scope (at [73]).

150 It is plain to me that Paul Hastings' conduct vis-à-vis Mr Chiu's documents is not fraudulent. This was not a case where the defendants had failed to disclose the documents of Mr Chiu altogether. The plaintiffs' unhappiness is with the scope of the defendants' disclosure. Amongst the hundreds of e-mails involving Mr Chiu that have already been disclosed by the defendants to the plaintiffs, they include e-mails between Mr Chiu and Mr Chen Xiang,[41] a high level official with the CLO, which was one of the entities referenced in the FCPA Findings (see [76]). In my view, the plaintiffs had ample opportunity to submit on the discovery of the documents but did not do so. The plaintiffs' assertion that they could only have taken issue with Mr Chiu's documents now in the light of the FCPA Findings lacks merit since the metadata showing that Mr Chiu was not the custodian of those documents was already available to the plaintiffs during the Arbitration. Furthermore, counsel for the plaintiffs in the Arbitration had first raised this issue with Mr Chiu's documents in a series of e-mail correspondence beginning on 14 June 2017 to Hughes Hubbard & Reed LLP, the defendants' arbitral counsel that had taken over from the PH Arbitration team shortly after the liability phase. The e-mails state, *inter alia,* that the plaintiffs' arbitration counsel were "in the process of working with the documents Claimants produced" and "noticed there do not appear to be any emails from Eric Chiu to anyone other than the GGAM principals".[42] Any connection between the FCPA Findings and Paul Hastings' collection of Mr Chiu's documents is tangential.

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41 PWS dated 17 September 2018, para 111.

42 First affidavit of Charles Patrizia, p 1019–1020.

151 In relation to the alleged non-disclosure of the Weidner Resorts documents, the plaintiffs had sought the documents in the Arbitration to "understand GGAM's principal's pursuit of investment and gaming opportunities, other than the Solaire Project". The defendants objected to this on the principal basis that Weidner Resorts was not a party to the proceedings. Consequently, the Tribunal rejected the plaintiffs' request.[43] The plaintiffs take issue with this because it was later revealed in the course of the liability hearings that Mr Weidner operates as Weidner Resorts in China and that Mr Chiu was on the latter's payroll.[44] To the plaintiffs' mind, this buttresses their allegation that Weidner Resorts was complicit in Mr Weidner's illegal strategies employed in China.

152 It is clear that the Tribunal has properly considered the plaintiffs' request[45] for the Weidner Resorts documents and dismissed it on the ground that Weidner Resorts is a third party. The Tribunal is clearly entitled to do so under Art 9.2 of the IBA Rules, which states that a tribunal shall exclude from evidence or production any document for any of the following reasons including the lack of sufficient relevance to the case or materiality to its outcome. As noted in the Annex to the Partial Award where the Tribunal comprehensively dealt with the plaintiffs' procedural objections, the plaintiffs "were afforded the opportunity to present their various requests for documents as well as any further or consequential matters flowing from such requests".[46]

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43 First affidavit of Charles Patrizia, p 1010.

44 First affidavit of Charles Patrizia, p 1017; PWS dated 17 September 2018, para 112.

45 First affidavit of Daniel Weiner, p 6721.

46 First affidavit of Michael Nolan, p 812.

153 Finally, in relation to the suppression of documents of Cantor Fitzgerald, the Tribunal had ordered production of documents from Cantor Fitzgerald and Mr Lutnick, its Chairman and CEO and also the Co-Chairman of GGAM. According to the plaintiffs, the Cantor Fitzgerald documents were "highly relevant given Cantor Fitzgerald's financial, tax and legal functions in relation to the defendants".[47] As to Mr Lutnick's documents, the argument was that he provided internal guidance for the defendants' management and works closely with Mr Weidner to make "material decisions affecting the company".

154 It is not in dispute that the defendants did produce documents relating to Cantor Fitzgerald.[48] However, the plaintiffs essentially argue that the disclosure was inadequate and that given the FCPA Findings, the role of Cantor Fitzgerald and Mr Lutnick must be seriously questioned.

155 The FCPA Findings say nothing about Cantor Fitzgerald or Mr Lutnick and have no connection with them either. The Tribunal has considered the plaintiffs' complaint in the Annex to the Partial Award and noted:[49]

> …the [plaintiffs] were afforded the opportunity to present their various requests for documents as well as any further or consequential matters flowing from such requests. The Tribunal heard and considered both Parties in respect of each request/application and reached its determination in accordance with the applicable rules. The two examples cited by the [plaintiffs] in support of their allegation of a "*suppression of critical evidence*" both relate to "*documents relating to Cantor Fitzgerald*". **The Tribunal has determined that this issue is effectively a red herring and does not have either a factual or legal bearing on any of the pleaded grounds advanced by either party.** [emphasis added in bold]

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47 PWS dated 17 September 2018, para 114.

48 First affidavit of Charles Patrizia, paras 68–70.

49 First affidavit of Michael Nolan, p 812; DWS dated 29 January 2019, para 218.

156 Therefore, I find that there is no fraud in relation to Paul Hastings' document collection or production for the Arbitration. The plaintiffs' allegations that Paul Hastings "deliberately limited the search for documents in a way that subverted the Tribunal's orders" are misguided and have been refuted by the Tribunal.[50]

Materiality requirement

157 In the light of my conclusion above that the plaintiffs have not made out their case on procedural fraud in the first place, it is strictly speaking, unnecessary for me to consider the remaining requirements of materiality and non-availability of evidence during the Arbitration. Nonetheless, given the breadth of the plaintiffs' arguments and submissions, I will comment on the materiality requirement first.

158 For the sake of argument, assuming procedural fraud was made out on the evidence, the FCPA Findings do *not* satisfy the materiality requirement: they do not constitute material information that would substantially impact the making of the Partial Award or information so material that earlier discovery of it would have prompted the Tribunal to rule in favour of the plaintiffs ([105]–[106] above). Thus, it cannot be said that the Tribunal's decision would have been different or that the Arbitration would have proceeded on an entirely different basis as the plaintiffs so argue.

159 Not any or every case of fraud would impugn a judgment or award. As alluded earlier, even where fraud is proven, there must be sufficient degree of connection between the fraud and the award that is being enforced for the ground of public policy under Art 36(1)(*b*)(ii) of the Model Law to be engaged:

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[50] DWS dated 29 January 2019, para 214.

The English decision in *Sinocore International Co Ltd v RBRG Trading (UK) Ltd* [2019] 1 All ER (Comm) 810 ("*Sinocore*") is illustrative. This degree of connection test demonstrates that fraud does not unravel all and is in substance no different from the concepts of materiality and "causative link" adverted to above (see [106]).

160 By way of illustration, in *Sinocore*, the plaintiff, Sinocore, had agreed to sell goods to the defendant, RBRG to be shipped from China to Mexico. On instruction from RBRG, the bank purported to issue an amendment to the letter of credit so that the shipment period was changed. Subsequently, Sinocore's collecting bank requested payment under the letter of credit and presented forged bills of lading. RBRG commenced arbitration proceedings for Sinocore's breach of contract. The arbitral tribunal held that the fundamental cause of the termination of the contract and Sinocore's failure to obtain payment was RBRG's unilateral amendment of the letter of credit.

161 RBRG sought to resist the recognition and enforcement of the award on the ground that it would be contrary to public policy under s 103(3) of the English Arbitration Act 1996 because of the forged bills of lading. Both the English High Court and the English Court of Appeal upheld the arbitral award. The Court of Appeal found that the degree of connection between Sinocore's fraud in presenting forged bills of lading and its claim for enforcement of the award was not sufficient to engage public policy or, if it was engaged, was also insufficient to justify the refusal of enforcement on public policy grounds (at [30]). The decision *Sinocore* thus demonstrates this high watermark for proving fraud and the necessary nexus between the alleged fraud and the tribunal's decision.

162 A considerable body of submissions was marshalled by the plaintiffs in support of how the FCPA Findings would have a material effect on the Tribunal's decision. I will deal with each of them in turn.

Whether the FCPA Findings constitute evidence of actual fraud

163 The foundation of the plaintiffs' arguments on the relevance and materiality of the FCPA Findings is that they show that Mr Weidner and Mr Chiu deployed the same strategies in Solaire for driving foreign VIPs and junkets which they had used while they were at LVS.[51] This allegation warrants closer examination of the FCPA Findings. In this regard, I start by considering the expert evidence on the evidential significance and value of the FCPA Findings.

In relation to LVS

164 In summary, the plaintiffs' expert, Mr Peter Clark ("Mr Clark"), the former special counsel in the SEC's Division of Enforcement and the former Deputy Chief of the DOJ's Criminal Division, Fraud Section, attempted to make much of the FCPA Findings. Mr Clark opines that the FCPA Findings indicate "a high probability that Mr Weidner and Mr Chiu were directly implicated in the conduct which formed the basis of the [FCPA Findings]" and that they "indicate a high probability that the actions of Mr Weidner and Mr Chiu were in possible violation of the Anti-Bribery Provisions of the FCPA."[52]

165 On the other hand, the defendants' expert, Mr Philip Urofsky ("Mr Urofsky"), the former Assistant Chief of the DOJ's Criminal Division Fraud

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51 Second affidavit of Michael Nolan, paras 18–24.

52 First affidavit of Peter Clark, p 14, para 5.

Section, is of the opposite view. Mr Urofsky's report states that the FCPA Findings do not contain any findings by the DOJ or the SEC that either Mr Weidner or Mr Chiu violated the FCPA, and the FCPA Findings do not contain any findings of bribery by LVS, Mr Weidner or Mr Chiu for the following related reasons:[53]

(a) First, the FCPA Findings are derived from negotiated agreements containing allegations based on the DOJ and SEC's inferences and extrapolations from the evidence.

(b) Second, there are no findings by a court or independent tribunal on the appropriateness or sufficiency of evidence of the allegations in the FCPA Findings.

(c) Third, Mr Weidner and Mr Chiu had no opportunity to contest the allegations in the FCPA Findings as they were not parties to the negotiated agreements.

(d) Fourth, there was no conclusion made from the FCPA Findings that bribes had been paid by LVS.

(e) Fifth, no public accusations were made or charges were filed by the US government authorities against Mr Weidner or Mr Chiu.

166 I am of the view that, on a balance of probabilities, the FCPA Findings do not prove that Mr Weidner and Mr Chiu bribed Chinese government officials and state-owned entities while they were with LVS (much less in Solaire). At its highest, the FCPA Findings implicate Mr Weidner and Mr Chiu in the conduct of three transactions, pertaining to LVS' violations of the FCPA

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53 First affidavit of Philip Urofsky, p 12–13, paras 3–5; Transcript, 22 May 2019, p 73.

Accounting Provisions but not the Anti-Bribery provisions. Consequently, I find that there is no sufficient degree of connection between the alleged fraud by the defendants and the Partial Award. I say this for a number of reasons.

167 As a preliminary point, it is apposite to recall that in the SEC Order, LVS settled the matter "without admitting or denying the findings herein" (see [74] above). Thus, the significance of the SEC Order is that LVS cannot challenge the alleged facts in any proceedings brought by SEC but it can do so in a proceeding brought by a party other than the SEC.[54] This is contrasted with the DOJ Agreement where LVS admitted that the alleged facts in the Statement of Facts "are true and accurate".[55] The DOJ Agreement is a non-prosecution agreement between the US government and the LVS, whereby LVS agrees to pay a financial penalty, undertake remedial measures and admits to stipulated facts. In return, the US government does not file any formal charging instrument in court.

168 Turning to the reasons proper, the first reason has to do with the inherent evidential issues with the FCPA Findings. Both sides argued on the weight of the FCPA Findings. I accept Mr Urofsky's point that the statements in the FCPA Findings are of "much lower degree of reliability than those that would be established through traditional adversarial proceedings in open court".[56] The SEC Order and the DOJ Agreement are both negotiated documents between the US government and LVS that contain allegations based on the US government's view of the evidence, including its inferences and extrapolations from the evidence. The findings itself were not placed before a court, an independent

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54 First affidavit of Philip Urofsky, p 18, para 18.

55 First affidavit of Michael Nolan, p 1358.

56 First affidavit of Philip Urofsky, p 21, para 24

tribunal or fact-finder to evaluate the sufficiency of underlying evidence or its appropriateness. I also note that Mr Weidner and Mr Chiu were not parties to the FCPA Findings and to that extent, had no participation in the negotiations between LVS and the authorities that resulted in the documents.

169 Secondly, no charges were brought by the DOJ or administrative actions brought by the SEC against Mr Weidner and Mr Chiu, in particular under the Anti-Bribery Provisions of the FCPA. As noted by Mr Urofsky, the statutory limitation period for filing charges against both Mr Weidner and Mr Chiu lapsed at the end of 2017 for the alleged conduct that occurred between 2006 and 2009.[57]

170 The decision in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 4 SLR 995 ("*Rakna (HC)"*) is a helpful illustration. The High Court there found that charges of bribery and corruption in *pending* criminal proceedings were not considered findings of fact of corruption or bribery, and were only found to be mere allegations (at [89]). This finding was undisturbed on appeal. *A fortiori*, in the present case, Mr Weidner and Mr Chiu were neither charged by the DOJ nor were administrative actions brought against them by the SEC. The FCPA Findings are only negotiated agreements that cannot, by themselves, be elevated to factual findings of bribery by Mr Weidner and Mr Chiu in LVS.

171 The absence of any charge is notable given the DOJ's emphasis on the prosecution of culpable individuals. The following excerpt from the Principles

[57] First affidavit of Philip Urofsky, p 31–32, paras 42–43.

of Federal Prosecution of Business Organisations issued by the DOJ was highlighted to me in this regard:[58]

> 9-28.210 – Focus on Individual Wrongdoers
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> A. General Principle: Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. **Proving individual culpability should be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of** a corporate guilty plea or some other disposition of the charges against the corporation, including a deferred prosecution or **non-prosecution agreement**, or a civil resolution. …
>
> [emphasis added]

172 This coheres with the guidance on individual accountability for corporate wrongdoing published by the DOJ, which is referred to as the "Yates Memo". It suffices to note that the six key steps highlighted in the memo are that:[59]

> (1) [i]n order to qualify for any cooperation credit, corporations must provide to the Department all relevant findings relating to the individuals responsible for the misconduct;
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> (2) criminal and civil corporate investigations **should focus on individuals from the inception of the investigation**;
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> (3) criminal and civil attorneys handling corporate investigations should be in routine communication with one another;
>
> (4) **absent extraordinary circumstances or approved departmental policy, the Department will not release culpable individuals** from civil or criminal liability when resolving a matter with a corporation;
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> (5) **Department attorneys should not resolve matters with a corporation without a clear plan to resolve related**

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58 First affidavit of Philip Urofsky, p 133.

59 First affidavit of Philip Urofsky, p 168.

> **individual cases**, and should memorialize any declinations as to individuals in such cases; and
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> (6) **civil attorneys should consistently focus on individuals as well as the company** and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.
>
> [emphasis added]

173 Assuming *arguendo* that Mr Weidner and Mr Chiu are guilty of bribery, it should follow in the light of the DOJ's policy that prosecution would generally be pursued notwithstanding that a non-prosecution agreement is reached between LVS and DOJ. The absence of charges or administrative actions brought (by either the DOJ or SEC) militates against any finding of bribery or corruption on the part of the defendants' directors.

174 Thirdly, it is uncontroverted that in their investigation of LVS, the SEC and DOJ only alleged violations of the Accounting Provisions, not the Anti-Bribery Provisions.[60]

175 The FCPA was enacted in 1977 and contains two distinct sections. Simply put, the first section of the FCPA amended the Securities Exchange Act to:[61] (a) require companies such as LVS to maintain accurate books and records and to implement internal financial controls under Securities Exchange Act (the "Accounting Provisions") and (b) prohibit companies such as LVS from taking acts in furtherance of offers, promises or payments, or authorisation thereof, of bribes to foreign public officials under the Securities Exchange Act (the "Anti-Bribery Provisions"). In addition, the legislation amended the Securities Exchange Act's penalty provisions to include penalties for violations of the

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60 First affidavit of Philip Urofsky, p 15, para 8.

61 First affidavit of Philip Urofsky, pp 14–15, para 6.

Anti-Bribery Provisions: Securities Exchange Act § 32(c). The second section of the FCPA applies the same prohibitions to US business entities and individuals who are not covered by the Securities Exchange Act provisions, which is immaterial for the present case.

176 In the SEC Order, LVS violated Securities Exchange Act § 13(b)(2)(A) for its failure to "*in reasonable detail, accurately and fairly reflect* the purpose of the payments" in its books and records, and Securities Exchange Act § 13(b)(2)(B) for failing to "*devise and maintain a reasonable system of internal accounting controls* over operations in Macau and China to ensure that access to assets was permitted and that transactions were executed in accordance with management's authorization" (see [83] above). As a result, funds were transferred to the Consultant in China in a series of transactions lacking supporting documentation or appropriate authorisation and these transfers occurred *despite the knowledge by senior LVS management* that could not account for significant funds previously transferred to the consultant *in an environment where significant bribery risks were present*.[62]

177 Similarly, in the DOJ Agreement, the offence was characterised as "a *wilful failure by then-executives of [LVS] to implement adequate internal accounting controls* in connection with *significant payments to companies associated with a consultant in a region known to be high risk for corruption*, without appropriate due diligence of certain entities, consistent monitoring of or justifications for payments, and proper approvals and documentation, even after certain then-senior executives of the Company had been notified about the consultant's business practices and failure to account for over US$700,000" [emphasis added] (see [88] above).

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62 First affidavit of Michael Nolan, pp 1343–1344, para 7.

178 Plainly, the offences are characterised as an internal accounting failure. While there are some references to bribery ("a region known to be high risk for corruption" and "environment where significant bribery risks were present"), nowhere in the FCPA Findings is it stated that LVS or its directors themselves were directly involved in bribery. That LVS operated in those settings is simply too flimsy a basis for a finding of fraud which is a serious allegation.

179 Fourth**,** the circumstances surrounding the production of the FCPA Findings also diminishes its evidential value for the purposes of the present proceedings. I say this for two inter-related reasons.

180 It cannot be denied that on a systemic and practical level, there are various incentives available to LVS for entering into such agreements with the DOJ and SEC. In this regard, Mr Urofsky's evidence is that a corporation that is intent on settlement (as opposed to litigation) would generally have very little or no incentive to contest the factual assertions contained in the FCPA Findings. It would likewise have little incentive to seek and include contrary or exculpatory evidence concerning the conduct under investigation.

181 I am inclined to accept Mr Urofsky's evidence. A party may seek to settle a dispute for any number of reasons which do not relate to his legal liabilities or his views of them: *Lim Tjoen Kong v A-B Chew Investments Pte Ltd* [1991] 2 SLR(R) 168 at [32]; *Ng Chee Weng v Lim Jit Ming Bryan and Another* [2010] SGHC 35 ("*Ng Chee Weng*") at [15]. In *Ng Chee Weng*, it was found that offers to settle did not amount to an admission of liability, in the context of protecting the "without prejudice" rule and allowing parties to speak freely in settlement negotiations.

182 The DOJ for one offers considerable incentives to companies to cooperate and settle a variety of regulatory infringements instead of litigating issues of fact and liability. In the present case, LVS received a 25% discount off the bottom of the US Sentencing Guidelines range for the monetary penalty imposed on it, as stated explicitly in the DOJ Agreement.[63] As noted from the Yates Memo earlier, in order for a company to qualify for any cooperation credit, corporations must provide facts relating to the employees and executives responsible for the misconduct.[64] Had LVS not cooperated, it would likely face harsher penalties and often a more severe form of resolution, including the filing of formal charges, which for companies in regulated industries such as gaming, could result in adverse collateral consequences from regulators separate from the enforcement proceedings.[65]

183 I should caveat that this is not to say that the integrity of the assertions set out in the FCPA Findings involving LVS are *necessarily* in doubt since there is admittedly no direct evidence of the effect of the practical incentives on LVS. Such evidence is in any case, I am inclined to think, generally difficult to procure. Rather, I consider that the existence of such incentives is one relevant consideration that diminishes the overall weight to be ascribed to the FCPA Findings in general, especially when they are being relied upon as evidence of fraud.

184 The factual circumstances vis-à-vis Mr Weidner and LVS in particular should also be taken into account. It is not disputed that Mr Weidner resigned from LVS in March 2009 after an acrimonious dispute with LVS' Chairman and

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63 First affidavit of Michael Nolan, p 1358.

64 First affidavit of Philip Urofsky, p 23, para 28; p 168.

65 First affidavit of Philip Urofsky, p 22, para 27.

CEO, Mr Sheldon Adelson, and certain directors over the financing, management and direction of the company. Mr Weidner's departure was a "highly publicized split" which was reported in the news.[66] This is corroborated by his letter of resignation from LVS dated 8 March 2009, where his reasons for resignation referred to "outstanding differences with the Chairman and the Chief Executive Officer about the management of the Company"[67] as well as his first statement given on 15 August 2012 to the plaintiffs, where he stated that "I had serious disagreements and concerns with company leadership, which I voiced to the board and ultimately led to my decision to resign" (see [120]). When considered with the earlier point about the availability of incentives to LVS in the context of investigations by the SEC and DOJ, some caution must be taken in according undue weight to the FCPA Findings.

185 I hasten to add that none of the above should be construed as deprecating the quality of the SEC Order or DOJ Agreement in and of themselves. The present enquiry is a *specific* one that is concerned with assessing their particular relevance for the purposes of imputing actual fraud on the defendants, which the plaintiffs seek to do herein. Cogent and compelling evidence is needed to make good an allegation of fraud or dishonesty. On a holistic assessment of the nature and evidential value of the FCPA Findings, noting in particular that the FCPA Anti-Bribery Provisions were not breached and the fact that neither prosecution nor administrative action were initiated against Mr Weidner and Mr Chiu, I find that the plaintiffs have not discharged their burden of proof that LVS or its directors (Mr Weidner and Mr Chiu) had bribed Chinese government officials and state-owned entities.

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66 DWS dated 17 September 2018, para 17.

67 First affidavit of William Weidner, paras 14–16; p 18.

In Solaire

186 As noted earlier, the plaintiffs aver that the FCPA Findings supposedly reveal that Mr Weidner's strategies in Solaire were "strikingly similar" to those developed at LVS which involved the same Chinese governmental officials (through CLO) and Mr Weidner's right-hand man, Mr Chiu. As such, notwithstanding the foregoing problems vis-à-vis the FCPA Findings in the context of LVS, the plaintiffs argue that fraud must have been practised by the defendants in Solaire as well. The plaintiffs submit that the "government-led, top-down junket approach" strategies which Mr Weidner testified he was pursuing to drive junkets and VIPs to Solaire, in reality, involved acts of bribery.[68] The plaintiffs employed the language associated with *Boardman v DPP* [1975] AC 421 ("*Boardman*") to determine the probative value of similar facts. In that case, evidence of facts that were so strikingly similar to the facts of the offence charged as to be of probative value was held to be admissible at the discretion of the court. I will however refrain from applying the legal definition in *Boardman* to the plaintiffs' argument since no specific reference was made either to the case itself or the principles applicable to similar fact evidence.

THE RAMP-UP PERIOD

187 Before I consider the plaintiffs' argument about striking similarity of facts, there is a threshold problem with the plaintiffs' submission that the FCPA Findings constitute evidence of fraud practised in Solaire. This pertains to the Tribunal's finding regarding the ramp-up period that was at play in the performance of the MSA. One of the arguments raised by the plaintiffs in the context of the Causal Fraud Issue before the Tribunal was that "[n]ot a single

68 PWS dated 17 September 2018, paras 58–62.

VIP player has been identified as having come to Solaire as a direct result of Mr. Weidner's 'leveraging'" despite the defendants' assurances of their strong relationships with the junket operators. It was also argued in the context of the Termination Issue that the defendants had failed to submit business and marketing plans that met prudent industry practice.

188 The Tribunal was of the view that the plaintiffs' arguments above were unmeritorious because the parties had envisioned an extended runway for attracting junket operators to Solaire. This is evident from the following extracts of the Partial Award:

> **VI. ALLEGED MISREPRESENTATIONS AND/OR CONDUCT OF GGAM AMOUNTING TO CAUSAL FRAUD**
>
> …
>
> ***(ii) Relationships with Junket Operators and Possession of Guest Data***
>
> …
>
> 131. … The Tribunal is persuaded that, given the standing of the GGAM Principals in the gaming industry, they did have access directly or indirectly to "high rollers" as they testified. … Ample testimonial and documentary evidence supports the proposition that both the Claimants and the Respondents planned not to seek "high rollers" prematurely, that is, until the property was sufficiently able to provide them with a pleasant experience. This would not have occurred until some months, or possibly even a year or more, after opening. The Respondents, however, terminated the Claimants before that point arrived …
>
> …
>
> **IX. ALLEGED FAILURE TO SUBMIT BUSINESS AND MARKETING PLANS THAT MET PRUDENT INDUSTRY PRACTICE**
>
> …
>
> ***(ii) Business and Marketing Plans***
>
> 208. As regards the lack of sufficient detail on the international mass-market segment and the VIP and junket

> market, the criticism is disputed by the Claimants who note that the plan discussed marketing strategies to attract premium and junket operators … The Claimants have also explained that VIP and premium mass marketing of a new casino should take into account a ramp up period i.e. it is only after the essential facilities and services are running smoothly that VIP and premium mass marketing activities can swing into full gear. This would explain the modest marketing efforts in the initial, pre-ramp up period …
>
> [emphasis added in underline]

189 A noteworthy decision that merits examination here is *AJU v AJT*. The respondent there had commenced arbitration against the appellant in connection with a contract between the parties. After the notice of arbitration had been filed, the appellant lodged a complaint with the Thai prosecution authority alleging that parties associated with the respondent had induced it to enter into the underlying contract through fraud. This resulted in criminal proceedings against the relevant parties on charges of fraud and forgery. While the criminal proceedings were underway, the appellant and respondent signed a Concluding Agreement whereby the parties agreed that upon the withdrawal and/or discontinuation and/or termination of the said proceedings, the appellant would pay the respondent a sum of US$470,000 whereupon each of them would take steps to terminate and withdraw *inter alia* all claims against each other in the Arbitration. The appellant then withdrew its complaint and the Thai prosecution authority issued a non-prosecution notice. Nevertheless, the respondent considered the non-prosecution order to be insufficient to fulfil the appellant's obligations under the Concluding Agreement (at [12]).

190 Subsequently, when the appellant sought to terminate the arbitration on the grounds of the Concluding Agreement, the respondent alleged that the agreement was null and void on the grounds of duress, undue influence and illegality. Importantly, the Tribunal then decided by way of an interim award that the Concluding Agreement was valid and enforceable and was *not* illegal

as it did not require the stifling of prosecution. Dissatisfied, the respondent attempted to set aside the interim award, *inter alia,* on the ground that the Concluding Agreement was against the public policy of Singapore under Art 34(2)(*b*)(ii) of the Model Law.

191 At first instance, the High Court judge set aside the interim award on the basis that the Concluding Agreement was an agreement to stifle the prosecution of charges and was hence contrary to the public policy of Singapore. On appeal, Chan Sek Keong CJ held as follows (at [65]):

> … the Judge was not entitled to reject the Tribunal's findings and substitute his own findings for them. On the facts of this case, s 19B(1) of the IAA calls for the court to give deference to the factual findings of the Tribunal. The policy of the IAA is to treat IAA awards in the same way as it treats foreign arbitral awards where public policy objections to arbitral awards are concerned, even though, in the case of IAA awards, the seat of the arbitration is Singapore and the governing law of the arbitration is Singapore law. Arbitration under the IAA is international arbitration, and not domestic arbitration. That is why s 19B(1) provides that an IAA award is final and binding on the parties, subject only to narrow grounds for curial intervention. **This means that findings of fact made in an IAA award are binding on the parties and cannot be reopened except where there is fraud, breach of natural justice or some other recognised vitiating factor.** [emphasis added]

192 This position has since been echoed by the Court of Appeal recently in *Rakna Arakshaka Lanka Ltd v Avant Garde Maritime Services (Pte) Ltd* [2019] 2 SLR 131. Briefly put, one of the grounds for setting aside pursued by the appellant there was that the Master Agreement in question was illegal and contrary to public policy. The Court of Appeal dismissed the argument as such (at [99]):

> Before we can consider the applicability and scope of Singapore public policy, however, [the appellant] has first to establish that the Master Agreement and the other agreements were illegal under their governing law. Such an issue would be pre-

> eminently one for the Tribunal to decide based on the facts and law before it as it was the forum concerned with the validity of the underlying obligations. [the appellant] did not put this issue before the Tribunal. Notwithstanding that, the Tribunal did look into the question and found that the Master Agreement clearly showed "no sign of illegality or even in the slightest [way], indicate that such Agreement and/or Agreements are contrary to public policy". **That finding is binding on the parties and [the appellant] cannot challenge it before this court as the court of the arbitral seat. It is well established that a finding of fact by an arbitral tribunal cannot be re-opened** by the supervisory court as the Judge observed, relying on *AJU v AJT* … In these circumstances, there is no need to consider public policy at all. [emphasis added]

193 It is clear from the Partial Award that the Tribunal found, or at least, accepted that no junkets came to Solaire as a result of the defendants' efforts. This is notwithstanding the fraud or corruption that the plaintiffs now allege. In the plaintiffs' own rejoinder filed in the Arbitration, it was accepted that it was the *plaintiffs* themselves that had brought VIP players or junket operators to Solaire, not the defendants.[69] Therefore, while I accept that the Tribunal had declined the plaintiffs' Request for Reconsideration of the Partial Award in the light of the FCPA Findings, and to that extent, did not take an explicit position on the fraud that the plaintiffs now allege against the defendants, the factual findings in the Partial Award, based on the plaintiffs' own evidence, cannot be criticised just because the plaintiffs now mount a different case in OS 1432. In my view, the submission that the FCPA Findings constitute new evidence of fraud seems to ring hollow.

ALLEGED STRIKING SIMILARITIES

194 I now turn to the plaintiffs' argument on striking similarities as a basis for imputing fraud on the defendants in relation to Solaire. The plaintiffs

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69 First affidavit of Michael Nolan, p 618, para 92.

highlight the factual similarities between the LVS operations and the Solaire operations to draw an "incontrovertible inference"[70] that the government-led, top-down junket approach deployed by the defendants in the performance of the MSA was *similarly corrupt*: in order to attract junket operators, Mr Weidner used the *same Chinese government officials and state-linked individuals* and the CLO in executing Mr Weidner's strategies for Solaire because they would receive bribes directly or through an intermediary.

195 According to the plaintiffs, the FCPA Findings shed light on Dr Chen Xiang and CLO's centrality to Mr Weidner's "government-led, top-down junket approach". By way of background context, Dr Chen Xiang was a high-level official with the CLO in Macau who had a supposedly close relationship with Mr Weidner and Mr Chiu. When asked by the Tribunal, Mr Weidner testified in the liability hearing as to the role of Dr Chen Xiang and the CLO vis-à-vis the procurement of a major Macanese junket operator named SunCity to Solaire as such:[71]

Mr Bishop:	**Does the government have a relationship with SunCity?**
Mr Weidner:	**Yes.**
Mr Bishop:	**What's the relationship?**
Mr Weidner:	This directly will tell you, it takes a little while to get there, how and why we started with China Liaison Office. It takes a little time, but I think I can give you the framework.
Mr Bishop:	I'm just struggling to figure out why the government would tell SunCity to do this.
…	
Mr Weidner:	… And three, because China is a directed economy, the economic office, called the China

[70] PWS dated 12 March 2019, para 130.

[71] First affidavit of Daniel Weiner, pp 884–885.

> Liaison Office, they are in charge of, theoretically, Macau's economy …
>
> So if you wanted to find out anything about any junket rep, to see if you knew Dr Chen, if you knew the CLO, he had a spreadsheet of every junket room, every junket operator, what his volume was and the key thing about the CLO is **the CLO is the junkets' get out of jail free card.**
>
> [SunCity] has 3,500 agents all over China and what are they doing? They are granting credit, they are collecting China and in a controlled economy where it's illegal to move money or move the RMB out, they were committing illegal acts every day.
>
> But since gambling is illegal in China but legal in Macau, as a pre-existing condition, **the CLO was the only group of people in China allowed to deal with gambling issues** … So the CLO could call the local authorities and explain, look this is not correct, it's illegal. However, this SAR has the right to have gambling and while it is incorrect in the movement of money, it is explainable under one China, two systems, that gambling is allowed in this SAR.
>
> …

[emphasis added]

196 The plaintiffs posit that Dr Chen Xiang and the CLO executed Mr Weidner's strategies for Solaire by introducing him to important junkets and other Chinese VIPs. The plaintiffs insinuate that bribery by Mr Weidner and Mr Chiu must have taken place in order for Dr Chen Xiang and the CLO to provide such significant benefits to Solaire. In support of this, the plaintiffs highlight the similarities between the involvement of the CLO in introducing Mr Weidner and Mr Chiu to the Consultant in LVS on the one hand (who had allegedly committed bribery based on the FCPA Findings) and Dr Chen Xiang's and the CLO's role in executing Mr Weidner's strategies in Solaire on the other hand. The plaintiffs also draw a parallel between Dr Chen Xiang from the CLO and

the Consultant from the CLO in Macau, who had allegedly acted as the facilitator for bribing Chinese government officials in the three transactions according to the FCPA Findings (see [75] above).

197 The plaintiffs also rely on two unexplained payments of US$25,000 in payments that GGAM made to Sahara ASF Asia, an entity affiliated to Mr Chiu during the period of time that Dr Chen Xiang was conferring the above benefits.[72] This was evidenced by an e-mail from Mr Garry Saunders to Mr Weidner dated 7 June 2013, arising out of a discussion as to whether Solaire should hire an individual who had connections with another Macanese junket operator known as Neptune:[73]

> … Are you proposing this as a GGAM expense? Will be difficult to sell EKR on the expense, and not pretty for us to eat (the t&e will probably be more than their salaries, plus general headache of taking on employees). Separately, looking at the last P&L, I noticed the second month of a $25,000 charge to Sahara ASF Asia (Andy Fonfa?) for a Macau Office. Is this for Eric? How is Andy involved? [emphasis added]

Mr Weidner subsequently forwarded this e-mail to Mr Chiu with the message stating, "We need to talk. Call?"

198 The report, commissioned by Spectrum Gaming Group ("Spectrum Report") and adduced by the plaintiffs, notes that it is unclear from the emails what the purpose of the two undisclosed payments was. The Spectrum Report goes on to note that the time period in which the two payments of US$25,000 were made from GGAM to Sahara ASF ("Sahara Payments") was between April and early June 2013 and corresponded precisely with the period of time when Dr Chen Xiang had been actively assisting GGAM in its efforts to develop

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72 First affidavit of Michael Nolan, p 1731, para 12.

73 First affidavit of Daniel Weiner, 3437.

relationships with junket operators in Macau. In doing so, the plaintiffs seek to draw similarities between these unexplained transactions and Mr Chiu's authorisation of several suspicious payments at LVS as stated in the Statement of Facts of the DOJ Agreement (see above at [189]).[74]

199 In fairness to the plaintiffs, the circumstances surrounding the Sahara Payments along with Mr Weidner's and Mr Chiu's behaviour, are arguably suspicious. However, that is as far as the evidence provided by the plaintiffs can show. The plaintiffs still have not proven what the transactions were for. Further, it is insufficient to draw an inference of bribery just because the key individuals involved in the breaches of the Accounting Provisions in the FCPA Findings (*ie,* Mr Weidner and Mr Chiu) and the consumer base (*ie,* junket operators) are the same as those in Solaire. The FCPA Findings make no findings with regards to Mr Weidner and Mr Chiu in respect of the strategies deployed at Solaire or the Sahara Payments for that matter. They also make no mention of junket operations at all. The FCPA Findings pertain to misconduct by LVS, a different company from GGAM, in a different venture (LVS, not Solaire), in a different country (China, not the Philippines), which occurred from 2006 to 2009, four years prior to the opening of Solaire in 2013.

200 The strategies employed in LVS, which were impugned in the FCPA Findings are also clearly different from those employed in Solaire. It will be recalled that the FCPA Findings concern three specific transactions (only two are mentioned in the DOJ Agreement): the Basketball Team transaction, the Adelson Centre transaction and the Macau Operations transaction (see [78]–[82]). On the other hand, GGAM's strategies for delivering VIP customers to Solaire did not involve any similar transactions to those highlighted in the FCPA

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74 First affidavit of Michael Nolan, pp 1956–1957, para 76.

Findings. Moreover, all that was mentioned in the DOJ Agreement was the limited role of the CLO: in 2006, the Consultant was first retained by LVS and introduced by a high-level person with the CLO in Macau. The plaintiffs have also yet to establish positively that the Consultant in LVS was Dr Chen Xiang in Solaire.

201 Therefore, I find that the FCPA Findings do not, on a balance of probabilities, prove that Mr Weidner and Mr Chiu, whilst in LVS, were involved in bribing Chinese government officials and state-owned entities. There are insufficient factual similarities between the operations in LVS and Solaire. It must be borne in mind that the court must take a careful and cautious approach in utilising similar fact evidence with regard to establishing fraud and dishonesty: *Tan Swee Wan and another v Johnny Lian Tian Yong* [2018] SGHC 169 at [276]–[278]. Especially for findings of fraud and dishonesty, I would be slow to draw an inference based on similar fact evidence, assumptions and unestablished facts. As such, there is no requisite connection between any fraud and the Partial Award to speak of and I do not think that the Tribunal's decision would have been any different or that the Arbitration would have proceeded on an entirely different basis.

Whether the FCPA Findings are nevertheless material

202 In the light of my foregoing findings, much of the plaintiffs' argument on materiality falls away. Nonetheless, I will briefly address the remaining points raised herein.

203 It was suggested that if Mr Weidner had not concealed or misrepresented his involvement in three transactions being investigated by the DOJ and the

SEC, the plaintiffs would not have entered into the MSA in the first place (*ie*, the Causal Fraud Issue).[75] I find this to be misguided.

204 There is no general duty or any duty of disclosure at common law in ordinary commercial contracts. The exception is reserved for contracts that are subject to the duty to act in good faith. The basis of contract law thus responds to active misrepresentations and generally imposes no liability for omissions: *Chitty on Contracts* vol 1 (Hugh Beale QC gen ed) (Sweet & Maxwell, 33rd Ed, 2018) at para 7-018.

205 In the present case, the MSA concerns a different company, different parties and a different time frame, as noted earlier. While it appears that the investigations by the DOJ and SEC into LVS were already ongoing at the time the MSA was signed,[76] I cannot find any duty on the defendants' part to disclose the LVS investigations or the impugned transactions. I also note that around March 2011, LVS published in its annual report that they were being investigated by the US authorities and this was publicised on several major media outlets. This was half a year before the parties entered into the MSA in September 2011.

206 The plaintiffs rely on, *inter alia,* cl 10.2 of the MSA. I reproduce the relevant clauses here:

> 10.2 **GGAM**
>
> GGAM represents and warrants as of the Effective Date that:
>
> …
>
> (G) there is no litigation or proceedings pending or threatened against GGAM that could adversely affect the validity of this

75 Second affidavit of Michael Nolan, paras 37–39.

76 PWS dated 17 September 2018, para 38.

> Agreement or the performance of GGAM of its obligations under this Agreement;
>
> (H) to its best knowledge, GGAM has complied and shall comply with all material requirements of the Philippine Anti-Money Laundering Laws in this Project;
>
> (I) to its best knowledge, GGAM has complied and shall comply with all material requirements of the Philippine Anti-Corruption Laws in connection with this Project …

207 As I have explained earlier, there is no breach of cl 10.2(G) because the only entity whose conduct is of relevance is GGAM (see [137]). In relation to cll 10.2(H) and (I), there is no evidence before me that there has been non-compliance in relation to the Philippines anti-money laundering or anti-corruption laws, whether arising out of the conduct of LVS and its principals between 2006 and 2009 disclosed in the FCPA Findings or otherwise. Thus, the FCPA Findings have no material effect on the Causal Fraud Issue.

208 Third, the plaintiffs submit that the FCPA Findings reveal that the defendants did not have strong and direct relationships with junket operators but rather corrupt strategies. This is contrary to the defendants' representations at the beginning of the parties' relationship.[77]

209 The FCPA Findings say nothing about the defendants' relationships with junket operators. It is undisputed that the two documents only concern relationships that LVS had, and even then it was focused on relationships with Chinese authorities. It is untenable to deduce therefrom that the defendants did not have any genuine relationships with junket operators. Even then, I have found above that the FCPA Findings are not evidence of bribery or corruption in LVS or Solaire.

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[77] Second affidavit of Michael Nolan, paras 36, 41(b); PWS dated 17 September 2018, para 50.

210 Moreover, the Tribunal in its Partial Award has already properly addressed this argument by the plaintiffs by making a finding as to the ramp-up period contemplated by the parties in the execution of the MSA (see [187]). As explained, the Tribunal was satisfied that the "high rollers" were only supposed to be brought in at a later stage of Solaire's development. These are factual findings that cannot be disturbed by the court save in cases of fraud, bribery or breach of natural justice, none of which have been made out.

211 Fourth, the plaintiffs also argue that the conduct of Mr Weidner and Mr Chiu in LVS, as revealed in the FCPA Findings "would have rendered the defendants unsuitable to participate in the management of Solaire" based on Philippines licensing regulations.[78] This argument is predicated on cl 15.1(f) of the MSA, which stipulates that:

> **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.
>
> [emphasis added]

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78 PWS dated 17 September 2018, para 46; Second affidavit of Michael Nolan, paras 37 – 39.

212 The plaintiffs refer to the expert opinion of Mr Jorge Sarmiento ("Mr Sarmiento"), the former President and Chief Operating Officer of the Philippines Amusement and Gaming Corporation ("PAGCOR"), a body that regulates the employment of persons in the gaming industry in the Philippines. Notably, Mr Sarmiento's report states that:[79]

> The violation of the FCPA of the nature set forth by the U.S. authorities by William Weidner and Eric Chiu who are senior officers of GGAM, and GGAM's hiring Michael French as President and Chief Operating Officer of Solaire, a person whom they have previously fired for rigging a drawing and Mr. French' failure to disclose this in his [Gaming Employment License] application are, to my mind, **reasons enough for PAGCOR to disqualify GGAM from being involved in gaming in the Philippines**. Had PAGCOR been aware of these facts, it would have **required that Bloomberry dissociate itself** from Mr. Weidner, Mr. Chiu and Mr. French. **In fact, PAGCOR would have required the immediate termination of the MSA if its continuation would not be possible without the involvement of Mr. Weidner, Mr. Chiu and Mr. French** or if it would allow a circumvention of the requirement that only persons of the highest integrity are allowed to participate in the operations of the Philippine gaming industry… [emphasis added]

According to the plaintiffs, this shows that PAGCOR would have required the termination of the MSA either because of the misconduct of Mr Weidner and Mr Chiu, or the hiring of Mr French without disclosing his unethical conduct in LVS, which had resulted in fines imposed by Nevada's Gaming Control Board.

213 I disagree. The text of cl 15.1(f) of the MSA makes clear that a ground for valid termination arises where there is a final order that is not "remedied within the cure period as may be allowed by PAGCOR". At best, Mr Sarmiento's evidence is that the information contained in the FCPA Findings might have been sufficient to disqualify GGAM. While that conduct relates only

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79 First affidavit of Michael Nolan, p 1519.

to LVS, PAGCOR would presumably be entitled to take into account past conduct in its assessment of an applicant's suitability in managing such facilities.

214 However, Mr Sarmiento stops short of saying that the misconduct of Mr Weidner and Mr Chiu in LVS would have resulted in a final and irremediable order, as contemplated in cl 15.1(f) of the MSA. Indeed, I do not think an irremediable order would have arisen for two inter-related reasons. For one, Mr Sarmiento's report states that in the counterfactual scenario, PAGCOR would likely have required the first plaintiff to "dissociate itself from Mr Weidner, Mr Chiu and Mr French". In other words, if the individuals "implicated" in the LVS investigations or other forms of misconduct were removed from the defendants and not involved in the MSA, PAGCOR may at the very least have considered allowing the defendants' application to be involved in the Philippines gambling sector. Furthermore, cl 15.1(g) of the MSA essentially provides that it is not a ground for termination where Mr Weidner ceases to be the CEO of GGAM, if the other principals "continue as a senior officer of GGAM actively involved in the performance of GGAM's obligations". Therefore, should the situation arise that Mr Weidner is "dissociated" from Solaire, cl 15.1(f) would not *ipso facto* justify termination in the light of cl 15.1(g).

215 Fifth, I also have difficulty with the plaintiffs' argument that the undisclosed misconduct of Mr French when taken together with the new revelations of misconduct by other individuals in GGAM, constitute a valid ground of termination. The premise of this submission is that the Tribunal had found that Mr French's conduct (that he was previously fired for rigging a drawing and failed to disclose this in his Gaming Employment License application with PAGCOR) was an isolated event and that "there is no other

evidence of unethical conduct by GGAM".[80] Consequently, the Tribunal found that there was no breach of cl 2.5 of the MSA, which essentially requires the defendants to act in accordance with the highest standards of business ethics (the "Standard of Care" proviso).

216 Notwithstanding the FCPA Findings indicate some wrongdoing by Mr Weidner and Mr Chiu in LVS confined to the Accounting Provisions, I do not consider them to be material for the purposes of the Standard of Care proviso in the MSA, when considered in the totality of the circumstances. The same reasons explicated above in the section on the evidential value of the FCPA Findings are applicable here (see [167]–[184]). Importantly, I note also that the Tribunal dismissed the plaintiffs' argument because (a) it was not pleaded; (b) it was not submitted that Mr French's unethical conduct itself was a breach of cl 2.5 of the MSA; and (c) that misconduct was not known by the plaintiffs at the point of termination. In any case, the Tribunal expressed reservations about whether that conduct would fall within the ambit of cl 2.5 of the MSA.

217 Finally, I also reject the argument that the FCPA Findings show that the defendants violated the requirement to perform its obligations through the Management Team pursuant to cl 2.4(a) of the MSA.[81] The plaintiffs submit that the FCPA Findings show that "the defendants were operating outside the framework of the Management Team to pursue Mr Weidner's 'strategies' and thereby build relationships…with junket operators and VIPs that the defendants could control themselves as a 'company within a company'".[82] In my view, this argument is unsupported by any evidence.

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80 Second affidavit of Michael Nolan, para 41.

81 Second affidavit of Michael Nolan, para 42.

82 PWS dated 17 September 2018, para 67; Second affidavit of Michael Nolan, para 42.

218 It is unclear to me how anything in the DOJ Agreement or the SEC Order suggests that the defendants have operated outside the Management Team framework stipulated by the MSA. I also find that the Tribunal had properly analysed cl 2.4(a) of the MSA before concluding that there had been no breach of it.

219 In sum, there is no sufficient degree of connection between the alleged procedural fraud and the Partial Award and it also cannot be said that the FCPA Findings were so material that earlier discovery would have prompted the arbitrator to rule in favour of the applicant: *Elektrim* (see [105]–[106] above). It follows also from the foregoing analysis that there was a good reason for non-disclosure of the information relating to the FCPA Findings.

Non-availability of evidence: is this a legal requirement

220 In the light of my finding that there is no procedural fraud in the first place and that in any case, the FCPA Findings do not satisfy the requirement of materiality, I need not express a view on the legal requirement of non-availability of evidence at the time of the Arbitration. I am, however, satisfied that the new evidence to demonstrate fraud was not available or could not have been obtained with reasonable diligence at the time of the Arbitration in this case. The FCPA Findings were not in existence at the time of the Arbitration. The question of the plaintiffs' due diligence, if any, does not arise in this case.

221 Suffice to say for now that *Swiss Singapore*, *Dongwoo* and *BVU v BVX* suggest that this requirement of due diligence applies in an unattenuated manner despite the allegation of fraud. A more relaxed position however appears to be taken in *Ching Chew Weng Paul, deceased, and others v Ching Pui Sim and others* [2011] 3 SLR 869, a case pertaining to the setting aside of judgments in

cases of fraud. Steven Chong J, as he then was, noted that the court would "generally expect the applicant alleging fraud to adduce new evidence which could not have been discovered at the time of trial with due diligence" (at [41]). However, it is stated that this non-availability requirement "ought not to be imposed rigidly such as to cause injustice in a situation where fresh evidence uncovers fraud on the other party". This represents at least a *prima facie* point of apparent divergence between the principles governing the setting aside of judgments and the resisting of enforcement of arbitral awards in the cases of fraud that is best left to another occasion.

222 I note that the English position in a recent decision of *Takhar v Gracefield Developments Ltd and ors* [2019] UKSC 13 ("*Takhar*") appears to go even further. The Supreme Court there was concerned with an application to set aside a judgment obtained by fraud. After considering the divergent authorities in the lower courts, Lord Kerr, with whom the majority agreed, held that where a judgment had been procured by fraud, and no allegation of fraud was raised at the trial, there is *no requirement* that the evidence of the fraud could not have been obtained before the first trial by exercise of reasonable diligence (at [46]). The court qualified this conclusion by stating that where a deliberate decision had been taken not to investigate the possibility of fraud in the first trial, even if that had been suspected, the court will exercise its discretion whether to allow the setting aside application (at [55]).

Resisting enforcement under Art 36(1)(*a*)(ii) of the Model Law

223 As explained at the outset of this judgment, the plaintiffs also rely on a distinct ground of being unable to present their case to resist enforcement of the Partial Award under Art 36(1)(*a*)(ii) of the Model Law. Art 36(1)(*a*)(ii) states:

> Article 36. Grounds for refusing recognition or enforcement

> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
>
> > (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
> >
> > > (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings **or was otherwise unable to present his case**;

224 The same facts that the plaintiffs rely on for their claim of procedural fraud form the basis for its claim of breach of natural justice here.[83] The plaintiffs contend that deceit and fraud of the defendants and/or Paul Hastings – in concealing evidence – constitutes a breach of the rule that each party must be given a fair hearing and a fair opportunity to present its case. The plaintiffs also refer to Paul Hastings' conduct during the Arbitration. They allege that the defendants' counsel in the Arbitration "improperly objected" to Bloomberry's questions and submissions at various points of the Arbitration.[84] As such, they were deprived of the opportunity to make arguments regarding the propriety, legality and money-laundering implications of Mr Weidner's strategies at Solaire.

225 The defendants' argument is simply that there has been no fraud and no breach of natural justice.

226 The plaintiffs' reasons for invoking Art 36(1)(*a*)(ii) of the Model Law represent a marked deviation from the typical factual scenarios that engage the maxim *audi alteram partem*. The typical scenarios being those where there has been a lack of proper participation or proper representation in the proceedings

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83 PWS dated 12 March 2019, para 75.

84 First affidavit of Michael Nolan, para 37(b).

that is attributable to the arbitral tribunal or extraneous circumstances beyond the parties' control (*UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations, 2012) at p 178). I understand the plaintiffs' case, more appropriately, to be described as one where they were arguably deprived of an opportunity to present a *different* case rather than one where there were unable to present their case *per se*. Therefore, it is difficult to see *how* the *audi alteram partem* rule has been breached.

227 In addition, it bears reiterating, with respect to the plaintiffs' accusations of suppression of documents by Paul Hastings, that a tribunal's ruling in accordance with the rules of the 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: *Dongwoo* at [55].

228 I also find that there is also no foundation to the plaintiffs' allegations of the defendants' interference during the hearings. From my examination of the transcript in the Arbitration, the purported instances of interference appear to be nothing more than the usual cut-and-thrust of oral advocacy. I also note that at the close of the liability hearing, the Tribunal invited the plaintiffs to ventilate their complaints concerning the procedure of the Arbitration. The Tribunal, in the Annex to the Partial Award, had comprehensively addressed the plaintiffs' complaints on procedural fairness. None of those complaints touched on the alleged inappropriate interference by the defendants' counsel, which the plaintiffs have now raised.[85]

229 Therefore, I find that the ground for resisting enforcement under Art 36(1)(*a*)(ii) of the Model Law is not engaged.

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85 First affidavit of Michael Nolan, p 807.

Conclusion on enforcement of the Partial Award

230 In summary, the FCPA Findings do not constitute strong and cogent evidence of any species of fraud that the plaintiffs have so sought to impress upon me. In the absence of any finding of fraud, it cannot be said that the FCPA Findings have any material effect on either the arguments that were advanced in the Arbitration as to the Causal Fraud Issue and Termination Issue, or that the Arbitration would have proceeded differently altogether. For the all foregoing reasons, the plaintiffs' application to resist enforcement under Art 36(1)(*a*)(ii) and Art 36(1)(*b*)(ii) of the Model Law is dismissed with costs.

Belinda Ang Saw Ean
Judge

Yeo Khirn Hai Alvin SC, Leo Zhen Wei Lionel, Reka Mohan and Nurul Ayu Fajarani (Wong Partnership LLP) for the first and second plaintiff;
Cavinder Bull SC and Kong Man Er (Drew & Napier LLC) (instructed counsel), Aaron Lee Teck Chye, Marc Wenjie Malone and Cheryl Chong (Allen & Gledhill LLP) for the first and second defendant.