IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 94

Civil Appeal No 98 of 2020

Between

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

… *Appellants*

And

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

… *Respondents*

In the matter of Originating Summons No 1385 of 2019

Between

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

… *Plaintiffs*

And

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

… *Defendants*

In the matter of Originating Summons No 1257 of 2019
(Summons No 6218 of 2019)

Between

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

… *Plaintiffs*

And

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

… *Defendants*

JUDGMENT

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

TABLE OF CONTENTS

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

[2021] SGCA 94

Court of Appeal — Civil Appeal No 98 of 2020
Sundaresh Menon CJ, Judith Prakash JCA and Woo Bih Li JAD
6 April 2021

4 October 2021 Judgment reserved.

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

Introduction

1 This is the second appeal arising out of arbitration proceedings seated in Singapore between the parties over the termination of a casino management contract (the "Arbitration"). As in the first appeal, the appellants are, essentially, challenging the decision of the arbitral tribunal (the "Tribunal") appointed to resolve their disputes. The first appeal dealt with a partial arbitral award dated 20 September 2016 (the "Liability Award") in which the Tribunal had held that the appellants were liable to the respondents for breach of contract. In *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2021] 1 SLR 1045 (the "CA Judgment"), this court held that the appellants' efforts to have the Liability Award set aside lacked merit and, accordingly, upheld the Liability Award. In the meantime, the Tribunal had heard the parties' evidence and submissions on the issue of remedies for breach

of contract and issued its final award on 27 September 2019 (the "Remedies Award").

2 The appellants' applications to set aside the Remedies Award and to resist its enforcement were heard by the High Court judge (the "Judge"). She dismissed the applications for the reasons given in her decision published as *Bloomberry Resorts and Hotels Inc and another v Global Gaming Philippines LLC and another* [2020] SGHC 113 (the "Judgment") The applications were brought on several grounds, namely: (a) that the Remedies Award dealt with matters beyond the scope of submission to arbitration; (b) that the Tribunal made the Remedies Award in breach of natural justice; and (c) that the enforcement of the Remedies Award would be contrary to the public policy of Singapore.

3 The present appeal, like its predecessor, raises several pertinent legal questions, chief amongst which is whether an arbitral tribunal's powers to fashion relief are limited or restricted in any way. In order to understand the challenges that the appellants have mounted to the Remedies Award, it is necessary not only to set out a short history of the parties' relationship but also to give a rather lengthy account of various steps that were taken in the Courts of the Philippines and before the Tribunal in the period shortly after that relationship broke down.

Background

The parties

4 The first appellant, Bloomberry Resorts and Hotels Inc ("Bloomberry"), is wholly owned by the second appellant, Sureste Properties, Inc ("Sureste").

Both are companies incorporated in the Republic of the Philippines. The appellants own the Solaire Resort & Casino (the "Solaire Casino"), a luxury hotel and casino in the Philippines. Bloomberry operates the Solaire Casino and Sureste manages the hotel and non-gaming aspects of the Solaire Casino. Sureste is wholly owned by Bloomberry Resorts Corporation ("BRC"), a listed company in the Philippines. BRC's Chairman and Chief Executive Officer is Mr Enrique K Razon, Jr ("Mr Razon"). Prime Metroline Holdings Inc ("PMHI") is the majority shareholder of BRC and hence the controlling shareholder of the appellants. PMHI is itself wholly owned by Mr Razon.

5 The first respondent, Global Gaming Philippines LLC ("GGAM"), a company incorporated in the State of Delaware in the United States of America, is the sole owner of the second respondent, GGAM Netherlands B.V. ("GGAM NL"), which is a company incorporated in the Netherlands. At the material time, Mr William P. Weidner ("Mr Weidner") was the respondents' Chairman and Chief Executive Officer. GGAM is a wholly owned subsidiary of Global Gaming Asset Management LP, a firm that develops, invests and advises hospitality companies and projects, with an emphasis on the casino sector.

The dealings between the parties

6 On 9 September 2011, the appellants and GGAM entered into a Management Services Agreement (the "MSA"). Under the terms of the MSA, GGAM was to provide management and technical services for the development of the Solaire Casino and to supervise its operation for two periods of five years after its construction ("Post-Opening Services"). Under cl 1.3 of the MSA, GGAM possessed the unilateral right to either allow the first five-year term to

lapse or to continue the performance of the MSA for a second five-year term. The MSA is governed by Philippine law, pursuant to cl 19.3 of the MSA. The parties do not dispute that the same law also governs the arbitration agreement contained in cl 19.2 of the MSA (the "Arbitration Clause").

7 In addition, cl 18.3 of the MSA granted GGAM the option to purchase up to 10% of BRC's shares for US$15m plus 10% of the equity that the appellants had injected into the Solaire Casino project. Exercising its rights under that clause, on 16 April 2012, GGAM signed an Equity Option Agreement (the "EOA") with BRC and Prime Metroline Transit Corp ("PMTC"), the latter being the predecessor in interest of PMHI. By the EOA, PMTC granted GGAM the option to purchase 921,184,056 of PMTC's shares in BRC (the "Shares") at PHP 1.67 per share (the "Option"). The EOA also contained an arbitration clause. Immediately thereafter, the parties took part in a roadshow in relation to the shares of BRC. On 3 May 2012, when this exercise ended, they had achieved a price of PHP 7.50 per share.

8 On 20 December 2012, GGAM exercised the Option and purchased the Shares for approximately US$37.43m on the basis of the Option price of PHP 1.67 per share.

9 On 8 March 2013, GGAM assigned its rights, titles, benefits, privileges, obligations and interest under the MSA, in respect of the Post-Opening Services, to GGAM NL, pursuant to cl 16.2 of the MSA.

10 In mid-March 2013, the Solaire Casino officially opened for business. By July 2013, however, the parties' relationship had soured. On 12 July 2013, Mr Razon sent an email to the respondents asserting that the appellants had

come to the "firm conclusion" that the MSA had "failed" and that an "amicable parting of ways" would be in "everyone's interest". He enclosed an unsigned letter alleging that the respondents had breached their obligations under the MSA and stating the appellants' intention to terminate the MSA.

11 On 12 September 2013, the appellants issued a formal Notice of Termination (the "NoT") of the MSA to the respondents, pursuant to cl 15.1(a) of the MSA, on the basis that there had been a material breach of the MSA by the respondents that was either incapable of remedy, or if capable of remedy, had not been remedied within 30 days of notice or such longer period not exceeding 60 days. The NoT stated that it was to be effective that night at midnight.

Commencement of the Arbitration

12 On the same day, 12 September 2013, the respondents submitted a Notice of Arbitration to the appellants, requesting arbitration of their claims against the appellants "aris[ing] out of or related to the MSA", pursuant to the Arbitration Clause and Art 3 of the UNCITRAL Arbitration Rules 2010 (the "UNCITRAL Rules"). In their notice, the respondents requested the Tribunal to make an award finding that the appellants had (a) materially breached their obligations under the MSA; and (b) wrongfully terminated the MSA. The respondents further asked the Tribunal to award them "an amount of damages to be determined at a final hearing".

13 On 12 October 2013, the appellants served on the respondents their Response to Notice of Arbitration, making a counterclaim for damages for the respondents' alleged breaches of the MSA. Additionally, the appellants stated

at para 7.3 of their response that they would "reserve their rights to claim against the 921,184,056 shares in [BRC] that were granted under an option provided under Clause 18.3 of the MSA as part of GGAM's compensation for services that it was to render to the [appellants] under the MSA".

14 On 11 November 2013, the respondents filed their Defense to the appellants' Counterclaims. Further pleadings were filed by both parties in the four years that followed, ending with the appellants' Sur-Rejoinder Memorial on Damages and Other Remedies (the "Sur-Rejoinder") filed on 31 August 2017.

GGAM attempts to sell the Shares

15 GGAM's removal from the Solaire Casino's operations was the impetus for its decision to completely sever its relationship with the Solaire Casino and therefore, to sell its equity stake in BRC. By 15 January 2014, GGAM had confirmed sale of the Shares to over 50 institutional investors at a price of PHP 8.05 per share, with the settlement of the transaction scheduled for 21 January 2014. GGAM's proposed sale of the Shares provoked a number of steps by the appellants, PMHI and BRC aimed at preventing any sale from taking place.

16 First, on 15 January 2014, BRC requested the Philippine Stock Exchange (the "Exchange") to suspend trading in respect of all BRC shares for one week. On 16 January 2014, the Exchange acceded to this request. In response, on the same day, GGAM submitted a letter to the President of the Exchange requesting that it lift the suspension and allow trading to continue.

The Exchange subsequently granted GGAM's request and trading of the counter generally resumed on 17 January 2014.

17 Next, on 17 January 2014, the appellants and PMHI filed an urgent petition with the Regional Trial Court of Makati City (the "Regional Court") in the Philippines. They sought the issue of writs to preliminarily attach the Shares and injunct GGAM's sale of the Shares, as well as a temporary restraining order.

18 On 20 January 2014, the Regional Court issued an order declaring that the petition was sufficient in form and substance and that the appellants (and PMHI) were entitled to the issuance of an immediately executory 20-day temporary order of protection. This was duly communicated to the Exchange, which stated in a letter to GGAM clarifying its 17 January 2014 decision to lift the trading suspension on the Shares:

> Based on subsequent letters sent by [BRC], the Exchange found that the dispute subject of the arbitration proceeding is an intracorporate dispute and that the voluntary trading suspension effectively prevents the prospective sale of the GGAM Shares in anticipation of a favorable ruling in the arbitration proceeding. Moreover, while [BRC's] real interest lay only with preventing the disposition of the GGAM Shares, the suspension of the trading of all of [BRC's] shares stands to prejudice the interests of [BRC's] shareholders as well as the investing public.

The Exchange also referred to the Regional Court's order and stated that it took the position that the "GGAM Shares cannot be disposed of over the Exchange for a 20-day period as directed by the order of the [Regional Court]".

19 On 25 February 2014, the Regional Court issued a Preliminary Injunction Order (the "Injunction Order") that temporarily enjoined GGAM from selling the Shares; it ordered that a "writ of preliminary attachment is …

to attach the 921,184,056 shares of [BRC]" and that GGAM was "restrained from disposing of, or facilitating, allowing, implementing and completing the sale or transfer of any of the 921,184,056 shares in [BRC] … during the pendency of the arbitration proceedings in Singapore".

20 On 27 February 2014, the Regional Court issued Writs of Preliminary Attachment and Preliminary Injunction (collectively, the "Writs") pursuant to the Injunction Order. The Injunction Order also provided that the Writs were issued "without prejudice to subsequent grant, modification, amendment, revision or revocation" by the Tribunal once it had been duly constituted.

21 On 11 March 2014, GGAM filed a petition for review on *certiorari* in the Philippine Court of Appeals (the "Philippine CA"), seeking to reverse the Injunction Order and cancel the Writs.

Steps taken by the Tribunal

22 On 28 March 2014, the Tribunal was constituted.

23 On 14 April 2014, the respondents filed a Request for Interim Measures of Protection (the "Request") before the Tribunal. Therein, the respondents asked, among other things, that the Tribunal restore "the Parties to the *status quo ante* as of January 15, 2014, when Bloomberry began to wrongfully interfere with the sale of all of GGAM's Shares" and to declare that "GGAM has full and legal beneficial ownership of 921,184,045 shares in [BRC] … free and clear of any claims, liens or encumbrances by the Philippine Petitioners".

24 On 30 May 2014, the Tribunal issued a decision holding that the Injunction Order was a "temporary order only in effect as long as not confirmed,

revoked or modified by the Tribunal". Because the Tribunal considered the Request to be a request for interim measures under Art 26 of the UNCITRAL Rules, it invited the parties to make substantive arguments and submissions on the Request itself. The appellants contended that the Request ought to be denied.

25 On 9 December 2014, and following a full evidentiary hearing, the Tribunal issued a decision on the Request, by way of an Order in Respect of the respondents' Interim Measures' Application (the "Interim Order"), expressly revoking the Injunction Order and vacating and lifting the Writs. In the Interim Order, the Tribunal observed that the Injunction Order had been intended to prevent any substantive change in either side's position prior to the Tribunal's constitution, and that it only bound the parties in so far as the Tribunal had not ruled on the issue. The Tribunal thus ordered that the Injunction Order be "revoked or superseded by this [Interim] Order" and directed the parties to the Arbitration to "accordingly bring this resolution before the [Philippine CA] … and to the [Regional Court] … and to assure its implementation". While the Tribunal ordered that the respondents were henceforth "free to deal with the Shares", which included the "right to sell or dispose of the Shares at their discretion", it left open the issue of the title to the Shares. The Tribunal emphasised that it made "**no declaration** as to the ownership of the Shares, and has not pre-judged any aspect of each side's pleaded case", deferring "any decision as to the declaration of the legal and/or beneficial ownership of the Shares to the merits phase of the Arbitration" [emphasis in original] (Interim Order at para 139). In addition, the Tribunal granted the parties to the Arbitration "leave to amend their respective claims and counterclaims as they deem necessary" (Interim Order at para 140).

26 Pursuant to the grant of leave, the parties subsequently amended their pleadings: (a) the appellants filed their Statement of Defense and Amended Counterclaims on 2 February 2015; and (b) the respondents filed their Reply to the appellants' Statement of Defense and Amended Counterclaims on 15 June 2015.

27 On 12 August 2015, the Tribunal issued an order bifurcating the Arbitration into a liability phase and a remedies phase.

Further court proceedings in the Philippines

28 In the meantime, on 15 December 2014, GGAM had filed a manifestation and motion (a document used to notify the courts of an event or factual developments in a case) before the Philippine CA, seeking to annul the Injunction Order. At that point in time, GGAM's petition for review on *certiorari*, filed on 11 March 2014, was still pending before the Philippine CA. In the manifestation and motion, GGAM asked the appellate court to "take note of" the Interim Order issued by the Tribunal and to render judgment confirming the Interim Order as well as to remanding the case to the Regional Court for the "issuance of any further implementing measure or order as may be necessary and appropriate". On the same day, GGAM also notified the Regional Court of the Interim Order by filing a manifestation before it.

29 The appellants, however, sought to resist implementation of the Interim Order. They took the following steps:

(a) On or around 19 December 2014, the appellants filed a counter-manifestation before the Regional Court, arguing (i) that the Interim Order filed by GGAM was not duly authenticated by the Tribunal;

(ii) that GGAM had failed to provide verification of the manifestation; and (iii) that GGAM had failed to comply with the Philippines Rules of Court requiring every written motion be set for hearing by the applicant.

(b) On 29 January 2015, the appellants filed a comment and opposition with the Philippine CA, aimed at opposing GGAM's manifestation and motion filed on 15 December 2014.

30 On 29 May 2015, the Philippine CA rendered its decision on GGAM's 11 March 2014 petition for review on *certiorari* as well as GGAM's manifestation and motion by way of a Resolution (the "First Resolution"). In the First Resolution, the appellate court held that GGAM's petition was "rendered moot and academic by the … Tribunal's [Interim Order]" and further recognised that the Injunction Order was no longer valid:

> … Considering that the Arbitral Tribunal's Order dated December 9, 2014 not only superseded and assailed February 25, 2014 Order but also vacated and lifted [the Writs], *then nothing is left for this Court to annul or act upon.* [emphasis added]

Moreover, the Philippine CA held that in accordance with ss 42 and 47 of the Alternative Dispute Resolution Act of 2004, Philippines Republic Act No. 9285 (the "ADR Act") and Rule 13 of the Special Rules of Court on Alternative Dispute Resolution (RL-3) (the "ADR Rules"), there was a need to remand the case to the Regional Court in order "to conduct further proceedings for the recognition and enforcement" of the Tribunal's Interim Order as that court was the proper venue for recognition and enforcement of arbitral awards. Such remand would be "in accordance with the … Tribunal's directive for the parties to bring the resolution before the [Regional Court] … and to ensure its

implementation".

31 On 4 June 2015, the appellants filed a Motion for Clarification with the Philippine CA that sought to clarify the First Resolution. They argued that that court's statement in the First Resolution could be misinterpreted to mean that the lifting of the Writs was an *ipso facto* consequence of the Interim Order and/or that the Philippine CA had already recognised and enforced the Interim Order.

32 On 27 November 2015, the Philippine CA issued another Resolution (the "Second Resolution") addressing the appellants' Motion for Clarification and reiterating its decision in the First Resolution. The appellate court denied the appellants' request that it declare that the Writs had not been *ipso facto* lifted by virtue of the Interim Order. On 17 May 2016, the same court issued a judgment making final the First Resolution.

The Tribunal issues the Liability Award

33 The Tribunal heard the parties' arguments on liability from 15 to 24 October 2015.

34 On 20 September 2016, the Tribunal released the Liability Award. The key issues before the Tribunal were, namely: (a) whether the respondents had perpetrated causal fraud by making fraudulent misrepresentations inducing the appellants to enter into the MSA; and (b) whether the appellants' termination (or rescission) of the MSA was wrongful. The Tribunal also considered the appellants' counterclaims against the respondents, by which they sought damages for non-performance and other reliefs relating to the Shares.

35 For present purposes, it suffices to note that the Tribunal made the following findings in the Liability Award:

(a) The Tribunal rejected the appellants' allegations of fraudulent misrepresentation, which included allegations that the respondents' principals had falsely projected an image equating GGAM with Las Vegas Sands ("LVS"), that through their collective experience at LVS, they had strong relationships with junket operators and data regarding foreign VIP players that they should bring into the Solaire Casino and that "GGAM was hired based on, among other things, its promises that it had operating policies, procedures and systems ready to be implemented" (Liability Award at paras 72, 92 and 148).

(b) The Tribunal also rejected the appellants' submission that they had been justified in terminating the MSA because of the respondents' breaches of contract. The grounds on which the appellants justified their termination included a contention that the respondents had failed to bring junkets and VIP players to the Solaire Casino. The Tribunal found that there had been no material breaches by the respondents because, among other things, the standing of the respondents' principals meant that they *did* have access to VIPs and junkets, but that a "ramp-up" period would have been necessary to bring them to the Solaire Casino and hence the business plan on this aspect understandably lacked detail. The appellants' termination of the MSA thus constituted a breach of the MSA, entitling the respondents to management fees (Liability Award at paras 131 and 272).

(c) The Tribunal held that there was no basis upon which to rescind the EOA to require the return of the Shares, or to challenge GGAM's title to the Shares. GGAM could thus exercise its rights in relation to the Shares, including the right to sell them. The Tribunal also rejected the appellants' submission that GGAM would be unjustly enriched if permitted to sell the Shares (Liability Award at paras 305 and 316).

36 The Tribunal reserved its decision on relief, remedies and costs to the remedies phase of the Arbitration (Liability Award at paras 326 and 330). In particular, the Tribunal emphasised that it would reserve to the remedies phase (Liability Award at para 328):

> … its decision on the [respondents'] request that the "*[appellants], having obtained an injunction to prevent the sale of the [Shares], and having hindered and blocked the sale of the shares after the Tribunal's order, are liable in damages in an amount to be determined in a later hearing*". The Tribunal notes that this issue involves both a question of liability (i.e whether the [appellants] "*hindered and blocked the sale of the [Shares] after the Tribunal's order*") and, in the event that liability is established, any appropriate remedies to be ordered. [emphasis in original]

Further correspondence between the parties

37 Following the issue of the Liability Award, the parties engaged in lengthy correspondence regarding the Shares. This is reproduced in detail at [24]–[30] of the Judgment. We summarise only the relevant portions here.

38 On 28 September 2016, BRC disclosed to the Exchange the following information in respect of the Liability Award:

> [The appellants] were advised by Philippine counsel that an award of the Arbitral Tribunal can only be enforced in the Philippines through an order of a Philippine court of proper

> jurisdiction after appropriate proceedings taking into account applicable Philippine law and public policy.

39 On 10 October 2016, the respondents' solicitors in the Arbitration wrote to the appellants' solicitors in the Arbitration, seeking clarification on the status of the Shares, and whether the appellants would object to Deutsche Bank (as the custodian of the Shares that had been held in a restricted, non-trading account since the Regional Court had issued the Writs) releasing the Shares.

40 On 11 October 2016, the appellants' solicitors replied stating that the appellants were not parties to the EOA and that Mr Razon had repeatedly indicated that there "would be no objection regarding the Shares if [the respondents] were not demanding excessive and unwarranted 'compensation' in addition to the Shares".

41 In February 2017, the appellants renewed the Writs pursuant to the Injunction Order that had been issued in February 2014 by the Regional Court. Deutsche Bank relied on this renewal to claim that the Injunction Order and the Writs remained operative. This prompted the respondents' solicitors to write to the appellants' solicitors on 17 March 2017, requesting that the appellants immediately take action to "assure that GGAM can sell" its Shares as Deutsche Bank had "informed GGAM that, without [the appellants'] permission for it to 'unfreeze' GGAM's shares, it [would] not release those shares to GGAM". The respondents also requested the appellants to "assure implementation" of the Interim Order and Liability Award by withdrawing the Injunction Order and to confirm in writing to Deutsche Bank and the Exchange that the appellants had "no objection to GGAM's sale of its BRC shares".

42 On 27 March 2017, the appellants' solicitors replied stating that "Bloomberry's position has been that if your side were not demanding unreasonable 'compensation' in addition to the Shares, objections to the sale of the Shares could be put aside as part of a compromise to resolve the Parties' dispute".

43 On 3 April 2017, the share price of BRC shares hit a high of PHP 8.17 per share on an intraday basis, a 19.5-month high. On the same day, the respondents' solicitors wrote to the appellants' solicitors reiterating their request that GGAM be allowed to sell the Shares, and stating that their failure to agree "will constitute further interference with GGAM's share rights and again impede GGAM's efforts to mitigate its damages. GGAM will hold [the appellants] responsible for that result".

44 On 10 April 2017, the appellants' solicitors replied reiterating their position in their letter of 27 March 2017.

45 Throughout this entire period, Deutsche Bank, as custodian of the Shares, declined to release the Shares as it had not received written consent from the appellants. On 11 September 2017, Deutsche Bank filed a Motion for Clarification before the Regional Court, seeking a ruling on, among other things, whether the Injunction Order and Writs remained valid.

46 On 12 October 2017, the appellants and PMHI filed a Comment before the Regional Court, arguing that the respondents had not filed for recognition and enforcement of either the Interim Order or the Liability Award and that PMHI could not be bound by the Interim Order and the Liability Award as it was not a party to the Arbitration.

47 On 16 October 2017, GGAM filed a Comment before the Regional Court, arguing that the Interim Injunction had been revoked and superseded by the Interim Order, which was self-executing.

48 On 4 December 2017, the Regional Court issued its decision on Deutsche Bank's Motion for Clarification, considering that the main issue was "whether or not the [Interim Order] and the [Liability] Award are self-executing and thus, do not need recognition and enforcement by the Court". It answered this "in the negative", considering that the Philippine CA's First Resolution and Second Resolution already made clear that awards made by the Tribunal required recognition and enforcement by the Regional Court. In holding that the Shares could not be released, the Regional Court affirmed the continuing validity of the Injunction Order and the Writs issued pursuant thereto and stated:

> To date, no such action for recognition and enforcement has been initiated by … GGAM with this Court. As such the [Injunction Order] dated February 25, 2014 and [the Writs] subsist subject to compliance by the [appellants] with the provision of preliminary injunction and preliminary attachment bonds to answer for any such damage that [the respondents] may incur as a result of said writs. A perusal of the records of this case shows that the [appellants] have valid and updated bonds as directed by this Court.
>
> This Court is duty-bound to review any awards by foreign arbitral bodies. However, it can only do so when the same is presented for recognition and enforcement in accordance with the prescribed procedure under the ADR Act and the Special ADR Rules. To short-cut the proceedings and declare as binding foreign arbitral awards without a hearing is to deprive the other party of due process.
>
> The necessity of a hearing is all the more evident in the case at bar where allegations of fraud are made by the [appellants] against … GGAM and where there are claims that there are third parties to the arbitration which may be affected if the [Interim Order] and the [Liability] Award were to be enforced.
>
> …

The Tribunal declines to reconsider the Liability Award

49 On 31 August 2017, the appellants filed with the Tribunal, a Request for Reconsideration of the Liability Award (the "Request for Reconsideration") on the basis of the two documents that they alleged were discoverable only after the issuance of the Liability Award, namely: (a) a 7 April 2016 Order by the US Securities and Exchange Commission instituting cease-and-desist proceedings against LVS; and (b) a Non-Prosecution Agreement dated 17 January 2017 between the US Department of Justice and LVS (collectively, the "FCPA Findings").

50 In their Request for Reconsideration, the appellants primarily asked the Tribunal to reconsider the Liability Award and to make a finding that the appellants had "rightfully ended the [MSA] due to GGAM's material breach of its obligations thereunder". The appellants argued, among other things, that: (a) the FCPA Findings when read together with the evidence in the Arbitration proceedings and publicly available information, established that the respondents had, in the course of the arbitral proceedings concealed critical information from, and made misrepresentations, to the Tribunal and the appellants, constituting procedural fraud that deprived the appellants of their rights as a party to the Arbitration; and (b) the FCPA Findings further substantiated the appellants' justifications for terminating the MSA, including GGAM's systematic, fundamental and material management of the Solaire Casino.

51 On 22 November 2017, the Tribunal issued its decision on the Request for Reconsideration (the "Reconsideration Decision"). The Tribunal stated that it did not consider that it had jurisdiction under Singapore law, as the law governing the Arbitration, to reconsider its findings on liability in the Liability

Award. This was because s 19B of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA") provided that an award, even a partial one, is final and binding on the parties, subject only to the provisions in Arts 33 and 34(4) of the UNCITRAL Model Law on Commercial Arbitration (the "Model Law"). None of the exceptions applied in the case. The Tribunal nevertheless expressed the view that the gravity of allegations of fraud meant that such a dispute might make the Singapore courts a better forum such that the "aggrieved party is not bereft of a remedy", observing that "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" (Reconsideration Decision at paras 73 and 74).

The Remedies Award

52 The Tribunal heard the parties' arguments on remedies from 28 May 2018 to 1 June 2018. Prior to the hearing, the Tribunal allowed the parties to file further submissions to address issues reserved for determination in the remedies phase of the Arbitration. The respondents filed their supplemental submissions on 16 May 2017, and subsequently amended their request for relief contained therein on 24 August 2017 (such amendment having not been objected to by the appellants). The appellants filed their Sur-Rejoinder on 31 August 2017. During the remedies phase of the Arbitration, the respondents argued that the appellants had persistently blocked the sale of the Shares even after the issue of the Liability Award. Having been denied access to the Shares, the respondents asked the Tribunal to award damages for the appellants' obstruction of the sale of the Shares.

53 On 27 September 2019, the Tribunal issued the Remedies Award.

54 In the Remedies Award, the Tribunal ordered the appellants to pay the respondents the following sums: (a) US$85.2m as damages for lost management fees; (b) US$391,224 as damages for pre-termination fees and expenses; (c) US$14,998,052 as costs; and (d) interest. Further, the Tribunal ordered the appellants to pay the full value of the Shares based on their value as of 9 December 2014 in exchange for GGAM's transfer of the Shares to the appellants. The dispositive part of the Remedies Award reads as follows (at para 507):

> 507. For the reasons set forth above, the Tribunal **AWARDS, DECIDES** and **ORDERS** as follows.
>
> (a) The [appellants] shall pay a total of **US$ 85.2 million** as damages for lost management fees to the [respondents], GGAM Philippines and/or GGAM [NL].
>
> (b) The [appellants] shall pay to the [respondents] **US$391,224** as damages for pre-termination fees and expenses, which are comprised of:
>
> 1. **US$ 148,750** on account of the February Invoice; and
>
> 2. **US$ 242,474** on account of travel expenses.
>
> (c) In relation to the damages for the [appellants'] wrongful interference with the Shares:
>
> 1. the [appellants] shall pay to [GGAM], within thirty (30) days from the date of this Final Award, **PHP 10,169,871,978.24** …, representing the full value of the Shares;
>
> 2. As a condition for this payment, the [respondents] shall take all necessary steps to release all ownership or other interests in the Shares to [the appellants] and transfer all such ownership to [the appellants] or their designee within five (5) business days from the date of such payment by [the appellants];

> 3. If [the appellants] do not pay [GGAM] for the Shares within thirty (30) days from the date of this Final Award, [GGAM] may sell its Shares on the market (the '**Share Sale**'). If the sale nets more than 10,169,871,978.24 PHP, then [GGAM] may retain the damages amount and pay the excess (the remainder) to the [respondents]. If the sale nets less than this amount, then GGAM may retain all proceeds and the [appellants] shall owe GGAM the difference.

(d) If [the appellants] do not pay the amount set out in (c) above within thirty (30) days from the date of this [Remedies] Award:

> 1. The [appellants] shall take all steps necessary (including directing their agent and controlling shareholder PMHI to cooperate) to file a motion to withdraw the original Petition seeking the writs of preliminary injunction and attachment in the Regional Trial Court within thirty-seven (37) days from the date of this [Remedies] Award.
>
> 2. The [appellants] shall take all steps necessary (including directing their agent and controlling shareholder PMHI to cooperate) to issue the joint press release in substantially the same form set forth in Annex A to [the respondents'] Supplemental Submission within thirty-seven (37) days from the date of this Final Award.
>
> 3. The [appellants] shall, within thirty-seven (37) days from the date of this Final Award, take all steps necessary (including directing their agent and controlling shareholder PMHI to cooperate) to instruct the Philippine Depository & Trust Corporation, the Philippine Stock Exchange, Deutsche Bank and the market that GGAM has free and clear title to the Shares and the absolute right to sell the Shares, and to instruct Deutsche Bank to transfer the Shares to an unrestricted trading account.

(e) The [appellants] shall take all steps necessary to facilitate the release of the dividends on the Shares in the amount of PHP 193,448,652 to [GGAM] within twenty-one (21) days from the date of this Final Award. In particular, the [appellants] shall submit a certified letter from their affiliate [BRC] addressed to Deutsche Bank that states as follows:

> '*[BRC], [Bloomberry], [Sureste] and [PMHI] have no objection to Deutsche Bank AG's immediate release of all dividends paid by [BRC] for the account of [GGAM].*'
>
> If these dividends are released to [GGAM] within the twenty-one (21) days, then the amount of damages for the shares (PHP 10,169,871,978.24) shall be reduced by the value of the dividends (PHP 193,448,652). If the [appellants] fail to timely facilitate the release of the dividends, then the amount of damages owed by [the appellants] for the Shares shall remain PHP 10,169,871,978,24.
>
> (f) The [appellants] shall pay **US$14,998,052** to the respondents as costs …
>
> (g) To grant post-award interest at the annual rate of 6%, compounded annually, beginning 30 days after the date of this [Remedies] Award on each of the amounts set forth above, except for the amounts in (b) above.
>
> (h) To award interest on the amounts in (b) above, beginning thirty (30) days after the dates the pertinent invoices become due, compounded monthly, at the interest rate of 50 basis points per month or 6% per annum, as per the terms of Article 4.8 of the MSA.
>
> (i) To reject all other claims and requests for relief.
>
> [emphasis in original]

The parties and the Tribunal have referred to paras 507(c) to 507(e) of the Remedies Award concerned with the Shares, as the "Constructive Remedy". We shall use this term as well although in our view it is somewhat misleading.

55 It will also be apparent that the Constructive Remedy is a bifurcated one, consisting of *two* key components:

> (a) The first part of the Constructive Remedy requires the appellants to "pay to [GGAM], within thirty days from the date of the [Remedies] Award, PHP 10,169,871,978.24 … representing the full value of the Shares" in exchange for the Shares, *ie,* para 507(c)(1) to (2) of the

Remedies Award. We shall refer to this as the "Payment Component" of the Constructive Remedy.

(b) The second part of the Constructive Remedy arises should the appellants fail to comply with the Payment Component. In that case, GGAM is entitled to sell the Shares on the market and the appellants are to direct PHMI to undertake steps to facilitate the sale of the Shares, *ie,* paras 507(c)(3) and 507(d) of the Remedies Award. We shall refer to this as the "Direction Component" of the Constructive Remedy.

56 On 9 October 2019, the respondents filed Originating Summons No 1257 of 2019 ("OS 1257"), seeking leave to enforce the Remedies Award. On 10 October 2019, the High Court granted leave for the respondents to do so by an order of court ("ORC 6889").

57 On 5 November 2019, the appellants filed Originating Summons No 1385 of 2019 ("OS 1385"), applying for the Remedies Award to be wholly set aside. Then, on 11 December 2019, they filed Summons No 6218 of 2019 in OS 1257 ("SUM 6218"), applying to set aside ORC 6889.

Arguments below

58 Before the Judge below, the appellants made three key arguments:

(a) First, the Constructive Remedy in the Remedies Award should be set aside pursuant to Art 34(2)(*a*)(iii) of the Model Law because it decided matters beyond the scope of submission to Arbitration. This was for three independent reasons (see [38] of the Judgment):

(i) The Constructive Remedy, arising out of the respondents' claim for wrongful interference with the Shares, concerned matters governed by a different contract containing its own arbitration agreement, *ie,* the EOA. It indirectly purported to bind a non-party to the arbitration, *ie,* PMHI.

(ii) The Tribunal did not have the power to make orders to redress non-compliance with the Interim Order and the Liability Award. But by the grant of the Constructive Remedy, this was exactly what it did. In addition, by the Constructive Remedy, the Tribunal had impermissibly deprived the appellants of their passive remedy to challenge enforcement of the Remedies Award.

(iii) The Constructive Remedy was a punitive remedy that was expressly disallowed by the Arbitration Clause.

(b) Second, the Remedies Award should be set aside under s 24(b) of the IAA, as well as Arts 34(2)(*a*)(ii) and 34(2)(*a*)(iv) of the Model Law owing to a breach of natural justice because (see [8(b)] of the Judgment):

(i) the Tribunal refused to consider evidence material to remedies on the basis that it could not revisit issues of liability;

(ii) the Tribunal refused to apply its mind to the appellants' demonstration that the respondents had committed procedural fraud; and

(iii) the appellants had made deliberate concealments in

document production that were relevant for the purposes of assessing damages arising from termination of the MSA.

(c) Third, the grant of damages in the Remedies Award for lost management fees ought to be set aside under Art 34(2)(*b*)(ii) of the Model Law as its enforcement would be contrary to the public policy of Singapore because it would uphold tax evasion fraud in the Philippines (see [8(c)] of the Judgment).

In the alternative, the appellants argued that the same grounds would justify resisting the enforcement of the Remedies Award, having cited analogous articles under Art 36 of the Model Law (see Judgment at [32]).

59 In response, the respondents submitted that the appellants' grounds for setting aside or resisting enforcement of the Remedies Award should be rejected because (see Judgment at [10]):

(a) First, the Constructive Remedy was entirely within the scope of the parties' submission to the Arbitration because: (i) the appellants had applied to the Regional Court, informing it that the issue of the Shares would be decided by the Tribunal; (ii) the dispute fell squarely within the language of the Arbitration Clause; (iii) the parties to the Arbitration had actively submitted on the issue of the Shares through their pleadings and submissions; and (iv) the Constructive Remedy is compensatory rather than punitive in nature.

(b) Second, no breach of natural justice was occasioned because: (i) the Tribunal considered all evidence material to the Remedies Award, especially on the question of reasonable certainty of damages *vis-à-vis*

the FCPA Findings; and (ii) the purported additional evidence would not have had a material impact on Tribunal's decision in rendering the Remedies Award.

(c) Third, the grant of damages to GGAM NL was not contrary to the public policy of Singapore because: (i) there was no evidence of tax evasion fraud; and (ii) GGAM NL is entitled to the benefits of the Philippines-Netherlands Tax Treaty.

Decision below

60 On 29 May 2020, the Judge delivered judgment on OS 1385 and SUM 6218, dismissing the appellants' applications to set aside and resist enforcement of the Remedies Award.

61 First, the Judge rejected the appellants' argument that the Constructive Remedy related to matters falling outside the scope of the Arbitration. Her reasons were:

(a) on a plain reading of the Constructive Remedy, it neither bound nor imposed an obligation on the non-party to the Arbitration, *ie,* PMHI, it did not affect the rights or interests of PMHI and any steps that PMHI may have to take would be merely incidental to the award of damages granted to GGAM (Judgment at [44]);

(b) the dispute regarding the appellants' interference or obstruction with the respondents' attempt to sell the Shares fell within the scope of the Arbitration Clause (Judgment at [47] and [48]);

(c) moreover, (i) the appellants were not deprived of the opportunity to resist enforcement in relation to the Payment Component of the Constructive Remedy; (ii) the purpose of the Constructive Remedy had little to do with aiding the Tribunal to enforce its own orders; and (iii) the Tribunal's decision on the wrongful interference claim was not in fact predicated on a finding that the Injunction Order had been improvidently issued by the Regional Court (Judgment at [55]–[57]); and

(d) the Constructive Remedy could not be characterised as punitive in nature because the Tribunal had expressly fashioned it to compensate GGAM for its loss in relation to the Shares (Judgment at [63]–[64]).

62 Second, the Judge held that there was no breach of natural justice. The Tribunal had clearly considered the impact of the FCPA Findings for the purposes of assessing the damages to be awarded. In doing so, it interpreted the evidence, made factual findings and found evidential gaps, concluding that there was no causal link between the FCPA Findings and the termination of the MSA and that the FCPA Findings would not have affected the renewal of the MSA for the second five-year term. It was entirely within the Tribunal's prerogative to make such a finding of fact (Judgment at [78]–[80]). In relation to the alleged concealment of documents, there was doubt about whether the respondents did in fact conceal documents in violation of the Tribunal's orders. The Judge concluded that even "if there had been a departure from the Tribunal's procedure, there is no evidence to suggest that this was material to the Tribunal's final determination" (Judgment at [81]).

63 Third, the Judge held that enforcement of the Remedies Award would not be contrary to the public policy of Singapore. She observed that the Tribunal had rejected the contention that GGAM NL was a sham entity that was established for no purpose other than to evade US and/or Philippine taxes. This was a finding of fact that the Tribunal was entitled to make that could not be reopened by the Court (Judgment at [87]). The appellants had also failed to provide any evidence to support the argument that respondents' interpretation of the Remedies Award would violate Philippine tax laws (Judgment at [89]).

Issues to be determined in this appeal

64 On appeal, the appellants have to a large extent, reiterated the arguments canvassed in the court below, as have the respondents. The issues that lie to be determined in this appeal are hence:

(a) whether the Constructive Remedy should be set aside under Art 34(2)(*a*)(iii) of the Model Law or refused enforcement under Art 36(1)(*a*)(iii) on the basis that it concerns a matter falling beyond the scope of submission to the Arbitration;

(b) whether the Remedies Award should be set aside on the basis that there was a breach of natural justice under s 24(b) of the IAA or because the Tribunal denied the appellants an opportunity to present their case under Art 34(2)(*a*)(ii) of the Model Law; and

(c) whether the portion of the Remedies Award awarding the respondents US$85.2m in damages for lost management fees should be set aside under Art 34(2)(*b*)(ii) and/or refused enforcement under

Art 36(1)(*b*)(ii) of the Model Law on the basis that its enforcement will be contrary to the public policy of Singapore.

We shall consider each in turn.

A matter falling beyond the scope of submission to arbitration

65 The crux of the appellants' jurisdictional argument is simply this: that the Tribunal *could not* and *should not* have made any valid order pertaining to the complaint about the subject matter of the EOA – *ie,* the Shares and the appellants' alleged interference in GGAM's attempts to sell them – and this renders the entirety of the Constructive Remedy susceptible to being set aside or refused enforcement.

66 In impugning the propriety of the Constructive Remedy, Mr Alvin Yeo *SC*, counsel for the appellants, pitches his argument at three levels: (a) first, the issue of the appellants' interference with the Shares was simply not within the scope of submission to the Arbitration; (b) second, even if the Tribunal was empowered to award damages for wrongful interference with the Shares, it should not have done so in the form of the Constructive Remedy on the basis that the Tribunal had essentially come up with this unique remedy to aid enforcement of its own order and/or award; and (c) third, there is a punitive element about the Constructive Remedy, which is contrary to the express terms of the Arbitration Clause.

67 Mr Cavinder Bull *SC*, counsel for the respondents, responds by saying that the dispute regarding the Shares falls within the scope of the Arbitration Clause. Moreover, he submits that the Share dispute – and certainly, any

remedies that might be available in that regard – was expressly submitted by the parties to the Tribunal pursuant to the Arbitration Clause, as well as through the respondents' pleadings and submissions. The issue was thus in play *throughout* the Arbitration, and it was entirely within the remit and competence of the Tribunal to fashion the Constructive Remedy.

General principles

68 We begin with the legal principles. Article 34(2)(*a*)(iii) of the Model Law is a reflection of the fundamental principle that an arbitral tribunal has no jurisdiction to decide any issue not referred to it for determination by the parties (*PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") at [37]). This is wholly in line with the notion of arbitration as a voluntary form of dispute resolution. Moreover, "where an arbitral award had been made on issues that had been submitted for arbitration, one party could not be allowed to introduce a new dispute which was not within the scope of submission to arbitration" (*PT Prima International Development v Kempinski Hotels SA and other appeals* [2012] 4 SLR 98 ("*Kempinski*") at [31], citing *London and North Western and Great Western Joint Railway Companies v J H Billington, Limited* [1899] AC 79 at 81). That said, a practical view has to be taken regarding the substance of the dispute which has been referred to arbitration (*Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2018] 1 SLR 1 at [58]).

69 In *CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305, this court laid out several guidelines to help determine whether an arbitral award had been made in excess of an arbitral tribunal's jurisdiction:

(a) the court adopts a two-stage enquiry: (i) first, to determine what matters are within the scope of submission to the arbitral tribunal; and (ii) second, to determine whether the arbitral award involved such matters or whether it involved a new difference outside the scope of the submission to arbitration and that was, accordingly, irrelevant to the issues requiring determination (at [30]);

(b) Article 34(2)(*a*)(iii) of the Model Law is not concerned with the situation where a tribunal did not have jurisdiction to deal with a dispute that it purported to determine, but applies where the tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it (at [31]); and

(c) mere errors of law or even fact are not sufficient to warrant setting aside an award under Art 34(2)(*a*)(iii) of the Model Law as a distinction has to be drawn between the erroneous exercise by an arbitral tribunal of an available power vested in it and the purported exercise by the tribunal of a power which it did not possess (at [33]).

70 In *Kempinski*, this Court explained the distinction between the scope of an arbitration agreement and the scope of submission to arbitration (at [32]):

> … *It is plain that the scope of an arbitration agreement in the broad sense is not the same as the scope of submission to arbitration.* The former must encompass the latter, but the converse does not necessarily apply, in that the particular matters submitted for arbitration may not be all the matters covered by the arbitration agreement. The parties to an arbitration agreement are not obliged to submit whatever disputes they may have for arbitration. Those disputes which they choose to submit for arbitration will demarcate the jurisdiction of the arbitral tribunal in the arbitral proceedings before them.

> [emphasis added]

71 This enquiry necessarily involves a consideration of the parties' pleadings. Pleadings perform as important a function in arbitration as they do in litigation. Pleadings delineate the scope of the issues that the parties have to address, and that the arbitral tribunal has been constituted to decide (see *Kempinski* at [33]). This prevents any party to the arbitration being taken by surprise and seeks to avoid an arbitration by ambush. That said, "*any new fact* or change in the law arising after the submission to arbitration which is ancillary to the dispute submitted for arbitration and which is known to all the parties to the arbitration is part of that dispute and need not be specifically pleaded" [emphasis added] (*Kempinski* at [47]). In the recent decision of *CBX and another v CBZ and others* [2021] SGCA(I) 3 ("*CBX*"), this court emphasised that the cited observation was not intended to give unrestrained licence to parties to introduce new claims into the arbitration, but was instead aimed at "addressing new and unpleaded facts or changes of an 'ancillary' nature … which were furthermore 'known to all parties' in that case" (at [48]). This is consonant with the dynamic nature of arbitration. But flexibility cannot be allowed to devolve into a free-for-all. The Court further observed that (*CBX* at [51]):

> … Any new claim or cause of action … must require, in the present Court's view, clear identification and admission by the arbitration tribunal, even if that were only to occur by conduct rather than express words or a pleading amendment. To introduce a new claim or claims into a current arbitration involves both substantive and procedural risks, including risks of confusion. That is particularly so with a claim only allegedly arising after commencement of an arbitration. Problems are even more likely if a claim sought to be advanced is prospective and will or may only arise at some future date between the close of submissions and the issue of an award, or (*a fortiori*), even thereafter. A tribunal's jurisdiction cannot cover all

> developments subsequent to its award, and its award cannot exclude the possibility that subsequent developments may prevent a prospective claim arising. Such problems are also especially likely to exist if there are already proceedings afoot before another tribunal to determine whether such a claim can or will arise at all.

72 Finally, where an arbitral award decides matters within the scope of submission, that is the end of the matter as far as any issue of jurisdiction is concerned. Even where an arbitral award decides matters beyond the scope of submission, the court nevertheless possesses a residual discretion to refuse to set aside that award, although such discretion ought to be exercised only if no prejudice has been sustained by the aggrieved party (*CRW Joint Operation v PT Perusahaan Gas Negara (Persero) TBK* [2011] 4 SLR 305 at [98]–[100]).

Was the issue of interference with the Shares validly before the Tribunal

73 The first objection that the appellants raise is a jurisdictional one. The issue is whether the Shares, and the appellants' alleged interference in respect of the Shares, were part of, or directly related to, the dispute the parties submitted for the Arbitration. To answer this question, it is necessary to deal in some detail with how the issue of the Shares arose in the first place, how it came to be raised in the Arbitration and how the Tribunal ultimately dealt with it. A lot of what took place has already been detailed above and we will endeavour to avoid repetition here.

The scope of the Arbitration Clause

74 The anterior question that arises is whether the Arbitration Clause is wide enough to cover the particular dispute regarding the Shares. The Arbitration Clause read as follows:

> 19.1 **Mutual Agreement**
>
> The Parties agree to act in good faith to resolve any and all disputes between them at the working group level. *Any dispute* that cannot be settled by mutual agreement within 30 days and such *dispute relates to the interpretation, carrying out of obligations, breach, termination or enforcement of this Agreement or in any way arises out of or is related to this Agreement* (except the disputes covered by Annex I) shall be settled exclusively in accordance with Clause 19.2.
>
> 19.2 **Arbitration**
>
> Except as required by Annex I with respect to Expert Disputes, any dispute required to be settled in accordance with this Clause 19.2 shall be settled by arbitration in Singapore under the United Nations Commission on International Trade Law (UNCITRAL) Rules in force at the date of this agreement (the "Rules") except to the extent the then current Rules are inconsistent with the provisions of this Clause 19.2, in which event the terms shall hereof control.
>
> …
>
> [emphasis added]

75 There is no reason why the generous approach to the interpretation of arbitration clauses, which the Singapore courts have routinely adopted, ought not to apply with equal force in this case. The appellants have not suggested otherwise. This means that "all manners of claims, whether common law or statutory, should be regarded as falling within their scope unless is good reason to conclude otherwise" (*Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 at [19]). The court will also interpret the word "dispute" broadly "and will readily find that *a dispute exists unless the defendant has unequivocally admitted* that the claim is due and payable" [emphasis in original] (*Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [69(c)]), as parties should be held to their contractual bargain to arbitrate. This is a fairly basic proposition as a matter of law.

76 The Arbitration Clause is phrased in broad terms. It covers any dispute that "arises out of or is related to" the MSA. That phraseology, to our mind, is sufficient to encompass any dispute arising between the parties in respect of the Shares since the Shares were acquired pursuant to a right given to the respondents by the MSA. By extension, the clause covers the dispute over the propriety of the appellants' actions in relation to the Shares.

77 The respondents' position on the alleged wrongful interference with the Shares has to be seen in light of the fact that they were mounting a claim in the Arbitration for a breach of the MSA, arising from improper termination by the appellants. In fact, and as explained in greater detail below, the respondents' *consistent* position taken throughout the course of the Arbitration was that they were entitled to deal with the Shares because the appellants had wrongly terminated the MSA.

78 What then about the fact that the EOA itself contained an arbitration clause? In our view, this is a red herring. By the time the Arbitration was commenced, the state of play in relation to the transaction under the EOA was this: GGAM had taken up the Option, had duly paid for the Shares in accordance with the price stipulated in the EOA and had acquired title to the Shares. As we observed at the hearing, it is not apparent whether there was any dispute then or later that would have come within the ambit of the EOA arbitration clause, simply because the transaction – entitling GGAM to require the delivery of the Shares, at a contractually specified purchase price – was for all intents and purposes, complete. Mr Yeo did not attempt to suggest otherwise, and he confirmed that no arbitration had been commenced under the EOA. Indeed, although PMHI was not a party to the Arbitration, this did not stop it from

applying for an urgent petition before the Regional Court, on the basis that the Shares were validly the subject of the Arbitration (see [17] above).

The issue of the Shares was put before the Tribunal

79 The next question is whether the parties expressly submitted the issue regarding the Shares to the Arbitration. In our view, the answer to this question is an unequivocal yes. That answer is clearly discernible from the parties' pleadings and actions. As elaboration, we repeat, to some extent, the chronology of pleadings and actions set out in [13] to [27] above.

80 The respondents filed their Notice of Arbitration on 12 September 2013. No issue was raised in that notice regarding the Shares or, indeed, any interference with the Shares by the appellants. Obviously not, because no such interference had yet occurred. In their Response to Notice of Arbitration filed on 12 October 2013, however, the appellants gave an early indication that they were reserving a right to claim against the Shares for GGAM's breach of contact.

81 As mentioned earlier, in January 2014, while steps were being taken to constitute the Tribunal, GGAM tried to sell the Shares and had obtained a private placement. The appellants and PMHI took objection to this. As there was no Tribunal in place then, they approached the Regional Court and obtained the Injunction Order and the Writs in order to prevent GGAM from dealing with the Shares. In fact, the basis on which the appellants (and PMHI) approached the Regional Court seeking the urgent petition to stop the respondents from dealing with the Shares was the termination of the MSA, which they averred had in effect revoked the rights conferred on GGAM under the EOA. The

appellants, alongside PHMI, argued in their petition and memorandum filed in support thereof, that the Shares were validly the subject of the appellants' counterclaims in the Arbitration under the MSA and thus, the dispute over the Shares ought to be heard and decided by the Tribunal:

> … ***These Shares are subject of a counterclaim by Petitioners [Bloomberry] and [Sureste] in an arbitration case***, and if the sale of the Shares is completed, the Petitioners will not be able to get back the Shares and they will not be able to satisfy any judgment for damages that they may be able to obtain against [GGAM] in their ongoing arbitration proceedings on the termination of their *Management Services Agreement* dated 9 September 2011 ("MSA") because of [GGAM's] failure to perform and misrepresentations. [emphasis in original; emphasis added in bold]

82 This is also consistent with the position adopted by the appellants in their letter to the Exchange dated 15 January 2014 seeking a trading suspension of the Shares. In the letter, they stated that the Shares "are the subject of the counterclaim of [Bloomberry] and Sureste against GGAM in the said arbitration proceeding".

83 In this situation, when the respondents came to file their Statement of Claim on 8 September 2014, they included the issue of the Shares. That pleading stated that their claim for damages was based on, among other things, "any additional economic or other harm to GGAM as a result of [the appellants'] material breaches of the MSA" and that the respondents continued to "fully reserve their rights to amend or supplement their claims and request for relief, including but not limited to the amount of damages as a result of [the appellants'] material breaches of the [MSA], as well as the outcome of the Tribunal's ruling on [the respondents'] request for Interim Measures of

Protection". The reference to the Request was a clear incorporation of the respondents' claims regarding interference with the Shares.

84 What is most pertinent, in our view, is that the *entire* issue of the Shares, and indeed the appellants' interference with them, arose even *before* the Tribunal was constituted. And it was dealt with by the Tribunal as one of its first steps upon constitution via the Interim Order in December 2014. In fact, the appellants' counsel in the Arbitration, at the hearing on the respondents' Request before the Tribunal, explained that the issue of the Shares had been framed for the Arbitration:

> The arbitration pleadings establish the Parties' disagreement as to a block of Shares. [The appellants'] response to the Notice of Arbitration … plainly articulates that [the appellants] reserve the right to claim against the Shares in [BRC] that were granted under an option provided under Clause 18.3 of the MSA … GGAM's defense to [the appellants'] Counterclaim, at Paragraph 6, plainly joins that issue and denies it. *That is an issue that has been framed for this arbitration.* [emphasis added]

85 In this regard, the Interim Order helpfully summarises some of the arguments raised before the Tribunal in respect of the respondents' Request. In particular, the Tribunal observed that in an application for a grant of injunctive relief, an applicant who seeks to enjoin the use of property that *prima facie* belongs to another must show, as a threshold matter that, among other things, there is a reasonable possibility that the applicant (in this case, the appellants) would succeed on the merits of its claim in relation to the ownership of the property which is the subject of the injunction. The Tribunal termed this the "Proprietary Argument" and described the affirmative case mounted by the appellants, in favour of maintaining the Injunction Order as follows (Interim Order at paras 123(a) and 126):

> 123. To the extent that the [appellants] make a positive case in favour of maintaining the [Injunction Order], the [appellants'] case … can be summarised as follows.
>
> > (a) The Shares, as a whole have a unique value to the [appellants]. Accordingly, the sale of the Shares (which is inevitable if the [respondents] were not enjoined from doing so) would irreparably, if not substantially, damage the [appellants], since it is *very difficult* (if at all possible) to reacquire this block of Shares …
>
> …
>
> 126. The Proprietary Claim may be summarised as follows.
>
> > (a) The MSA is to be rescinded because of the [respondents'] substantial breaches of its terms.
> >
> > (b) Since the MSA contained a clause which granted the EOA (Clause 18.3), rescission of the MSA would also mean rescission of the EOA. This result is to be obtained either by construing both contracts to be part of the same contract or construing Clause 18.3 as being the operative clause which in law and fact granted the option.
> >
> > (c) Once the EOA is rescinded, it follows that the property that passed pursuant to the EOA is also to be returned to the respective Parties; the Grantor recovering the Shares, and the Grantee returning the Shares (and recovering the amounts paid for those Shares).
>
> [emphasis in original]

86 The Tribunal did not consider that the appellants were likely to suffer irreparable or substantial harm if the Shares were to be sold by the respondents. In finding so, the Tribunal made several observations, including that it was not persuaded, even at such a preliminary stage of the Arbitration, that the appellants had a serious claim to the Shares that could be subverted by their sale. The Tribunal also observed that, at least provisionally, even assuming that restitution would be the proper remedy, the appellants would not be the

appropriate parties to whom the Shares should be returned as they should revert to the entity in which they were vested prior to the transfer, *ie,* PMHI as PMTC's successor in interest (Interim Order at para 127). What is key is that *at no point* did the appellants object, at the hearing of the respondents' Request, to the jurisdiction of the Tribunal to make *any* order in respect of the Shares. They could have, for example, asserted that the Shares were within the remit of a separate arbitration agreement and had nothing to do with the present Arbitration. They did not do so. On the contrary, the appellants were more than willing to invoke the Tribunal's powers to injunct the respondents from dealing with the Shares. Even after the Interim Order was issued, there was no suggestion that the appellants had asked the courts in the Philippines to set aside the Interim Order on the basis of any lack of jurisdiction on the part of the Tribunal to issue it.

87 It is also notable that the respondents wrote a letter to the Tribunal dated 22 January 2015 (the "January 2015 Letter") in response to the Tribunal's grant of leave in the Interim Order for the parties to amend their pleadings. The respondents stated *in clear terms* that they were seeking damages relating to the Shares:

> …
>
> As the Tribunal is aware, [the respondents] have alleged that [the appellants] wrongfully terminated the [MSA], and [the respondents] *filed this Arbitration to recover all damages caused by this wrongful termination and [the appellants'] wrongful actions in implementing that termination.* [The respondents] have sought damages reflecting "any additional economic or other harm to GGAM as a result of [the appellants'] material Breaches of the MSA". *See e.g.,* Statement of Claim para. 238(5).
>
> One of [the appellants'] actions has been their wrongful interference with [the respondents'] sale of the equity position in the project, including their initial misrepresentations to the

> [Exchange], and their subsequent efforts to obtain the writ of preliminary attachment and a preliminary injunction, which the Tribunal has vacated … As [the respondents] have stated since [the appellants] began their interference, these actions violated their fundamental property rights and caused [the respondents] damages. …
>
> *As reflected in their extensive briefing on interim measures, [the respondents] reaffirm that among the damages that [they] will seek to prove in the Arbitration are those arising from [the appellants'] wrongful interference with [the respondents'] sale of the Shares.* [The respondents] continue to seek damages arising from [the appellants'] interference, including damages from the delayed sale and any lost sale opportunities. [The respondents] previously set forth [the appellants'] unlawful interference and the harm it caused [the respondents] both in the interim relief briefing and at the hearing … [and] will provide further details of their claims and the applicable damages theories in their Reply to [the appellants'] Statement of Defense and Counterclaims.
>
> *[The respondents] also reserve the right to claim additional damages in the event [the appellants] or others acting in concert with them engage in further interference with [the respondents'] sale of the Shares, notwithstanding the Tribunal's [Interim Order]. …*
>
> [emphasis added]

88 This position was reflected in the appellants' Statement of Defense and Amended Counterclaims subsequently filed on 2 February 2015, which included an amended counterclaim for monetary damages equivalent to the value of the Shares and/or mutual restitution in the form of an order that GGAM transfer the Shares to the appellants in exchange for US$37m (at paras 143, 156, 167 and 190):

> 143. Accordingly, Bloomberry now asserts amended counterclaims for (1) damages equivalent to the value of the Shares, (2) rescission of the equity option grant and restitution of the Shares on behalf of its agent, [PMHI]; (3) annulment of the MSA on the basis of causal fraud and restitution of the Shares on behalf of its agent, [PMHI]; and (4) equitable relief from GGAM's unjust enrichment.

> …
>
> 156. As Grantor [of the Shares], [PMHI] acted on behalf of, and as agent for, Bloomberry and Sureste to comply with their enforceable obligation under the MSA to grant GGAM the right to purchase up to 10% ownership rights in the [Solaire Casino].
>
> …
>
> 167. GGAM's failure to fulfil its obligations and representations has resulted in a failure of consideration, thereby entitling Bloomberry and Sureste to recover the value of the benefit conferred – that is, the value of the Shares. The Parties had envisioned if GGAM failed to perform its obligations under the MSA, the liability for such performance could be equivalent to the value of the Shares.
>
> …
>
> 190. [The appellants] respectfully requests that the Tribunal issue an award:
>
> a. Declaring that [the appellants] rightfully ended the [MSA] due to GGAM's material breach of its obligations thereunder;
>
> b. Declaring that [the appellants] rightfully rescinded the [MSA], including the [EOA] granted therein, due to GGAM's substantial breach of the Parties' agreement;
>
> c. Annulling the [MSA], including the [EOA] granted therein, due to GGAM's causal fraud;
>
> d. Declaring that GGAM will be unjustly enriched if it is permitted to sell the Shares, and enjoining GGAM from pursuing such a sale;
>
> e. *Awarding [the appellants] monetary damages equivalent to the value of the Shares, and/or awarding mutual restitution in the form of ordering GGAM to transfer the block of Shares to [the appellants] in exchange for approximately US$ 37 million.*
>
> …
>
> [emphasis added]

The basis of such rescission, according to the appellants, was that the MSA and the EOA were to be "regarded as components of one overall deal".

89 Consistent with the January 2015 Letter, the respondents' Reply to the appellants' Statement of Defense and Amended Counterclaims filed on 15 June 2015 expressly sought damages arising from the appellants' interference with the Shares. It specified that "[t]o prevent GGAM from selling the Shares, [the appellants] had the [Exchange] suspend trading of the Shares and then improperly obtained injunctive relief from the Philippine Courts". And in spite of the Interim Order, the appellants "and their affiliates have continued to oppose implementation of the Tribunal order. As a result, GGAM has been unable to sell the Shares". These wrongful actions had "prevented GGAM from selling its Shares for 18 months (and counting), injuring it by compelling it to hold the Shares, subjecting it to price volatility and other risks … such an unlawful restriction is functionally a conversion of the Shares, an injury for which the cases have defined a specific and proper remedy". Owing to this, the respondents urged the Tribunal to implement a remedy that would address both the injury suffered by GGAM and the fact that the appellants were continuing to prevent GGAM from selling the Shares (at paras 209 and 217 to 220):

> 209. The Tribunal should implement a remedy that addresses both the past and ongoing harm arising from [the appellants'] wrongful restriction on GGAM's sale of the Share. …
>
> …
>
> 217. [The appellants] have repeatedly exercised wrongful dominion over GGAM's property by preventing GGAM from selling the Shares. Each instance results in a new conversion of GGAM's right to sell the Shares. That one act may constitute a conversion does not prevent the Tribunal from assessing damages based on a second or third act which also results in a wrongful exercise of control over the Shares. …
>
> 218. The first act that began the restriction was [the appellants'] decision to freeze the sale of the Shares, which [the appellants] then solidified with the implementation of wrongful

> injunction preventing GGAM from selling the Shares as of January 15, 2014.
>
> 219. But there was a second conversion of the Shares. In the Interim Order, the Tribunal specifically determined that [the appellants'] blocking of GGAM's sale of the Shares was improper, and the Tribunal held that GGAM may sell the Shares. But then [the appellants] continued to prevent GGAM from effectuating the Tribunal's decision. …
>
> 220. [The appellants'] improper efforts continue. Even though the Tribunal ordered that the sale could occur, [the appellants] have prevented implementation. And when the [Philippine CA] recognized that the Tribunal had itself "vacated and lifted" the prior injunction, [the appellants] acted within a day to counter the court's order, and to assure that GGAM could not sell the Shares. [The appellants'] repeated efforts to block the sale of the Shares in the [Philippine CA], after the Tribunal determined that GGAM may sell the Shares, constitute a new beginning of the restriction. Therefore, both January 15, 2014 and December 20, 2014 constitute alternative starting points for damages calculation.

90 It is telling that while objecting to the other parts of the January 2015 Letter, the respondents never voiced *any* objection to the respondents' understanding that their Statement of Claim could and would include a claim for damages in respect of the Shares. This is bolstered by the fact that in the appellants' Statement of Defense and Amended Counterclaims, they raised no jurisdictional objection to the Tribunal's competence to hear the damages claim in respect of the interference with the Shares. On the contrary, the appellants had themselves counterclaimed for the return of the Shares (or their monetary equivalent) issued under the MSA.

91 In their Rejoinder Memorial on Liability filed on 4 September 2015, the appellants continued to seek, among other things, an award (a) "[a]nnulling the [MSA], including the [EOA] granted therein, due to GGAM's causal fraud"; (b) "[f]inding that GGAM will be unjustly enriched if it is permitted to sell the

Shares"; and (c) granting "mutual restitution in the form of ordering GGAM to transfer the block of Shares to [the appellants] on behalf of their agent [PMHI] in exchange for approximately US$ 37 million" (at paras 228 and 229). Apart from this, the appellants' Rejoinder Memorial on Liability did not touch on the issue of the claim for wrongful interference with the Shares *at all*.

92 In support of his argument that the issue of the Shares was not validly before the Tribunal, Mr Yeo points to several extracts from the appellants' Rejoinder Memorial on Damages and Other Remedies (the "Rejoinder on Remedies"), filed on 15 December 2015, to argue that objections were raised to the competence of the Tribunal to hear the claim relating to interference with the Shares. In our judgment, this submission is misconceived. Not once was the objection ever framed as a "jurisdictional" one, which is striking given "jurisdiction" can hardly be said to be a term of art unknown to seasoned arbitration practitioners. This is abundantly clear from the following extracts (Rejoinder on Remedies at paras 78, 86, 87, 93 and 98 to 100):

> 78. Under novel and inapplicable theories of conversion and optimal deterrence, [the respondents] request the Tribunal to order Bloomberry to pay more than US$ 318 million in damages for pursuing rights and remedies available to Bloomberry under Philippine law and the UNCITRAL Rules. This request for essentially punitive damages should be denied.
>
> …
>
> 86. As a matter of Philippine law, Bloomberry, Sureste, and [PMHI] … have the right to be heard prior to the recognition and enforcement of the [Interim Order]. …
>
> …
>
> 87. Instead of dealing in a straightforward manner with the hearing before the [Regional Court] as ordered by the [Philippine CA], [GGAM] have employed multiple schemes to circumvent the proceeding, which is required under Philippine law. Notably, the [Philippine CA] has recently reaffirmed its order.

> Nonetheless, [the respondents] continue to blame their claimed "inability" to enforce the [Interim Order] on Bloomberry and go so far as to request this Tribunal order an extraordinary "constructive" remedy. The Tribunal should adhere to Philippine law and decline to do so.
>
> …
>
> 93. As noted above, even if the Tribunal ultimately determines that [the respondents] have full and rightful legal ownership of the Shares, this Tribunal should not find Bloomberry liable for "conversion" of the Shares. *If the Tribunal does find Bloomberry liable for "conversion", then the Tribunal should not award [the respondents] a windfall of hundreds of millions of dollars by applying an antiquated and irrelevant test to value the Shares. Damages awards should not result in disproportionate compensation, which is exactly what [the respondents] seek here.*
>
> …
>
> 98. [The respondents] propose a "Constructive Remedy" requiring Bloomberry to purchase the Shares from [the respondents] for more than US$ 318 million. [The respondents] describe this remedy as "consistent with optimal deterrence theory." "Optimal deterrence" is neither a rule of law in the Philippines or the United States, nor is it an accepted principle utilized by Philippine or U.S. courts. Instead, it is an academic concept regarding adjustment of damages to deter future conduct. Punitive damages, referred to as exemplary or corrective damages in the Philippine Civil Code, are imposed by way of example or correction for the public good. In cases involving breach of contract, a court may award exemplary damages only if the defendant acted in an "outrageous" or "wanton, fraudulent, reckless, oppressive, or malevolent manner." That is not the case here.
>
> 99. [The respondents] do not cite any legal authority for their proposed "Constructive Remedy," and neither Bloomberry's counsel nor its legal experts are aware of case law that is precedent for such an extraordinary request. …
>
> 100. *Even if the Tribunal ultimately determines – which it should not – that [the respondents] have full legal and/or beneficial ownership of the Shares, Bloomberry does not believe that any damages are owed.* Under Philippine law, Bloomberry had a legal right to request an injunction on sale of the Shares during the pendency of the Arbitration, and Bloomberry has a legal right to be heard regarding the [Interim Order] permitting

> such a sale. Bloomberry has not exercised "unauthorized dominion" over the Shares and should not be held liable for purported "conversion". In particular, Bloomberry should not be punished for pursuing these rights by being required to purchase the Shares from [the respondents] at an inflated price. [The respondents'] damages theories are unsupported by and inappropriate under Philippine law and should be denied.
>
> [emphasis added]

93 What this submission elides is a distinction between a reservation on jurisdiction and an argument on the merits. The extracts cited above, and in particular paras 86 and 87 of the appellants' Rejoinder on Remedies, appear to be an argument on the merits, as opposed to a jurisdictional objection. Understood properly, the appellants were arguing that on a *proper application of the law*, the Tribunal ought not to order the Constructive Remedy. This is quite different, from say, an argument that the issue of the Shares was not put before the Tribunal, or that the Tribunal was not competent to either consider the matter, or to issue remedial relief thereafter.

94 But Mr Yeo has yet another string to his bow. He says that the Tribunal must have at least implicitly considered that to be a jurisdictional objection raised by the appellants as to the Tribunal's competence to decide on the alleged obstruction of the sale of the Shares and to award attendant relief. This is evidenced by the fact that the Tribunal did deal with a jurisdictional argument in the Remedies Award, albeit having decided in the affirmative that it had such jurisdiction (at paras 422, 432 and 434):

> 422. *For the purposes of considering the arguments that PMHI was not heard and the lack of the jurisdiction of this Tribunal in respect of non-parties to the MSA,* it will be useful to review in detail the Parties' arguments at the various phases of this proceeding and the Tribunal's decisions in their respect.
>
> …

> 432. First, the Tribunal observes that, as pointed out by Justice Puno, the [Regional Court] "issued the limited preliminary injunction and a preliminary attachment *notwithstanding* the presence of a non-party to the arbitration".
>
> …
>
> 434. *The Tribunal considers that the issues raised by [the appellants] in this proceeding relating to the competence of the Tribunal in respect of (i) PMHI, and (ii) the obstruction of the sale of the Shares, contradict what has been stated by [the appellants] to the Tribunal as the basis for [the appellants'] standing to submit counter-claims on which the Tribunal relied.*
> …
>
> [emphasis added]

95 The Tribunal rejected the appellants' objection that it lacked jurisdiction in respect of non-parties to the MSA and thus had no power to order the Constructive Remedy. It gave two reasons for this rejection. First, the Tribunal observed that the Regional Court had "issued the limited preliminary injunction and preliminary attachment ***notwithstanding*** the presence of a non-party to the arbitration" [emphasis in original] (Remedies Award at para 432). Second, the Tribunal found it contradictory that while the appellants claimed PMHI had no opportunity to be heard in the Arbitration, they had similarly and repeatedly affirmed to the Tribunal that "PMHI was their agent in the context of the counterclaims for damages" and the "relief requested by the [appellants] that the Tribunal order GGAM to transfer the Shares to the [appellants] on behalf of PMHI" confirmed this agency relationship (Remedies Award at paras 433 and 435). Thus, the Tribunal concluded that following the appellants' own admission that PMHI was its agent, "then the principals were before the Tribunal, and they owned any claim of defence of the agent and were fully heard on all issues related to the dispute relating to the Shares" (Remedies Award at para 434).

96 Mr Bull does not shy away from the jurisdictional language employed by the Tribunal but points to the footnote in para 432 of the Remedies Award that makes a reference to the appellants' "Sur-Rejoinder on Damages, paras 240 to 242". What this demonstrates, he argues, is that any jurisdictional objection that the Tribunal considered and decided on was in relation to objections raised in the appellants' Sur-Rejoinder, which was filed only *after* the issue of the Liability Award.

97 We accept Mr Bull's submission. The Sur-Rejoinder was filed by the appellants on 31 August 2017. This was the first time any jurisdictional argument was raised by the appellants. To say that this was too late to raise that argument is an understatement. The Sur-Rejoinder was filed *close to a year* after the Tribunal released the Liability Award on 20 September 2016. Not only did the appellants not object to the Tribunal's jurisdiction up to the point of the Liability Award, they *actively submitted to it*, having stated that (a) the Tribunal was empowered to deal with orders for the benefit of PMHI because they were putting forth their claim on the basis that PMHI was its agent, as well as (b) having highlighted on several occasions the interrelatedness of the MSA and the EOA, for example in their Request, and their Statement of Defence and Amended Counterclaims (see [88] above).

98 The immediate impression that one gets from this sequence of events is that the appellants were quite content to resist the respondents' claims on the merits, having put before the Tribunal their *own* claim for the Shares (as principal of PMHI) and damages arising therefrom. Crucially, when the rights to the Shares were the subject of dispute before the Tribunal *during the liability phase of the Arbitration*, the appellants were more than willing to place the issue

before the Tribunal and make substantive arguments on the points. They did not, then, contest the Tribunal's jurisdiction to determine the rights to the Shares. It was only after the Tribunal found against the appellants in the Liability Award that they questioned the Tribunal's jurisdiction. This undermines the sincerity of the appellants' objections. We also observe that in their application to set aside and/or resist enforcement of the Liability Award, the appellants did not seek to nullify the Tribunal's award on the basis that it had acted outside of its jurisdiction by determining the ownership of the Shares. As such, it does not lie in the appellants' mouths to now belatedly assert that the issue of the Shares was not within the Tribunal's competence to decide. This assertion smacks of an afterthought and a contrivance. As the Judge observed, "Bloomberry was content for the Shares dispute to remain in the Tribunal's hands until it lost" (Judgment at [50]). We echo this observation.

99 The appellants' submission implies that it was only in January 2015, by way of the January 2015 Letter, that the issue of the Shares (and indeed the alleged wrongful interference) was raised by the respondents for the first time. But this is myopic. As will be apparent from the above, it is correct that in terms of pleadings, a claim for damages arising from the appellants' alleged interference with the Shares was made *formally* in the respondents' Reply to the appellants' Statement of Defense and Counterclaims on 15 June 2015, *after* the issuance of the Interim Order. But this is understandable because when the Notice of Arbitration was filed in 2014, there had not yet been any interference or any application to the Regional Court to injunct the sale of the Shares. This therefore cannot be fatal to the respondents' claim for damages arising from interference with the Shares. Leave was granted by the Tribunal for the parties to amend their pleadings. And the respondents duly did so. The question is really

whether it had earlier been raised as an issue of contention before the Tribunal. In this vein, it is clear that it would have been raised *at least* by 9 December 2014*, ie,* the date of the Interim Order.

100 Any pleading objection can also hold no water because the pleadings *reflected expressly* the claim for damages arising from the interference with the Shares. Nor can the respondents' Reply to the appellants' Statement of Defense and Counterclaims be impugned. Suffice to say, the appellants were not taken by surprise. The correspondence between the parties shows that the appellants were acutely aware of the claim for damages made by the respondents, but took the position that such damages were unwarranted. Indeed, no pleading point was taken before the Tribunal either. This issue of the Shares, using the language of *Kempinski*, was clearly a factual development occurring after the Arbitration had started "ancillary to the dispute submitted for arbitration and which [was] known to all parties to the arbitration".

101 In the final analysis, it is plain that the issue of the Shares, and the appellants' alleged interference with the Shares, was a point that was put before the Tribunal. The Tribunal considered the arguments mounted by the parties and came to a decision. The simple point is this. From the very beginning of the Arbitration, the Shares and indeed the respondents' right to deal with them were a live issue that was the subject of dispute before the Tribunal. We therefore answer the question of whether the Tribunal possessed jurisdiction in respect of the dispute involving the Shares – and the interference therewith – firmly in the affirmative.

The Constructive Remedy does not affect the rights of a third party

102 A separate objection taken by the appellants to the purported overreach of the remedy fashioned by the Tribunal has to do specifically with the Direction Component of the Constructive Remedy. The appellants claim that it impermissibly affects the rights of a third party and non-party to the Arbitration, PMHI. We reject this argument. We have three reasons.

103 First, and as stated above, the appellants' consistent position in the Arbitration up until the issuance of the Liability Award was that they were entitled to rescission of the EOA and restitution of the Shares "on behalf of [their] agent, [PMHI]" and that "[a]s the Grantor, [PMHI] acted on behalf of, and as agent for, Bloomberry and Sureste to comply with their enforceable obligations under the MSA to grant GGAM the right to purchase up to 10% ownership rights in the [Solaire Casino]". The assertion that PMHI was a non-party entirely unrelated to the appellants and that such an order would prejudice its rights, was an issue raised late in the day, specifically, only in the appellants' Sur-Rejoinder. Indeed, the appellants' objection before the Tribunal at the remedies phase of the Arbitration was focussed on the fact that the Constructive Remedy "would conveniently allow GGAM to avoid the difficulties of trying to enforce an award that was rendered against the rights and interests of a party that is not present in these proceedings, [PMHI]" [original emphasis omitted] (Remedies Award at para 468). The Tribunal rejected this given the appellants' prevarication and found that the agency relationship was confirmed by the relief requested by the appellants that the Tribunal order GGAM to transfer the Shares to them on behalf of PMHI (Remedies Award at 435). This factual finding made by the Tribunal, as the Judge rightly recognised, "even if erroneous, cannot be challenged here" (Judgment at [69]).

104 Second, and in any event, the Tribunal did not make *any* orders that purport to bind PMHI (as a third party and a non-party to the Arbitration). No order was made against PMHI. The Direction Component of the Constructive Remedy specifically obliges the *appellants* to take various steps and if necessary, for the *appellants* to direct "their agent and controlling shareholder to cooperate". Nor did the Tribunal make *any* orders that would affect the rights of PMHI. As Mr Bull points out, if PMHI wants to commence arbitral proceedings under the EOA, it remains free to do so, as that is its right. This right remains entirely unaffected by the Constructive Remedy. Clearly, the Tribunal was cognisant that any non-party to the Arbitration could not and would not be subject to any of its orders. In our view, the relief it gave to the respondents reflects such an understanding.

105 Such an order is not unprecedented, and finds support in Professor Gary Born's treatise, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) ("*International Commercial Arbitration*") at 2445 to 2446:

> First, an arbitral tribunal's powers are virtually always limited to the parties to the arbitration and the arbitration agreement. …
>
> …
>
> Even where no such statutory limit on the arbitrators' authority with respect to third parties exists, the contractual nature of the arbitral process implies that the tribunal's authority is limited to the parties to the arbitration. Among other things, a tribunal may not order the attachment of assets in the custody and control of a nonparty.
>
> Despite the foregoing, an arbitral tribunal would have the power to order a party to take steps vis-à-vis third parties to prevent or accomplish specified actions. For example, *a corporate entity could be ordered to direct its subsidiary to take certain steps (e.g., return or preserve specified property, deliver or safeguard*

> *funds)*. Such orders test the limits of arbitral powers, but, in appropriate cases, where necessary to accomplish justice, *a tribunal has the authority to issue them.*
>
> [emphasis added]

In our view, the Direction Component of the Constructive Remedy was a practical mechanism to do just that: to facilitate the release and sale of the Shares.

106 Finally, the respondents recognise that they "cannot hold PMHI liable for any failure of Bloomberry to comply with the Constructive Remedy". If the appellants fail to get PMHI to do the things prescribed in the Constructive Remedy, the appellants may be on the hook for a breach of the order, but PMHI most certainly is not. Where PMHI's assistance is required in order to discharge the appellants' obligation, it is for the appellants to secure that assistance. It is telling that when pressed on *exactly* what rights of a non-party such as PMHI would have been affected by the Constructive Remedy, the appellants were unable to proffer any satisfactory answer. We thus need say no more on this point.

Did the Tribunal attempt to enforce its own orders

107 The second facet of the appellants' jurisdictional objection is that the Tribunal had purportedly, and impermissibly, sought to enforce its own orders through the imposition of the Constructive Remedy.

An arbitral tribunal's powers

108 A good starting point is to consider the powers of an arbitral tribunal. The powers exercisable by an arbitral tribunal may broadly be described as

comprising (a) *procedural* powers; (b) *substantive* powers; and (c) *remedial* powers.

109 An arbitral tribunal's *procedural powers* are wide-ranging. This is because an arbitral tribunal is the master of its own procedure, subject to the parties' agreement and mandatory procedural norms prescribed under the *lex arbitri*, with Art 19(2) of the Model Law and the common law representing the positive aspect of the tribunal's mastery (*Anwar Siraj and another v Ting Kang Chung and another* [2003] 2 SLR(R) 287 at [41]–[42] and *Republic of India v Vedanta Resources plc* [2020] SGHC 208 ("*Vedanta*") at [34]–[38]). Section 12(1) of the IAA lists some of the various powers granted to an arbitral tribunal. These are powers that provide the procedural scaffolding for an arbitration, necessary to assist in the just and proper conduct of arbitration so that parties do not have to apply to the Court for procedural orders or directions (see Timothy Cooke, *International Arbitration in Singapore, Legislation and Materials* (Sweet & Maxwell, 2018) ("*International Arbitration in Singapore*") at para 1.110). Procedural powers are termed as such because they do not purport to determine the parties' rights and liabilities conclusively.

110 In contrast, an arbitral tribunal's *substantive powers* come hand in hand with its adjudicatory role. Arbitration is ultimately an alternative form of dispute resolution. An arbitral tribunal is tasked by the parties to decide the dispute at hand, on the merits of the case. Arriving at a decision is necessarily a composite task, which entails finding the facts, ascertaining the law, developing the law if necessary, and applying the law as ascertained or developed to the facts as found to resolve the parties' dispute, all in accordance with the parties' agreement and the law governing the arbitration (*Vedanta* at [134] and [141]–[143]). Having

undertaken this analytical exercise, the arbitral tribunal proceeds to render an award that substantively determines the rights and liabilities of the parties to the arbitration, granting the appropriate relief where necessary.

111 To this end, an arbitral tribunal's *remedial powers* are broad and akin to a court's powers. Section 12(5)(*a*) of the IAA puts this beyond doubt:

> **Powers of arbitral tribunal**
>
> …
>
> **12.**–(5) Without prejudice to the application of Article 28 of the Model Law, an arbitral tribunal, in deciding the dispute that is the subject of the arbitral proceedings –
>
> (a) may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that Court …

The mirroring provision in the context of domestic arbitrations is s 4(2) of the Arbitration Act (Cap 10, 2002 Rev Ed). Paragraph 14 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) in turn empowers the High Court to grant "all reliefs and remedies at law and in equity, including damages in addition to, or in substitution for, an injunction or specific performance". The common forms of reliefs and remedies include monetary awards, orders for specific performance, injunctions and declaratory reliefs. This is of course, subject to any agreement to the contrary made by the parties.

112 That said, what is also clear is that s 12 of the IAA does not confer upon arbitral tribunals the power to grant *all the reliefs* that the High Court can grant. Section 12(5) of the IAA is in *pari materia* to s 12(1) of the New Zealand Arbitration Act 1996 (Act No 99 of 1996). That section was derived from s 10 of the New Zealand draft bill, contained in the New Zealand Law Commission

Report, *Arbitration* (NZLC R20, 1991) (President: Sir Kenneth Keith KBE) (the "NZLC Report"). The discussion in the NZLC Report on s 10 of the draft bill is instructive in this regard. It recognised that "[s]ection 10 falls short of completely assimilating the powers of an arbitral tribunal to those of the High Court. Obviously, the power to grant a remedy or relief *does not include the High Court's coercive powers*" [emphasis added] (at para 258). This leads us to our next point.

113 Armed with an order or an award rendered by an arbitral tribunal, a party will, more often than not, take proactive enforcement steps to secure compliance. This enforcement can take numerous forms, such as a writ of seizure and sale, garnishee proceedings, the appointment of a receiver or an order for committal. The rationale for enforcement is easily understood. It will be apparent that the sanctity of orders and directions, and indeed the integrity of the arbitral process itself, may be considerably undermined should there be no way to ensure compliance. Where the powers of an arbitral tribunal and the powers of the High Court diverge is the power of enforcement. This is because, as mentioned above, an arbitral tribunal does not have the same coercive powers of enforcement as the High Court (see also *Arbitration in Singapore: A Practical Guide* (Sundaresh Menon ed-in-chief) (Sweet & Maxwell, 2nd Ed, 2018) at [13.091]). The enforcement of arbitral awards, orders and directions is a matter squarely within the domain of the courts, and is statutorily provided for:

(a) An order or direction made by an arbitral tribunal, is enforceable in Court pursuant to s 12(6) of the IAA (the parallel provision in domestic arbitrations being s 28(4) of the AA). Section 12(6) appears to

provide two methods by which a party can enforce an order or direction: (i) first, with leave of the court, in the same manner as orders of court and (ii) second, by entering judgment in terms of the order or direction, although it has been observed that the "circumstances when a procedural order would be sought to be enforced by the latter route will likely be exceptional" (*International Arbitration in Singapore* at para 1.130).

(b) An arbitral award rendered by an arbitral tribunal is also enforceable in Court, as is made clear by s 19 of the IAA and s 46(1) of the AA, which both provide that an arbitral award, foreign or domestic, may be "enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award". Section 33(1) of the IAA also preserves the right to enforce a foreign award through the reciprocal enforcement of judgments route.

114 The following passage from *International Commercial Arbitration* is to similar effect (at 2466 to 2447):

> … it is also clear that an *arbitral tribunal ordinarily lacks the authority directly to enforce its provisional measures.* Rather, such enforcement is the responsibility of national courts, at the application of one or more of the parties.
>
> As with final relief, *an arbitral tribunal lacks direct coercive power to compel compliance with its awards or orders of provisional measures.* This is evident, for example, in the language of the Swiss Law on Private International Law, which provides that "[i]f the party so ordered [by the arbitral tribunal to take specified provisional measures] does not comply therewith voluntarily, the arbitral tribunal may request the assistance of the competent court.
>
> Even absent such statutory language, however, it is clear under *virtually all national arbitration regimes that an arbitral tribunal*

> *cannot itself ordinarily apply direct coercive enforcement measures to obtain compliance with its provisional orders. This is merely a specific application of the more general rule, discussed below, that an arbitral tribunal is not competent to exert direct coercive measures to enforce its own final awards.*
>
> …
>
> [emphasis added]

115 Institutional rules may also expressly confer enforcement powers on the tribunal; for example, Rule 27(l) of the Singapore International Arbitration Centre Rules (6th Ed, 1 August 2016) allows, unless otherwise agreed by the parties, an arbitral tribunal to "impose such sanctions as the Tribunal deems appropriate in relation to such failure or refusal" of any "party to comply with … the Tribunal's orders or directions or any other partial Award". This rule is, however, not in play in the present case.

116 Bearing these principles in mind, we now turn to the parties' arguments.

The true purpose of the Constructive Remedy

117 Mr Yeo does not take issue with the broad remedial powers granted to an arbitral tribunal under the IAA. This is consistent with the position adopted by the appellants in the Arbitration, in which the appellants "did not dispute that the Singapore High Court would have the power to grant the Constructive Remedy as pleaded by the [respondents; nor did they dispute that the Tribunal accordingly also has the power to make such relief" (Remedies Award at para 468). Rather, Mr Yeo's submission is that *notwithstanding* such broad remedial powers, the Tribunal overreached by invoking the powers of the seat court in fashioning a remedy that should have properly been the subject of an application to the local enforcing Court in the Philippines. Further, the Constructive

Remedy was but a mere guise to indirectly compel enforcement of the Tribunal's Interim Order and Liability Award.

118 In response, Mr Bull argues that the appellants have mischaracterised the Constructive Remedy. It is compensatory and not coercive in nature and the remedy arose simply from the appellants' conduct in interfering with the Shares. Contrary to what the appellants contend, the Tribunal's direction was not founded on the basis that because its orders had been breached it had to punish and deter the appellants further. The Tribunal was entitled to fashion such a remedy and there is nothing objectionable about it. Implicit in Mr Bull's argument, it appears to us, is an acknowledgment that *if* the Tribunal, instead of making an award of damages for wrongful interference with the Shares, had in fact made an award of damages for the appellants' failure to comply with the Tribunal's orders, this would be beyond the pale. This then prompts the question: what is in substance, the true purpose of the Constructive Remedy?

119 We deal first with the contention that Tribunal usurped the powers of the Philippine Courts. Mr Yeo's essential point appears to be that what the respondents ought to have done was to have gone back to the Regional Court and taken out an action for enforcement of the Interim Order. He says that as a matter of Philippine law, an order made by an arbitral tribunal is considered a foreign arbitral award that is capable of recognition and enforcement. While he does not venture so far as to suggest that the respondents were *legally* obliged to take such action, he contends that it would have been the appropriate remedy for the respondents to avail themselves of if they were maintaining that they were the victims of the appellants' recalcitrance.

120 Before us, Mr Bull devoted much time to arguing that the Interim Order was self-executing. Even though the Philippine CA did state that there was a need for the case to be remanded to the Regional Court, Mr Bull argued that the Philippine CA had made this observation because the appellants had sought two things in a belt and braces manner. One was for an order that the Injunction Order was a nullity and the second was for an order in terms of the Interim Order. As regards the first, the Philippine CA agreed that the Injunction Order was null, while the latter, the Philippine CA observed, was appropriately relief that ought to be granted by the Regional Court. The appellants' position is therefore that the Philippine CA was not saying that the appellants were obliged to enforce the Interim Order as such an interpretation would run counter to the Regional Court's own decision, which stated that the Injunction Order was a "temporary order only in effect as long as not confirmed, revoked or modified by the Tribunal". In addition, Mr Bull argues that this is an argument of causation masquerading as an argument of jurisdiction.

121 The appellants' present argument was also raised before the Tribunal, as may be gleaned from their submissions in the Arbitration:

> (a) In their Rejoinder on Remedies, the appellants took umbrage at the respondents for failing to deal "in a straightforward manner with the hearing before the [Regional Court] as ordered by the [Philippine CA]", and asserted that the respondents "continue to blame their claimed 'inability' to enforce the [Interim Order] on Bloomberry and go so far as to request this Tribunal order an extraordinary 'constructive' remedy" (at para 87).

(b) In their Sur-Rejoinder, the appellants asserted that if "GGAM wanted to hasten the sale of the Shares, it could have followed the proper channels to seek enforcement before the court of competent jurisdiction, the [Regional Court]" but it had not done so, and instead "chose to blame its inability to sell the Shares on Bloomberry, asking the Tribunal to compel Bloomberry to purchase the Shares at an inflated price" (at paras 29 and 234).

The Tribunal found those arguments to be of little merit and held that the respondents had "no obligation to seek enforcement of the [Interim Order] and the Liability Award in the [Regional Court]" (Remedies Award at para 436). Whether or not the Interim Order was self-executing in the Philippines, the Tribunal observed that the parties "still have an obligation to comply with the [Interim Order] and the Liability Award unless vacated by a court in Singapore" (Remedies Award at paras 440).

122 Leaving aside the question of whether the Interim Order was self-executing, we are unable to see how the respondents' argument may appropriately be characterised as anything other than an argument as to *causation*. In this regard, we agree with Mr Bull's submission. Understood properly, the suggestion is that any damage suffered by the respondents as a result of the alleged interference could have been avoided (or at least mitigated) had the respondents simply gone back to the Regional Court. Put differently, the respondents were responsible for their own loss. We agree entirely with the Judge's observation that this argument appears to be "little more than a challenge on a point of causation dressed up in a jurisdictional challenge" (Judgment at [56]). Even taken at its highest, an erroneous conclusion on

causation, as a matter of law and fact, cannot warrant a setting aside on the basis of an excess of jurisdiction under Art 34(2)(*a*)(iii) of the Model Law. To hold otherwise would be an impermissible interference with the substantive powers of the Tribunal, as the only fact-finder and decision-maker on the merits of any dispute submitted to arbitration.

123 Next, we turn to the appellants' submission that the Tribunal had sought to enforce its own orders *by way of* the Constructive Remedy. Having carefully considered the reasoning of the Tribunal in the Remedies Award, we reject this argument. In our judgment, it is clear that the Tribunal, in fashioning the Constructive Remedy (*ie,* both the Payment Component and the Direction Component), sought to compensate the respondents for the loss occasioned to them from January 2014 onwards when the appellants first interfered with the intended sale of the Shares. The Tribunal did not seek to mandate enforcement of its prior orders and it is completely inaccurate to characterise the Constructive Remedy as having such an effect. We explain.

124 It is important to appreciate how the Tribunal arrived at its decision to impose the Constructive Remedy. The question that had first to be determined, as the Tribunal described it, was as follows (Remedies Award at para 437):

> … whether [the appellants'] continuing non-compliance with this Tribunal's [Interim Order] and the Liability Award, *the resulting interference with the right of GGAM to dispose of the Shares*, and [the appellants'] stated intent to continue to interfere, constitute grounds for a finding of liability by this Tribunal.
>
> [emphasis added]

125 The Tribunal found that such deliberate non-compliance with its orders did constitute such a ground. The Tribunal held that from January 2014 to

March 2017, the appellants had prevented the respondents from selling their Shares on multiple occasions. The instances of obstruction consisted of: (a) the appellants' request to the Exchange to suspend trading of the Shares; (b) the appellants' and PMHI's (successful) application to the Regional Court seeking the issuance of writs of preliminary attachment and injunction; (c) the appellants' refusal to give consent to Deutsche Bank to release the Shares after the issuance of the Liability Award in October 2016; and (d) the appellants' continued refusal to withdraw their petition filed before the Regional Court or to confirm with Deutsche Bank that they had no objection to the sale of the Shares in March and April 2017 (Remedies Award at para 446).

126 Moreover, the Tribunal noted that at the hearing on remedies, the appellants "stated clearly that they would continue to obstruct GGAM's access to the Shares irrespective of the Tribunal's ruling" (Remedies Award at para 447). Hence, the appellants' "flagrant disregard for the Tribunal's [Interim Order] and the Liability Award and willful [*sic*] refusal indefinitely to enable GGAM access to the Shares for the apparent purpose of pressuring the [respondents] into a settlement on [the appellants'] terms is tantamount to their *de facto* seizure, a misappropriation for the purpose of using them to settle other matters in dispute between the Parties" (Remedies Award at para 448). Specifically, the Tribunal determined that, *at least* from the date of the Interim Order, the appellants were held liable for damages *caused* to the respondents under Arts 20 and 2176 of the Civil Code of the Philippines (the "CCP"), the appellants having acted contrary to their legal obligations under the MSA and the UNCITRAL Rules to be bound by the Tribunal's Interim Order and Liability Award. The Tribunal deemed it unnecessary to determine whether the Injunction Order was improvident (as the appellants had contended) in order to

award damages for wrongful interference with the Shares as the appellants' actions in failing to comply with the Interim Order and Liability Award by themselves had independently given rise to liability under Arts 20 and 2176 of the CCP (Remedies Award at para 449).

127 The Tribunal concluded thus (Remedies Award at para 450):

> As demonstrated by the evidence set out above, the [appellants] have willfully [*sic*] or at least negligently *caused damage to the respondents by interfering with and blocking the exercise of its ownership rights in its Shares*, especially its right to sell the Shares (Article 428 of the CCP). [emphasis added]

128 Following the Tribunal's finding that the appellants were liable to the respondents for damages arising from the former's interference with the Shares, the Tribunal proceeded to determine the value of the Shares for the purpose of computing damages. The Tribunal decided that the appellants must pay the *full value of the Shares* in exchange for GGAM's transfer of the Shares to the appellants (Remedies Award at para 469). In arriving at its conclusion that the total value of the Shares (and thus the quantum of damages awarded) amounted to PHP 10,169,871,978.24, the Tribunal's reasoning was as follows:

(a) First, the Tribunal chose to take the date of the Interim Order to determine the value of the Shares, *ie,* 9 December 2014. This was the date on which the Tribunal had first confirmed the respondents' right to sell the Shares (Remedies Award at para 453).

(b) Second, and in choosing to take the date of the Interim Order to determine the value of the Shares, the Tribunal rejected the respondents' proposed 'Highest Intermediate Value' ("HIDV") approach to measure the quantum of damages when sales of shares or stocks are improperly

restricted. The HIDV approach would entail determining the "highest price at which GGAM's sale would have occurred once the restriction began, and [awarding] GGAM that value for the Shares in exchange for GGAM giving the Shares to the [appellants]". The Tribunal was not convinced that a single Philippine case was "sufficient evidence to demonstrate that the HIDV is necessarily part of Philippine law, and should be applied in the circumstances of the instant case" (Remedies Award at para 452).

(c) Third, the Tribunal held that a block sale discount ought to be applied in assessing the value of the Shares as at 9 December 2014 because the Shares were a large chunk of thinly-traded shares. The Tribunal adopted the appellants' expert's calculation of 10.8% as a discount, observing that while the respondents "disagree that a block sale discount should be applied, they have not disputed that this would be an appropriate block sale discount to use should the Tribunal find (as it has) that a block sale discount should be applied" (Remedies Award at para 463). This led to a price of PHP 11.04 per share (Remedies Award at paras 462 to 466).

129 The Tribunal also explained that the Constructive Remedy would (a) compensate the respondents fully for the value of the Shares in exchange for the Shares so as to shift the risk of price fluctuations in the Shares onto the appellants while (b) avoiding the prospect of double recovery by the respondents (Remedies Award at paras 469 and 470).

130 Overall, we agree with the Judge that the "purpose of the Constructive Remedy has little to do with aiding the Tribunal to enforce its own orders"

(Judgment at [56]). The Tribunal's reasoning demonstrates a clear compensatory methodology employed in awarding damages to the respondents for their losses arising from the appellants' interference with the Shares. We agree with Mr Bull that instead of seeking to enforce a breach of the Tribunal's own orders, the Tribunal's decision on liability for interference of the Shares was grounded quite clearly in an obligation under domestic Philippine law, *viz*, Arts 20 and 428 of the CCP. It was not imposing liability for non-compliance with the Interim Order and the Liability Award. As the Tribunal explained, Art 20 of the CCP gave rise to an obligation on the appellants' part to indemnify GGAM for the damage suffered as a result of the appellants' actions and further, the appellants had committed a quasi-delict within the meaning of Art 2176 of the CCP, giving rise to the appellants' obligation to pay compensation (Remedies Award at para 449). This is in contradistinction to say, a line of reasoning adopted by an arbitral tribunal that orders of the tribunal ought to be complied with, and that it had decided to impose damages to redress such non-compliance. This was not what the Tribunal purported to do because its finding on liability was predicated on a breach of Philippine law, which led to compensatory damages for loss.

131 We recognise, as Mr Yeo points out, that the Tribunal did refer to the appellants' obligation to comply with the Interim Order and the Liability Award and found that they had failed to do so. But this does not lead to the ineluctable inference that the purpose of the Constructive Remedy was to enforce the Tribunal's orders. The Tribunal's reasoning must be viewed in context. And a close reading of the Remedies Award makes clear that the Constructive Remedy was fashioned to compensate the respondents for losses arising from the appellants' continuing interference with the Shares and their declaration that

they would continue with that course. The interference comprised not only positive actions to obstruct sale attempts but also deliberate failure to comply with remedial actions ordered by the Tribunal. The appellants' actions and wilful non-compliance in respect of the Interim Order and the Liability Award were the *means* by which they interfered with the Shares, which led to the respondents' inability to deal with the Shares and to suffer consequential loss. This is why the Tribunal took pains to specify the various instances of the appellants' interference/obstruction. It is clear that this obstruction did not just comprise non-compliance with the Interim Order and Liability Award (see [127] above). The Constructive Remedy was not targeted at enforcing those orders.

132 A counterfactual would be helpful to illustrate this point. For example, if the appellants had only told Deutsche Bank, as custodian of the Shares, not to release the Shares for sale and had not obtained an injunction order from the Regional Court (*ie,* the Injunction Order), it can hardly be disputed that the respondents would have been entitled to seek damages for wrongful interference with the Shares from the Tribunal. As such, the Injunction Order granted by the Regional Court at the behest of the appellants, was merely a *means* by which the appellants interfered with the Shares. Similarly, the appellants' failure to comply with the Interim Order was yet another way by which they continued to interfere with the Shares, as was the appellants' conduct subsequent to the release of the Liability Award. The damages awarded by the Tribunal were *for the interference* with the Shares and *not for failure to comply* with the Interim Order and Liability Award as such. Although the respondents could arguably have sought damages from the Regional Court, that was only one of the options available to them – they were not obliged to seek damages through that avenue

exclusively. Indeed, it made both commercial and expedient sense for the Tribunal to deal with this dispute (as one ancillary to the main dispute over the termination of the MSA) because the parties and the relevant background facts were already before the Tribunal.

133 We also disagree with Mr Yeo that the Tribunal made no attempt whatsoever to assess what the damages arising from wrongful interference were. It is apparent from the Remedies Award that the Tribunal employed the language of compensation throughout. And this was neither mere lip service nor a Potemkin village; there are several key indicia that point towards the Constructive Remedy serving as a compensatory remedy:

(a) For starters, the Tribunal was mindful of the possibility of double recovery and thus ensured that any damages payable to the respondents would have to be in exchange for the Shares. Indeed, to allow the respondents to recover the full value of the Shares whilst still being able to retain them would be antithetical to the notion of fair compensation. Likewise, the "significant" block sale discount that was applied in assessing the value of the Shares was warranted because of the relatively large number of Shares from a counter that was thinly-traded.

(b) Next, in selecting the date of valuation of the Shares, *ie*, 9 December 2014, the Tribunal was "left in no doubt" that at this date, the respondents would have tried to sell the Shares had the appellants allowed them to do so and that the deprivation of this opportunity would warrant compensation. In a sense, the Tribunal was saying that the appellants should have been allowed to deal with the Shares on that date, and would then have received what was rightfully due to them. The

choice of that date would also guard against the risk of fluctuations in the price of the Shares, especially since the interference was continuing.

(c) Thirdly, the Direction Component of the Constructive Remedy and in particular para 503(3)(c) of the Constructive Remedy provides that if damages are not paid by the appellants, GGAM will be permitted to sell the Shares to others. Depending on the sale price however, the difference must be accounted for. This is yet another safeguard against the possibility of either under-compensation or over-compensation.

134 Where the Tribunal took into account any recalcitrance, it was neither to punish the appellants nor to award damages to the respondents *for that* recalcitrance. Instead, the Tribunal took into consideration the appellants' recalcitrance when it had to decide how best to *implement* (and not enforce) its decision to award the respondents damages. This is clear as the respondents had implored the Tribunal to adopt the Constructive Remedy in order to address "both the past and ongoing harm by GGAM resulting from the [appellants'] restriction on GGAM's sale of the Shares" (Remedies Award at para 402). Instead of procuring the practical release of the Shares, the appellants continued to throw up barriers and obstacles, refusing to grant permission to Deutsche Bank to release the Shares even after the issuance of the Liability Award. Hence, the Tribunal's explanation that the appellants' "statement that it would not allow GGAM to sell its Shares despite the [Interim Order] and Liability Award signals to the Tribunal that the exercise of such relief … is necessary so that GGAM is not forced to bear the risk of price fluctuations on its Shares and also to compensate GGAM fully for the value of its Shares" (Remedies Award at para 470).

135 Relatedly, the appellants' recalcitrant conduct also contributed to the Tribunal's decision to institute the Direction Component of the Constructive Remedy. In the Tribunal's view, the Direction Component would "give effect to [the respondents'] ownership in the Shares" in light of the appellants' intimation before the Tribunal that they would not allow the sale of the Shares. The Tribunal noted that the appellants' conduct up to the Remedies Award had been consistent with that intent. Hence, being well apprised of the appellants' conduct, the Tribunal made such orders as it considered were "reasonably necessary to give effect" to its decision that the appellants should pay the full value of the Shares (as at 9 December 2014) as damages to the respondents, in exchange for the transfer of the Shares (Remedies Award at para 472).

136 As Mr Bull puts it, this meant that the *actual mischief* as found by the Tribunal – the respondents' attempted sale of the Shares repeatedly being stymied by the appellants – could be addressed in a practical manner, to facilitate the sale of the Shares. We agree. Viewed holistically, the Constructive Remedy was a pragmatic solution to the realities of the situation. Much like a court does, the Tribunal fashioned a remedy *in light of all the circumstances*. It cannot be faulted for doing so.

There has been no deprivation of a passive remedy

137 When an international arbitration award is rendered in Singapore, the party against whom it is made may chose, instead of applying to set it aside, to resist enforcement of the arbitral award (see *PT First Media TBK (formerly known as PT Broadband Multimedia TBK v Astro Nusantara International VB and others and another appeal* [2014] 1 SLR 372 at [53]–[55], [65]–[71] and [84]). Neither party takes objection to this general principle.

138 The appellants' complaint that the Constructive Remedy deprived them of their passive remedy was not phrased clearly but appears to be this. The Direction Component of the Constructive Remedy is contingent on the failure of the appellants to comply with the Payment Component of the Constructive Remedy. The Direction Component of the Constructive Remedy directs, among other things, the appellants to take "all steps necessary … to file a motion to withdraw" the Preliminary Injunction and the Writs in the Regional Court, as well as to get PMHI, as its controlling shareholder, to cooperate in this as well. This, however, runs counter to the expectation that a party who has obtained an order and award would first take out enforcement proceedings, that would correspondingly entitle the counterparty to resist enforcement. The Tribunal, in fashioning such a remedy, has thus deprived the appellants of their *passive* remedy of resisting enforcement of an award or order because the Constructive Remedy does away with the respondents having to go back to the Regional Court to enforce the Interim Order and/or the Liability Award.

139 We reject this argument. There is no basis for suggesting that the Constructive Remedy has deprived the appellants of their passive remedy to resist enforcement. The appellants' argument is betrayed by their very own conduct in the present case. It is not disputed that the appellants are themselves resisting enforcement of the Remedies Award in the present action. This right has not been undermined in any meaningful sense by the Constructive Remedy.

140 How the respondents will receive the compensation awarded under the Liability Award is something that will necessarily be worked out in due course. Doubtless the respondents must first seek to enforce the Remedies Award in whichever jurisdiction they may deem fit to do so. If the appellants do not

comply with the Payment Component of the Constructive Remedy, it is certainly open to the respondents to take out enforcement proceedings, in the Philippines for example, of the Direction Component of the Constructive Remedy, because otherwise they will not be able to deal with the Shares. In short, whatever the status of the Interim Order, be it self-executing or not, that order has been overtaken and replaced by the Remedies Award; should the appellants fail to comply with the Remedies Award, the respondents will still have to take enforcement action.

141 It is thus simply an untenable assertion that the appellants, by virtue of the Constructive Remedy, have lost any rights to pursue their passive remedy to resist enforcement of the Remedies Award. The appellants have an opportunity here, an opportunity in the Philippines, and indeed, the opportunity anywhere else in world where the respondents may try to enforce the Remedies Award to avail themselves of the right to resist enforcement. And in all these places, their right to resist enforcement subsists untouched, unscathed and untarnished. Whether they in fact succeed in resisting enforcement, is of course, a wholly separate point, and a point that need not trouble us further.

Whether the Constructive Remedy is punitive in nature

142 The appellants' third fundamental objection, as Mr Yeo puts it, is that instead of awarding or assessing damages for wrongful interference, as the Tribunal purported to do so, it instead ordered a buyout in substance. The Tribunal, in fashioning the Constructive Remedy, was seeking to *punish* the appellants for non-compliance with its earlier orders. The Constructive Remedy was thus a punitive remedy expressly disallowed by cl 19.2(c) of the MSA. In

this regard, Mr Yeo submits that the Judge had erred in three key respects:

> (a) that the Judge's finding that the appellants' only complaint in the Arbitration was with respect to the valuation date to measure quantum "ignores Bloomberry's arguments that the Constructive Remedy, *regardless of the methodology used to calculate the value of the Shares, was not a compensatory remedy*";
>
> (b) that the language employed by the Tribunal relating to the appellants' "recalcitrance" falls within the description of a punitive or exemplary remedy under Philippine law, *ie,* one ordered by way of example or correction; and
>
> (c) that while it was within the Tribunal's remit to punish a party for its conduct, it would have been reasonable for the Tribunal to draw adverse inferences or to impose a cost order. To transform the Interim Order into a breach giving rise to the Constructive Remedy was unwarranted and outside the scope of the agreement to arbitrate.

143 The parties are in agreement that the Tribunal had no power to make an award of punitive damages. Clause 19.2(c) of the MSA provides that "[e]xcept in connection with claims by third-parties for which a Party is entitled to indemnification pursuant to this Agreement … the award *may not include, and the parties specifically waive any right to an award of multiple*, *exemplary or punitive damages*" [emphasis added]. Unsurprisingly, the parties disagree whether the Constructive Remedy was, in fact, punitive.

144 Having considered the parties' submissions, we reject the appellants' assertion that their position before the Tribunal was that the Constructive

Remedy would, "regardless of the methodology" employed to calculate the value of the Shares, be punitive. This is not borne out by the evidence.

145 As reflected in the Tribunal's summary of the parties' submissions in the Remedies Award, the appellants had argued that the Constructive Remedy "based on the [HIDV] approach is a form of damages that is intended to deter future bad conduct" and "[a]s such, GGAM is seeking punitive damages". The appellants also argued before the Tribunal that a court in the Philippines would not apply the HIDV approach "because there is clear evidence of the price at which GGAM tried to sell the Shares … in January 2014".

146 In support of their argument, the appellants refer to para 109 of the fourth supplemental opinion, dated 31 August 2017, tendered in the Arbitration by their expert on Philippine law, retired Philippine Supreme Court Justice Jose C. Vitug. However, viewed in its proper context, Justice Vitug's opinion is clearly expressed in reference to the respondents' proposed method of valuing the Shares by way of the HIDV methodology (at paras 107 to 109):

> 107. Picazo Law and Milbank have also requested my opinion of the matter of GGAM's asserted constructive remedy – *that the Arbitral Tribunal order [the appellants] to purchase the Shares at the "Highest Intermediate Value" or in the alternative, for [the appellants] to shoulder the difference between the "Highest Intermediate Value" and the actual selling price of the Share if sold to a third party.*
>
> 108. I am of the opinion that this "constructive remedy" has no basis at all under Philippine law as I have not come across any case wherein the Philippine Supreme Court sanctioned such "constructive remedy".
>
> 109. *To me, this "constructive remedy" does not appear to be a remedy for recovery of actual losses but is instead akin to a punitive remedy.* In other words, it appears that GGAM is claiming more than actual or compensatory damages.

> [emphasis added]

Put another way, Justice Vitug's view that the Constructive Remedy would be punitive arises from the assumption that it does not purport to compensate *actual* losses, which is in turn connected to what the appellants claim is the necessary effect of adopting the proposed methodology espoused by the respondents, *ie,* the HIDV methodology.

147 This position is further reiterated in the appellants' Sur-Rejoinder (at paras 261, 262 and 267):

> 261. As a threshold matter, **GGAM is entitled only to actual damages that can be proved to have arisen from the [Regional Court's] orders**. Philippine law indeed makes clear that there must be *actual proof* of damages incurred. Here, it is particularly hard to imagine that GGAM could seriously claim any actual damages for its current inability to sell the Shares. …
>
> 262. **It is through this lens that one must view [the respondents'] "constructive theory" for damages for damages based on a so-called "Highest Intermediate Value Test" ("HIVT"). It appears not only to be a transparent attempt to conceal the fact that [the respondents] have suffered no damages as a result of their inability to sell the Shares during these proceedings** … If, for the sake of argument, the Tribunal were to give any credence to GGAM's claim that it has suffered damages, then the Tribunal will have to come to the conclusion that the **HIVT is inappropriate to determine the quantum of these purported damages.**
>
> …
>
> 267. … **GGAM and its consultants admit that their "constructive remedy" based on HIVT is a form of damages that is intended to deter future bad conduct. As such, the inescapable conclusion is that GGAM is seeking punitive damages.** …
>
> [emphasis in original; emphasis added in bold]

148 Thus, to the extent that the appellants now argue that the Constructive Remedy, regardless of valuation method used, was a punitive remedy, the appellants' *own position* before the Tribunal was that it was the HIDV method propounded by the respondents which would be punitive. As the respondents submit, this position must reflect the appellants' tacit acceptance that a valuation method that compensates the respondents for actual damages, in other words, one not based on the HIDV method, would *not* be a punitive remedy. In this context, it is significant that the Tribunal expressly rejected that valuation method in the Remedies Award; the Tribunal concluded that as it had rejected the HIDV approach, the appellants' objection that the Constructive Remedy (based on the HIDV method) is a form of punitive damages would subsequently fall away. There was, in the Tribunal's view, "nothing 'punitive' in valuing the Shares as of the date that GGAM clearly had the right to sell those Shares pursuant to the [Interim Order]" (Remedies Award at para 471). Given the way in which the appellants had framed their submissions before the Tribunal, we agree with the respondents. The Tribunal's decision not to adopt the HIDV approach to valuation rendered the contention of the Constructive Remedy being punitive a moot point.

149 We turn next to the appellants' argument that the Tribunal's use of the term "recalcitrance" in the Remedies Award (in the context of describing the appellants' conduct in respect of the Shares) indicates that the Constructive Remedy was punitive. We do not accept this submission. The parties do not dispute that the Tribunal referred to the appellants' "recalcitrance" on two occasions in the Remedies Award:

(a) First, at para 470: "[w]hile the Tribunal does not use the HIDV, it accepts that the [appellants'] recalcitrance justifies ordering that the [appellants] pay the full value of the Shares as of December 9, 2014 as damages to the [respondents], in exchange for GGAM's transfer of the Shares to the [appellants]"; and

(b) Second, at para 471: "[t]he Tribunal is not ordering specific performance or enforcing the 'put right' … Rather, it is exercising its power to fashion appropriate relief in the face of the [appellants'] transparent recalcitrance to allow GGAM to sell its Shares (despite the [Interim Order] being made almost five years ago), and considers that such relief would shift the risk of fluctuations in the price of the Shares to the [appellants]".

150 That said, we do not think that the Tribunal's passing comments are sufficiently probative of the Constructive Remedy being a punitive award of damages. Even if infelicitous, the Judge quite rightly observed, "the use of the word 'recalcitrance' does not *ipso facto* entail that a remedy is 'punitive', for it is within the Tribunal's remit to criticise a party for unscrupulous conduct" (Judgment at [63]). This language is descriptive rather than normative. The Tribunal did not seek to use the Constructive Remedy to punish any aberrant behaviour on the part of the appellants.

151 Viewed in this light, the appellants' argument that the definition of a punitive remedy under Philippine law is one that is imposed "by way of example or correction for the public good" and available only if the party in breach acted in a "wanton, fraudulent, reckless, oppressive, or malevolent manner" is of minimal assistance to its case on appeal. This is because, as the Judge also

observed, the respondents' expert, retired Philippine Supreme Court Chief Justice Reynato S Puno, gave evidence that "a remedy is compensatory if it arises as a 'natural and probable consequence' of conduct that is subject of the contractual claim". In the Judge's view, both experts' "expositions of Philippine law are not irreconcilable and merely represent two sides of the same coin" (Judgment at [64]). It appears to us that the appellants' true grievance lies in the Tribunal's decision to value the Shares as of 9 December 2014. But this was eminently within the exclusive domain of Tribunal, such matters being findings of fact (Judgment at [65]). We agree and consider that the appellants have proffered no satisfactory argument to persuade us otherwise.

152 Finally, we turn to the appellants' argument that instead of fashioning the Constructive Remedy, the Tribunal should have drawn adverse inferences or penalised the appellants by way of a costs order in response to the appellants' non-compliance with the Interim Order and Liability Award. This too, must necessarily fail. This puts the cart before the horse. It erroneously presumes that the Tribunal intended to punish the appellants. But, for the reasons outlined above, we have found that the Constructive Remedy was a compensatory remedy. Thus, in so far as the appellants' contention is that the Constructive Remedy is punitive or exemplary because it sought to address non-compliance with the IMO and the Liability Award, we do not accept that it is so.

A breach of natural justice

153 The appellants' argument that the Remedies Award ought to be set aside for a breach of natural justice is two-fold:

(a) that the Tribunal refused to consider evidence material to remedies on the basis that it could not revisit liability; and

(b) that the respondents (and their counsel in the Arbitration) had concealed documents, and evidence of GGAM's corrupt conduct at the Solaire Casino, and thus deprived the appellants of the opportunity to present their case.

154 The legal principles in respect of a setting aside application on grounds of a breach of natural justice were recently restated by this court in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another* [2020] 1 SLR 695. They are helpfully summarised by the Judge in the Judgment at [74]. We need not rehearse them here.

The Tribunal's refusal to consider evidence

155 The first line of attack mounted by the appellants is that, together with their Request for Reconsideration of the Liability Award, they had submitted "extensive evidence", including documentary, testimonial and expert evidence, showing that Mr Weidner and one Mr Eric Chiu ("Mr Chiu") were involved in fraudulent transactions at LVS and the Solaire Casino and that they had concealed the same from the appellants and the Tribunal. This included, among other things, the FCPA Findings. They also submitted a declaration made by Mr Jorge Sarmiento, the former President of and CEO of Philippine Amusement and Gaming Corporation ("PAGCOR"), which stated that the violation of the FCPA evidenced by the FCPA Findings would have been reason enough for PAGCOR to disqualify the respondents from being involved in gaming in the

Philippines, thereby justifying the termination of the MSA. We shall refer to the latter document as the "Sarmiento Declaration".

156 At the outset, what is clear is that the appellants had adequate opportunity to present their case. This is evidenced by the fact that the appellants had sought remedies for the situation that would arise if the Tribunal reversed its findings in the Liability Award, *and in the alternative*, also remedies "[i]f the Tribunal does not revisit the Liability Award and maintains its finding that the MSA was wrongfully terminated". Put another way, the appellants had envisaged the situation in which the Tribunal could not (or would not) revisit the Liability Award and hence made arguments solely on remedies too. These were arguments that were based on the FCPA Findings as well as the Sarmiento Declaration. It is startling that the appellants would now suggest that they were deprived of the opportunity before the Tribunal to present their affirmative case on the FCPA Findings and other documentary evidence, at least in so far as the remedies phase of the Arbitration was concerned.

157 In any event, we reject the appellants' argument that the Tribunal had *refused* "to consider material evidence and arguments on key issues in dispute "in the remedies phase, on the basis that it could not revisit liability". This, with respect, is a woeful mischaracterisation of the Tribunal's reasoning in the Remedies Award. The Tribunal did not consider the FCPA Findings and other documents tendered only *in so far as these related to the issue of liability*. This statement is not only consistent with its Reconsideration Decision, but is also entirely unimpeachable as a matter of law because once a tribunal has issued an award (be it an interim, interlocutory, partial or final award), the tribunal is *functus officio* in relation to the specific issues dealt with by the award

(*PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364 at [206]). A tribunal's jurisdiction to *substantively* review its award is extinguished once that award is rendered. As *Halsbury's Laws of Singapore* vol 2 (LexisNexis, 2016 Reissue) further describes the concept of *functus officio* at para 20.116:

> A valid award once made is final and binding and enforceable against the party against whom it is made. … The arbitrator has no power to re-visit the issues decided and cannot vary, amend, correct, review, add to or revoke the award. It follows that he has no power to issue any supplemental award on the issues decided except for clerical or calculation errors. If the award is the final award, it terminates the arbitration and extinguishes the original cause of action. He becomes *functus officio* upon making the final award. In the case of an interim award the arbitrator becomes *functus* in respect of issues disposed in the interim award although not *functus officio* in relation to such matters as may remain outstanding for determination in the arbitration.

158 At the remedies phase of the Arbitration, the Tribunal expressly considered the FCPA Findings and other documents *in so far as these related to the issue of remedies* and, in particular, for the purpose of assessing the quantum of damages to be awarded to the respondents arising out of the appellants' wrongful termination of the MSA. In this respect, the Tribunal considered the allegations of fraud and/or corruption on the part of Mr Weidner, Mr Chiu and the respondents *firstly*, in the context of the issue regarding the reasonable certainty of damages and *secondly*, in the context of whether the Tribunal ought to apply the doctrine of equitable mitigation to reduce the quantum of damages payable by the appellants to the respondents. The Tribunal's line of reasoning was comprehensively summarised by the Judge and as she observed, "the Tribunal interpreted the evidence, made factual findings and found evidential gaps … [a]ccording to the Tribunal, the FCPA Findings

were not material evidence" in respect of either enquiry (Judgment at [75]–[79]). We agree entirely. We see no basis for any suggestion that there was a breach of natural justice occasioned in the Arbitration.

Concealment of documents in the Arbitration

159 This second ground was not pursued with great vigour before us and, in our view, rightly so. As Mr Yeo himself recognised, there is considerable overlap with the arguments presented on this ground with the arguments made in respect of the applications to set aside and to resist enforcement of the Liability Award. We may thus dispose of this contention swiftly.

160 The argument that the respondents and their counsel in the Arbitration, M/s Paul Hastings LLP ("PH LLP"), had concealed documents in the Arbitration is not new. It was raised before us in the appellants' challenge to the Liability Award and we rejected it in the CA Judgment. In particular, we found that there was no unlawful concealment by PH LLP of certain e-mails from Mr Chiu's personal e-mail account. This was because even if said e-mails fell within the scope of the Tribunal's order for production of documents, there was no evidence that the decision not to produce the e-mails had been made dishonestly, given the number of e-mails that had been produced by the respondents. There was a paucity of evidence to suggest any concealment *aimed at deceiving the* Tribunal (CA Judgment at [71]). Likewise, the FCPA Findings did not lend any new significance to Mr Chiu's e-mails as the centrality of Mr Chiu to Mr Weidner's strategies would have been well known to the appellants and the FCPA Findings could not have shed any light on that since the findings pertained to separate transactions (CA Judgment at [72]). No procedural fraud of the kind alleged by the appellants had been established in

relation to PH LLP's document collection or production for the Arbitration. Our findings there apply with equal force here. This argument discloses no basis for setting aside and/or refusing enforcement of the Remedies Award.

Contrary to the public policy of Singapore

161 Finally, the appellants submit that the portion of the Remedies Award granting US$85.2m in damages to the respondents for lost management fees ought to be set aside or refused enforcement. They say that in so far as the Remedies Award was interpreted by the Judge as a net or post-tax figure, compliance with the Remedies Award would be "contrary to the Tribunal's decision and would require Bloomberry to violate Philippine tax laws". This is because the appellants "must, as the withholding agent under Philippine law, pay 30% of the monetary damages award not to GGAM, but to the Philippine Bureau of Internal Revenue or face a threat of serious legal consequences and significant monetary penalties".

162 The legal principles governing applications to set aside awards or resist enforcement on the grounds of an arbitral award being contrary to the public policy of Singapore are well-established. As this court summarised in *AJU v AJT* [2011] 4 SLR 739 ("*AJU*") , the prevailing approach is that the public policy objection must involve either "exceptional circumstances … which would justify the court in refusing to enforce the award" or be a violation of "the most basic notions of morality and justice" (at [38], citing *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 at [40] and [75]). In addition, unless the decision or decision-making process of the tribunal is tainted by fraud, breach of natural justice, or any other vitiating factor, any error made by an arbitral tribunal would not *per se* be contrary to public policy (*AJU*

at [66]). The public policy objection pitched at a high threshold is thus necessarily of a narrow scope (*PT Asuransi* at [59]).

163 In our judgment, the appellants' argument is a non-starter and we reject it. Simply put, and as the respondents quite rightly point out, *nothing* in the Remedies Award prevents the appellants from performing their alleged duties as withholding agents and paying any taxes due on the award sums. Enforcement of the Remedies Award can hardly be said to *require* the appellants to violate Philippine tax laws. Nor have the appellants provided even a modicum of evidence to demonstrate that the respondents' interpretation of the Remedies Award would violate Philippine tax laws.

164 This question of the payment of withholding tax was put before the Tribunal. In essence, the respondents had argued there that any damages awarded to them should be grossed-up so that what they would recover would be net of tax. This they said, was the tax treatment contemplated by the parties to the MSA. The Tribunal rejected the respondents' argument and held that the appellants would not be responsible for any tax gross up. We reproduce the salient portions of the Tribunal's reasoning in Remedies Award dealing with the gross-up of management fees for ease of reference (at paras 350, 355 and 361):

> 350. The [respondents] contend that the tax treatment contemplated by the Parties in the MSA requires that the [appellants] gross up the Management Fee payment to include withholding tax under law unless the [appellants] also timely provide the certifications required by law to support GGAM's exemption from the withholding tax under the Philippines-Netherlands Tax Treaty. The [respondents] base this argument on Section 4.6 of the MSA: "*the fees payable to GGAM shall be structured in the most tax effective methodology*".
>
> …

> 355. The [appellants] contend that the [respondents'] request for a "gross-up" is not based on any analysis of the MSA, the Philippine tax code, taxation treaties or other applicable tax systems. Notably, the MSA does not oblige Bloomberry to indemnify GGAM for any taxes paid in the Philippines, on the contrary, it provides that "*[t]axes accruing on the fees payable to GGAM shall be for the account of GGAM*".
>
> …
>
> 361. The Tribunal has already considered and rejected [the appellants'] contention that GGAM Philippines is a sham entity. … In addressing the gross-up claim, the key question is whether the [appellants] were obliged under the MSA to issue the certificates in question and, failing to issue them, be responsible for the payment of the taxes of the [respondents]. The MSA is clear in stating that "*[t]axes accruing on the fees payable to GGAM shall be for the account of GGAM*". The arguments of the [respondents] are based on the general statement that "*the fees payable to GGAM shall be structured in the most tax effective methodology*". The plain reading of this sentence does not support the [respondents'] position. First, the issuance of the certificates is not related to the structure of the fees but to the fulfilment of the requirements under the Philippines-Netherlands Tax Treaty. Second, even if the fee structure could be understood to fall within the terms of Section 4.6 of the MSA, this section does not impose any specific obligation on the [appellants] to take any action to assist the [respondents] before the tax authorities. Third, Section 4.6 needs to be read as a whole. The [respondents'] understanding of this clause contradicts the clearly stated obligation of GGAM to pay the taxes that accrue on fees payable to GGAM. There is no record of what the Parties meant when they used the phrase "tax effective methodology" and no such evidence has been offered in the extensive exchanges on the tax gross up issue. Therefore, the Tribunal **concludes that the [appellants] are not responsible for any tax gross up and have no obligation to indemnify the [respondents] for any taxes due on their fees or damages awarded by the Tribunal.**
>
> [emphasis in original; emphasis added in bold]

165 It is clear from the extract above that the Tribunal had specifically addressed their mind to the issue of the withholding tax. Having regard to the

wording of the MSA, the Tribunal concluded, in clear and unequivocal terms, that any damages to be awarded in respect of the management fees arising out the breach of the MSA would be a pre-tax figure. As the Judge put it, "GGAM has to pay its own taxes on the Tribunal's award to GGAM of US$85.2m" (Judgment at [89]).

166 Nothing in the Remedies Award is remotely suggestive of its enforcement being contrary to the public policy of Singapore. Simply stated, avoiding *any* non-compliance with Philippine tax law is wholly within the control of the appellants – their duties and obligations, if any, remain entirely unaffected by the Tribunal's award of damages in the Remedies Award.

167 That said, even if the dispositive portion of the Remedies Award does not reflect expressly the award of US$85.2m in damages for lost management fees to the respondents as being subject to the payment of the withholding tax, the Tribunal's clear intention for such damages awarded to be subject to the payment of the withholding tax, if any, cannot be doubted. This must be the case, following from the Tribunal's analysis and conclusion as laid out above. If the appellants are able to show that they have in fact discharged a withholding tax liability to the Philippine government on account of what is due to the respondents under the Remedies Award, we see no reason in principle why they ought not to be entitled to claim that such quantum shall go towards the discharge of the arbitration debt (or more accurately, the judgment debt, when the Remedies Award is ultimately recognised and enforced).

Conclusion

168 For the reasons given above, we find no merit in the appellants' submissions and dismiss the appeal. Costs follow the event and the respondents are accordingly entitled to an order for their costs of and incidental to the appeal. Having regard to the parties' respective costs schedules, we award the respondents the sum of $60,000, inclusive of disbursements, payable by the appellants to the respondents forthwith. The usual consequential orders shall apply.

Sundaresh Menon
Chief Justice

Judith Prakash
Justice of the Court of Appeal

Woo Bih Li
Judge of the Appellate Division

Yeo Khirn Hai Alvin *SC*, Leo Zhen Wei Lionel and
Wong Zheng Hui Daryl (WongPartnership LLP) for the appellants;
Bull Cavinder *SC*, Ong Chee Yeow and Kong Man Er
(Drew & Napier LLC) (instructed),
Lee Teck Chye Aaron, Marc Wenjie Malone and
Chong Xue Er Cheryl (Allen & Gledhill LLP) for the respondents.