

Case Comment

**FASHIONING PRAGMATIC REMEDIES TO ADDRESS
PRACTICAL REALITIES**

*Bloomberry Resorts and Hotels Inc v
Global Gaming Philippines LLC [2021] SGCA 94*

[2022] SAL Prac 3

KONG Man Er

*LLB (Hons) (King’s College London), BCL (University of Oxford);
Advocate and Solicitor (Singapore);
Director, Drew & Napier LLC.*

Melody **LAU**

*LLB (Hons) (National University of Singapore), BA (Hons) (Yale-NUS College);
Advocate and Solicitor (Singapore);
Associate, Drew & Napier LLC.*

I. Introduction

1 An arbitral tribunal may fashion pragmatic remedies to address the practical realities of a case, including ordering a party to an arbitration agreement to procure a third party to carry out certain acts.

2 In *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines*,¹ the Singapore Court of Appeal upheld the arbitral tribunal’s award of a “Constructive Remedy” which required the appellants to direct their controlling shareholder to facilitate a sale of the respondents’ shares. The Court of Appeal held that the Constructive Remedy was “a pragmatic solution to the

1 [2021] SGCA 94.

realities of the situation” wherein the respondents’ attempted sale of the shares had been repeatedly stymied by the appellants.²

II. Background facts

A. The parties’ dealings

3 On 9 September 2011, Bloomberry Resorts and Hotels Inc and Sureste Properties Inc (collectively, “Bloomberry”) and Global Gaming Philippines LLC and GGAM Netherlands BV (collectively, “GGAM”) entered into a management services agreement (“MSA”), pursuant to which GGAM was to manage the development and operation of the Solaire Resort and Casino (“Solaire”) in Manila, the Philippines.³

4 The MSA granted GGAM the option to purchase up to 10% of the shares in Bloomberry’s parent company, Bloomberry Resorts Corporation (“BRC”), a listed company in the Philippines. GGAM exercised the option and purchased 921,184,045 shares (“Shares”) in BRC for approximately US\$37.43m on 20 December 2012.⁴

5 The Solaire officially opened for business in mid-March 2013. Shortly after, Bloomberry terminated the MSA in July 2013 and GGAM commenced arbitration proceedings (“Arbitration”) against Bloomberry in September 2013 for wrongful termination of the MSA.⁵

6 Whilst steps were being taken to constitute the tribunal, GGAM tried to sell its Shares in BRC.⁶

2 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [136].

3 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [4]–[6].

4 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [7]–[8].

5 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [10]–[14].

6 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [15].

B. Bloomberry's interference with GGAM's sale of the Shares

7 From 15 January 2014, Bloomberry, Bloomberry's controlling shareholder ("PMHI"), and BRC took steps to prevent GGAM's sale of the Shares.

8 BRC requested the Philippine Stock Exchange ("Exchange") to suspend trading of all BRC shares for one week. When the Exchange lifted the suspension at GGAM's request, Bloomberry and PMHI filed an urgent petition with the Regional Court of Makati ("Regional Court") to prevent GGAM from dealing with the Shares. Bloomberry successfully obtained a preliminary injunction order ("Injunction Order") from the Regional Court to temporarily enjoin GGAM from selling the Shares, and writs of preliminary attachment and preliminary injunction (collectively, the "Writs") pursuant to the Injunction Order. On 11 March 2014, GGAM filed a petition for review on *certiorari* in the Philippine Court of Appeals ("Philippine CA"), seeking to reverse the Injunction Order and cancel the Writs.⁷

9 The tribunal was constituted on 28 March 2014. After the tribunal was constituted, GGAM filed a request for interim measures. On 9 December 2014, the tribunal issued an interim order ("Interim Order") expressly revoking the Injunction Order, and vacating and lifting the Writs. The tribunal directed parties to "assure its implementation" before the Philippine CA and the Regional Court. The tribunal further ordered that GGAM were henceforth free to deal with the Shares, including selling or disposing of the Shares at GGAM's discretion.⁸

10 Following the Interim Order, GGAM filed a manifestation and motion before the Philippine CA, seeking to annul the Injunction Order. GGAM also filed a manifestation to notify the Regional Court of the Interim Order.

7 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [16]–[21].

8 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [22]–[25].

11 However, Bloomberry sought to resist implementation of the Interim Order. Amongst others, Bloomberry took steps to oppose GGAM’s application before the Philippine CA to annul the Injunction Order. Bloomberry also filed a counter-manifestation before the Regional Court, arguing that the Interim Order filed by GGAM had not been duly authenticated by the tribunal, that GGAM had failed to provide verification of the manifestation, and that GGAM had failed to comply with the Philippines’ Rules of Court.⁹

C. The tribunal’s decision

12 In a partial award dated 20 September 2016¹⁰ (“Liability Award”), the tribunal found that Bloomberry was liable to GGAM for wrongful termination of the MSA, and that there was no basis to challenge GGAM’s title to the Shares.¹¹

13 Notwithstanding the Liability Award, Bloomberry continued to block GGAM’s sale of the Shares, including by renewing the Writs pursuant to the Injunction Order that had been issued by the Regional Court and refusing to provide its written consent to Deutsche Bank, the custodian of the Shares, to release the Shares to GGAM.¹²

14 On 27 September 2019, the tribunal issued a Remedies Award ordering Bloomberry to pay GGAM: (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 Bloomberry 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

9 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [28]–[29].

10 Bloomberry’s efforts to set aside the Liability Award were rejected by the Singapore Court of Appeal in *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 1 SLR 1045.

11 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [34]–[35].

12 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [38]–[48].

to Bloomberry (the “Constructive Remedy”). The Constructive Remedy consisted of two key components:¹³

(a) The “Payment Component”, which required Bloomberry to pay to GGAM, within 30 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.

(b) The “Direction Component”, which arises should Bloomberry fail to comply with the Payment Component. In that case, GGAM is entitled to sell the Shares on the market and Bloomberry are to direct PMHI to undertake steps to facilitate the sale of the Shares.

15 The Singapore High Court dismissed Bloomberry’s application to set aside the Remedies Award, and alternatively, to resist its enforcement. Bloomberry appealed against the High Court’s decision.

III. Issues on appeal

16 Bloomberry argued that 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 concerned a matter falling beyond the scope of submission to the Arbitration.¹⁴ Bloomberry pitched their argument at three levels:¹⁵

(a) First, the issue of Bloomberry’s interference with the Shares was 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

13 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [53]–[55].

14 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [64].

15 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [66].

Remedy, which was fashioned to enforce its own order and/or award.

(c) Third, there is a punitive element of the Constructive Remedy which is contrary to the express terms of the arbitration agreement.

17 In addition, Bloomberry argued that the tribunal made the Remedies Award in breach of natural justice, and that the enforcement of the Remedies Award would be contrary to the public policy of Singapore. The Court of Appeal dismissed Bloomberry's appeal.

IV. The Court of Appeal's analysis of the Constructive Remedy

18 The Court of Appeal found that the tribunal was competent to grant the Constructive Remedy. The issue of Bloomberry's interference was within the scope of submission to Arbitration, and the tribunal was entitled to fashion the Constructive Remedy as a pragmatic remedy to address the practical realities of Bloomberry's interference with GGAM's sale of the Shares.

A. Issue of interference with the Shares was submitted to the tribunal

19 The Court of Appeal found that the issue of Bloomberry's interference with the Shares was within the scope of submission to the Arbitration.

20 First, the Court of Appeal considered that the phraseology of the arbitration clause, which covers any dispute that "arises out of or is related to" the MSA, was sufficient to encompass any dispute in respect of the Shares since the Shares were acquired pursuant to a right granted to GGAM by the MSA. In doing so, the Court of Appeal applied the generous approach to the interpretation of arbitration clauses routinely adopted by the Singapore courts.

21 Second, the Court of Appeal held that the parties had expressly submitted the issue regarding the Shares to the Arbitration. The court considered it pertinent that the entire issue of the Shares and Bloomberry's interference with the Shares was live even *before* the tribunal was constituted. Furthermore, it was dealt with by the tribunal as one of its first steps upon constitution via the Interim Order. Yet, at no point did Bloomberry object to the tribunal's jurisdiction to make any order in respect of the Shares. On the contrary, in Bloomberry's urgent petition to the Regional Court to injunct GGAM from dealing with the Shares and memorandum filed in support thereof, Bloomberry had argued that the Shares were validly the subject of Bloomberry's counterclaim in the Arbitration.¹⁶

22 The Court of Appeal also observed that Bloomberry not only did not object to the tribunal's jurisdiction up to the point of the Liability Award, they actively submitted to it. Bloomberry expressed no objections to the consistent position in GGAM's pleadings and correspondence to the tribunal that GGAM were seeking damages relating to the Shares, and had themselves counterclaimed for the return of the Shares issued under the MSA.¹⁷ Whilst Bloomberry had argued that the tribunal should decline to order the Constructive Remedy, the Court of Appeal drew a distinction between an argument on the merits and a reservation on jurisdiction. Understood properly, Bloomberry's arguments fell within the former.¹⁸

23 Where Bloomberry raised any jurisdictional arguments, they did so too late in the day. Bloomberry raised their jurisdictional argument for the first time in their sur-rejoinder filed on 31 August 2017, close to one year after the tribunal released the Liability Award. In the Court of Appeal's view, the fact that Bloomberry only questioned the tribunal's jurisdiction after the tribunal found against Bloomberry in the Liability

16 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [84]–[86].

17 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [87]–[91].

18 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [92]–[93].

Award undermined the sincerity of Bloomberg’s objections, and “smacks of an afterthought and a contrivance”.¹⁹

B. Constructive Remedy did not affect the rights of a third party

24 The Court of Appeal also rejected Bloomberg’s argument that the Direction Component of the Constructive Remedy impermissibly affects the rights of a third party and non-party to the Arbitration, PMHI, for three reasons:

(a) First, the tribunal had made a factual finding that PMHI was Bloomberg’s agent, and this could not be challenged even if erroneous.²⁰

(b) Second, and in any event, the Direction Component of the Constructive Remedy did not make any orders that purported to bind PMHI. It merely obliged *Bloomberg* to direct their agent and controlling shareholder to co-operate. Nor did the tribunal make any orders that would affect the rights of PMHI. Significantly, the Court of Appeal opined that the Direction Component of the Constructive Remedy was a legitimate “practical mechanism” fashioned by the tribunal to facilitate the release and sale of the Shares.²¹

(c) Third, GGAM could not hold PMHI liable for any failure of Bloomberg to comply with the Direction Component of the Constructive Remedy, as it was for Bloomberg to secure PMHI’s assistance if required.²²

C. Constructive Remedy was compensatory and not coercive

25 The Court of Appeal further rejected Bloomberg’s argument that the tribunal had impermissibly sought to enforce

19 *Bloomberg Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [98].

20 *Bloomberg Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [103].

21 *Bloomberg Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [104]–[106].

22 *Bloomberg Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [106].

its own orders (*ie*, the Interim Order and the Liability Award) through the imposition of the Constructive Remedy.

26 The Court of Appeal observed, as a starting point, that the powers exercisable by an arbitral tribunal comprise (a) procedural powers; (b) substantive powers; and (c) remedial powers. Unlike procedural powers which do not purport to determine the parties' rights and liabilities conclusively, an arbitral tribunal exercises substantive powers to render an award that substantively determines the rights and liabilities of the parties to the arbitration, granting the appropriate relief where necessary. To this end, an arbitral tribunal's remedial powers are broad and akin to a court's powers.²³

27 Notwithstanding, s 12 of the International Arbitration Act 1994²⁴ does not confer upon arbitral tribunals power to grant *all the reliefs* that the High Court can grant. An arbitral tribunal's power to grant a remedy or relief does not include the High Court's coercive powers of enforcement. The enforcement of arbitral awards, orders and directions is a matter squarely within the domain of the courts.²⁵ The Court of Appeal noted that if the tribunal had in fact made an award of damages for Bloomberry's failure to comply with the tribunal's orders, this would be beyond the pale.²⁶

28 The Court of Appeal held that, having carefully considered the reasoning of the tribunal in the Remedies Award, the true purpose of the Constructive Remedy was to compensate GGAM for the loss occasioned to them from January 2014 onwards when Bloomberry first interfered with the intended sale of the Shares, and not to mandate enforcement of its prior orders.²⁷ The Court

23 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [109]–[111].

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25 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [112]–[114].

26 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [118].

27 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [123].

of Appeal found it important to appreciate how the tribunal arrived at its decision to impose the Constructive Remedy.

29 Importantly, the Court of Appeal found that the tribunal’s reasoning in its Remedies Award “demonstrates a clear compensatory methodology employed in awarding damages to [GGAM] for their losses arising from [Bloomberg’s] interference with the Shares”.²⁸ The Court of Appeal based its finding on, *inter alia*, the following:²⁹

(a) The first question that the tribunal considered was *whether* Bloomberg’s continuing non-compliance with the Interim Order and Liability Award, the resulting interference with the right of GGAM to dispose of the Shares, and Bloomberg’s stated intent to continue to interfere, constituted grounds for a finding of liability. The tribunal took pains to detail Bloomberg’s instances of obstruction, which did not merely consist of non-compliance with the Interim Order and Liability Award. The tribunal only proceeded to determine the value of the Shares for the purpose of computing damages *after* finding that Bloomberg were liable to GGAM for damages for their interference with the Shares.

(b) The tribunal was mindful to safeguard against under-compensation or over-compensation. To avoid double recovery, the tribunal determined that Bloomberg must pay the full value of the Shares *in exchange for* GGAM’s transfer of the Shares to Bloomberg. The tribunal further rejected GGAM’s proposed “Highest Intermediate Value” (“HIDV”) approach of taking the highest price at which GGAM’s sale would have occurred once the restriction began. Additionally, the tribunal applied a block sale discount to account for the Shares being a block of thinly-traded Shares.

28 *Bloomberg Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [130].

29 *Bloomberg Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [122]–[136].

(c) The tribunal chose the date of the Interim Order to determine the value of the Shares, being the date on which the tribunal had first confirmed GGAM’s right to sell the Shares. In doing so, the tribunal was “left in no doubt” that at this date, GGAM would have tried to sell the Shares had Bloomberry allowed them to do so, and that the deprivation of this opportunity warranted compensation.

30 The Court of Appeal held that the damages awarded by the tribunal were for Bloomberry’s *interference* with the Shares, and not their failure to comply with the Interim Order and Liability Award. 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 the light of all the circumstances*, and cannot be faulted for doing so.³⁰

31 The Court of Appeal also found untenable Bloomberry’s argument that they had, by virtue of the Direction Component of the Constructive Remedy which required Bloomberry to withdraw the Injunction Order and Writs in the Regional Court, lost their right to pursue their passive remedy of resisting enforcement of the Remedies Award. Bloomberry were in fact resisting enforcement of the Remedies Award in the present action.³¹

D. Constructive Remedy was not punitive

32 The Court of Appeal also rejected Bloomberry’s argument that the Constructive Remedy was punitive and therefore contrary to the parties’ agreement that an award may not include punitive damages. Bloomberry’s own position before the tribunal was that a valuation method that compensated GGAM for actual damages, one not based on the HIDV methodology, would not be punitive. As the tribunal had expressly rejected the HIDV valuation method

30 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [136].

31 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [137]–[141].

in the Remedies Award, this rendered Bloomberry's contention moot.³²

33 Further, the Court of Appeal held that the tribunal's passing use of the term "recalcitrance" in the Remedies Award was not sufficiently probative of the Constructive Remedy being a punitive award of damages. The Court of Appeal agreed that it was within the tribunal's remit to criticise a party for unscrupulous conduct. Ultimately, the tribunal did not seek to use the Constructive Remedy to punish any aberrant behaviour on the part of Bloomberry.³³

V. Key takeaways

34 The Court of Appeal's decision recognises the broad powers of arbitral tribunals to fashion pragmatic remedies to address the practical realities of a case. These remedies include compelling a party to the arbitration agreement to take steps to ensure that third parties carry out specific actions. However, the party against whom the tribunal's order is made may seek to set aside the tribunal's order on the grounds that the grant of the remedy exceeds the scope of the parties' submission to arbitration or is an impermissible attempt by the tribunal to enforce its own orders. In these circumstances, the court will carefully consider the arbitral tribunal's reasoning, the parties' conduct and submissions in the arbitration, and the true purpose of the remedy granted by the tribunal. The Court of Appeal's decision provides useful guidance to arbitrators and practitioners on the scope of pragmatic remedies that an arbitral tribunal can fashion to address the practical realities of a case.

32 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [145]–[148].

33 *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines* [2021] SGCA 94 at [149]–[150].