[2013] CCJ 5 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No CV 7 of 2012
BZ Civil Appeal No 4 of 2011

BETWEEN

BCB HOLDINGS LIMITED
THE BELIZE BANK LIMITED **APPELLANTS**

AND

THE ATTORNEY GENERAL OF BELIZE **RESPONDENT**

Before The Rt Honourable **Mr Justice Byron, President**
And The Honourables **Mr Justice Saunders**
Mme Justice Bernard
Mr Justice Wit
Mr Justice Anderson

Appearances

Mr Edward Fitzgerald QC, Mr Eamon Courtenay SC and Mrs Ashanti Arthurs-Martin for the Appellants

Mr Michael Young QC, Ms Magalie Perdomo and Ms Iliana Swift for the Respondent

JUDGMENT
of
The President and Justices Saunders, Bernard, Wit and Anderson
Delivered by
The Honourable Mr Justice Adrian Saunders
and
The Honourable Mr Justice Winston Anderson
on the 26th day of July 2013

JUDGMENT OF THE HONOURABLE MR JUSTICE SAUNDERS

[1] The London Court of International Arbitration ("the Tribunal") determined that the State of Belize should pay damages for dishonouring certain promises it had made to two commercial companies, namely, BCB Holdings Limited and The Belize Bank Limited ("the Companies"). The promises were contained in a Settlement Deed as Amended ("the Deed") executed in March 2005. The Deed provided that the Companies should enjoy, from the 1st day of April, 2005, a tax regime specially crafted for them and at variance with the tax laws of Belize.

[2] This unique regime was never legislated but it was honoured by the State for two years until it was repudiated in 2008 after a change of administration in Belize following a General Election. The Companies then commenced arbitration. The Tribunal found the State of Belize in breach and awarded damages against Belize in addition to arbitration costs and legal, professional and other fees ("the Award"). The Award totalled approximately $44 million and it carried interest at the rate of 3.38% compounded annually. The damages were calculated on the hypothesis that the Companies would have continued to benefit from the special tax regime at least until 2020; the year when, in keeping with the laws of Belize, BCB Holdings Limited's status as a public investment company was due to expire.

[3] The Companies are applying now to enforce the award. The State resists enforcement. The critical question is whether it is or is not contrary to public policy for the Court to enforce the same. For the reasons that follow it is our judgment that it would be contrary to public policy to recognise the Award and accordingly we decline to enforce it.

A brief background

[4] The Deed arose, at least in part, out of the stated intention of the Minister of Finance and the Companies to settle a pre-existing dispute between them. The prior dispute had to do with a share purchase deed and an option deed the parties had previously negotiated. That initial dispute had itself been submitted to the Tribunal for resolution by arbitration

because of certain claims made by the Companies against the State. The Deed recorded the Companies' agreement not to pursue further these existing claims. In return, the Minister agreed to grant the Companies the special tax regime to which reference was earlier made. The Deed expressed that its provisions were to be governed by English law and it contained an arbitration clause stipulating that either party could refer to the Tribunal for resolution of disputes that were not amicably settled.

[5] The Deed was executed by the Prime Minister (the then Minister of Finance) and also by the Attorney General of Belize. The document was expressed to be "confidential". The parties agreed not to make any announcement concerning its contents or any ancillary matter. That did not, however, prevent any announcement being made or any confidential information being disclosed by a party -

> "a) with the written approval of the other parties, which in the case of any announcement shall not be unreasonably withheld or delayed; or
>
> b) to the extent required by law or any competent body or stock exchange."

[6] For well over a year after its execution, the Commissioner of Income Tax was unaware of the Deed's existence or its implications. On 10th July, 2006 the Commissioner wrote to the Companies seeking their compliance with the published tax laws of the land. The Companies responded by instructing the Commissioner to liaise directly with the Minister of Finance. Three months later the Commissioner wrote back to the Companies accepting the Companies' position and retracting what initially was his. For a period of two years, the Companies enjoyed the tax regime set out in the Deed.

[7] In February, 2008, following a general election, a new administration was sworn into office in Belize. A few months later the Commissioner of Income Tax assessed the Companies for tax on the basis of Belize law in respect of the period the Companies had enjoyed the benefits under the Deed. The Commissioner rejected the tax returns filed by the Companies for the two previous years and required the Companies to comply with the law. The Commissioner informed the Companies that the Deed did not supersede the country's revenue laws. This turn-around by the Government constituted a repudiation of

the promises made in the Deed and motivated the Companies once again to resort to arbitration.

The Arbitral Award

[8] The Tribunal was duly constituted but the State did not participate in the arbitration. It did not appear. It did not make any submissions to the Tribunal. It did not enter a defence to, nor did it comment upon, the Companies' submissions. The Tribunal nonetheless rightly felt that it still had an obligation to take into account such matters as it considered might represent Belize's position on the issues in dispute. There was some material that enabled it so to do. Satellite proceedings had been tried in the Belize courts in which the State had participated and been legally represented. The Tribunal concluded that the submissions made in those proceedings and the judgments of the courts provided an indication of what arguments the State of Belize would have likely pursued before the Tribunal in relation to the matters in dispute.

[9] The Tribunal considered that it had jurisdiction to entertain the dispute. It dismissed any notion that the dispute was not arbitrable whether because tax-related matters were involved or because of the alleged incompatibility of the promises made to the Companies with Belize law. In making these findings the Tribunal emphasised that it was pronouncing not upon the taxation regime of Belize but instead upon the contractual warranties the Government, in the exercise of its sovereign power, had made to the Companies. The Tribunal noted that the Crown at common law had a wide prerogative power to enter into contracts and this power was unfettered by restrictions as to subject matter or persons. The Tribunal asserted that the only constraint on this wide prerogative power is that any such contract: (i) should be entered into in the ordinary or necessary course of Government administration; (ii) must be authorised by the responsible Minister, and that (iii) any payments by the Government to honour any such contract must be covered by, or referable to, an appropriate Parliamentary grant.

[10] The Tribunal decided that the first of these three conditions was demonstrably established as the Deed gave the Government considerable financial benefits, including the Companies' agreement not to re-open the previous disputes between the parties. The Tribunal reasoned that it was not unusual for governments to enter into settlement arrangements which involved concessions or reductions. As to the second condition, according to the Tribunal, the Prime Minister clearly had actual and ostensible authority both to make the contractual warranties that were made and to assure the Companies that they would indeed enjoy the promised benefits. The Tribunal stated that the third condition did not apply in this case. No specific reason was given for this finding but one can infer that it was because the Deed did not require the Government to make un-appropriated payments to anyone.

[11] The Tribunal did not justify their decision only on the wide prerogative power of the Government. The Tribunal also held that section 95 of the *Income and Business Tax Act*[1] expressly authorised the Government, through the Minister of Finance, to make and guarantee the promises contained in the Deed. As section 95 is a short section we take the liberty of setting it out in full:

> "(i) The Minister may remit the whole or any part of the income tax payable by any person if he is satisfied that it would be just and equitable to do so.
>
> (ii) Notices of such remission shall be published in the Gazette".

In support of its findings that the Agreement was not illegal and the dispute was arbitrable the Tribunal cited several authorities.[2]

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[1] *Income and Business Tax Act*, Cap 55 [Belize]

[2] These included but were not limited to *The Attorney General of New South Wales v Bardolph* [1934] 52 CLR. 455; *The Attorney General of Saint Lucia v Martinus Francois,* Civil Appeal No 37 of 2003; *In re D.H. Curtis (Builders) Ltd* [1978] 2 WLR 28; *Marubeni Hong Kong and South China Ltd v. Government of Mongolia* [2004] 2 Lloyd's Rep. 198; *Attorney-General v.Silver* [1953] AC 461, Arbitral awards made in *Alcoa Minerals of Jamaica, Inc. v. Government of Jamaica, Engineering Company (Italy) v. Engineering Company (Greece) and Producer (Greece), TCSB Inc. v Iran and Paushok and Others v. the Government of Mongolia* and an Article by Emmanuel Gaillard on *Tax Disputes Between States and Foreign Investors* "Tax Disputes Between States and Foreign Investors" [1997] NYLJ 217

The decisions of the Courts below

[12] The Tribunal's award cannot be enforced in Belize without an application first being made to the court to enforce it. The legislative basis for enforcement is the *Arbitration (Amendment) Ordinance* No 21 of 1980[3] ("the Act"). The application to enforce was made to a trial judge in Belize. On this occasion the State appeared and made several submissions strenuously resisting the application.

[13] In essence, the State submitted to the judge that (a) the relevant provisions of the Act were in fact not part of the law of Belize; (b) the subject matter of the arbitration was non-arbitrable and (c) it would be contrary to public policy to enforce the Award. The judge rejected each of these arguments. The judge noted that section 28 of the Act enshrines the principle that an arbitral award, made pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention")[4] is, for all purposes, binding on those who are parties to the Convention. The judge held that this Award is a Convention Award. The judge therefore weighed this principle against the provisions of section 30 of the Act which enjoins the court not to refuse enforcement of a Convention award except upon very limited grounds which are specifically prescribed. Citing the case of *P T Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA*[5], the judge explained that the courts in Belize ought to lean toward enforcement of Convention awards unless to allow enforcement would "shock the conscience" or "is clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public". The judge concluded that the Deed was a lawful and legally binding commercial agreement and that to refuse enforcement would transgress established applicable legal principles and practices. He therefore ordered that the Companies be at liberty to enforce the Award in the same manner and to the same effect as a local judgment. The State appealed the judge's decision to the Court of Appeal.

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[3] Arbitration Act, Cap 125 [Belize]

[4] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (adopted 10 June 1958, entered into force on 7 June 1959) 330 UNTS 3 (New York Convention)

[5] [2007] 1 SLR (Reissue) 597

[14] It is a matter of great regret that the Court of Appeal determined the appeal on a consideration only of the State's submission (discussed more fully in the judgment delivered by Justice Anderson), that the Act was invalid and that for this reason enforcement of the Award should be refused. Two of the three judges upheld that submission. The third, Mendes JA, dissented. In his opinion the Act was valid and therefore the other submissions regarding enforceability were not at all moot.

[15] No other issues were discussed in the judgment of the Court of Appeal. Mendes JA expressed his willingness to pronounce on the other issues in the case which, given his opinion that the Act was valid, would have arisen. Since his views on those other issues would have been otiose, given that the opinions of his colleagues had already determined the appeal, he considered ultimately that it was superfluous to express them in his judgment.

The issues

[16] Three central issues arise from the appeal of the Companies to this Court:

1. Is the Act valid? Was its passage an improper encroachment by the Belize colonial legislature upon the preserve of the Crown? Should the claim for enforcement be dismissed on this ground?

2. If the first point is decided in favour of the Companies and the Act is valid and applicable, should this Court remit the case to the Court of Appeal so that it can first pronounce on the questions whether the Award should not be enforced because it is non-Arbitrable and/or because it is contrary to public policy?

3. If the Act is not invalid and the case is not remitted, should the application to enforce the Award be refused either because it would be contrary to public policy to do so (the public policy point) or because it is in respect of a matter which was not capable of settlement by arbitration (the non-Arbitrability point)?

[17] For the reasons set out by Justice Anderson, we are of the view that the Act is not invalid and the case should not be remitted. As our opinion on the public policy point is

dispositive of the appeal we consider it unnecessary to consider the non-Arbitrability point.

The Public Policy Point

The submissions of the parties

[18] On this point, the State submits that it was never bound by the agreement that gave rise to the Deed because implementation of the same without parliamentary approval violates the country's fundamental law. While the Minister, in making agreements, could ordinarily be taken to have implicitly promised that he would secure any necessary legislative approval, the Award on its face discloses that no such approval was ever sought or obtained and there never was any intention to seek or obtain such approval. In these circumstances, counsel submits, the Court should not enforce the Award as it is repugnant to the Belize legal order.

[19] The Companies, on the other hand, argue that the State benefited from the Agreement because the Deed amicably settled prior and pending claims of the Companies against the Government. The Tribunal has definitively ruled that the Agreement was not illegal and the Court should not now re-open the merits of what has already been determined. The State could and should have raised, before the Tribunal or before the English supervisory courts, any arguments it now wishes to raise on the legality of the Deed. The Award is final and, in keeping with the pro-enforcement bias courts should have towards Convention Awards, this Court should enforce it. The Companies support their submissions with reference to several authorities[6].

The broad approach to the public policy exception

[20] Competing policies are invariably at play when a court is called upon to decide whether to enforce an arbitral Award. The court must balance divergent policies and interests and apply to them principles of proportionality.

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[6] These included: *Soinco SACI and Another v Novokuznetsk Aluminium Plant and Others* [1998] 2 Lloyd's Rep. 337; *Westacre Investments Inc v Jugoimport-SPDR Holding Co. Ltd* [2000] 1 QB 288; and *Kersa Holding Company Luxembourg v Infancourtage, Famajuk Investment and Isny Kersa Holding Company Luxembourg v Infancourtage, Famajuk Investment and Isny* 24 November 1993, reported in Yearbook Commercial Arbitration, A.J. van den Berg ed., Vol. XXI, 1996, p.624

[21] Almost two hundred years ago, Burrough J. in *Richardson v. Mellish*[7] famously noted that "public policy" is a very unruly horse. Once you get astride it, he warned, you never know where it will carry you. This admonition is especially prescient because the concept of public policy is fluid, open-textured, encompassing potentially a wide variety of acts. It is conditioned by time and place. Religion and morality, as well as the fundamental economic, social, political, legal or foreign affairs of the State in which enforcement is sought, may legitimately ground public policy concerns. Whether those concerns are of a substantive or procedural nature, if they are fundamental to the polity of the enforcing State, they may successfully be invoked.

[22] Since the Award here in question is a foreign Award governed by English law, the question that naturally arises is, whose public policy is being interrogated? Is there some international public policy which must be used as a yardstick against which to measure those matters which it is said are contrary to public policy?

[23] Public policy in this case must in the first instance be assessed with reference to the values, aspirations, mores, institutions and conception of cardinal principles of law of the people of Belize. It is in Belize that the Companies seek to enforce the Award and it is the courts of Belize that must make the assessment as to what, if anything, is offensive to public policy. It is also in Belize that the underlying obligations and promises were to be performed. Article V. 2(b) of the Convention provides that enforcement of an award may be refused, if enforcement would be contrary to *"*the public policy of *that country";* that is, in this case, the State of Belize. But this does not mean that, although there is no universal standard of "public policy"[8], it would be appropriate for courts to adopt a parochial approach. As Cardozo J. reminds us in *Loucks v Standard Oil Co. of New York*[9], the courts are not free to refuse to enforce a foreign judgment at the pleasure of the judges or to suit the individual notion of expediency or fairness.

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[7] (1824) 2 Bing 229, 252
[8] See: International Law Association's Final Report on Public Policy 2002 at [21]
[9] 224 N.Y. 99

[24] Where enforcement of a foreign or Convention award is being considered, courts should apply the public policy exception in a more restrictive manner than in instances where public policy is being considered in a purely domestic scenario. This is because, as a matter of international comity, the courts of one State should lean in favour of demonstrating faith in and respect for the judgments of foreign tribunals. In an increasingly globalised and mutually inter-dependent world, it is in the interest of the promotion of international trade and commerce that courts should eschew a uniquely nationalistic approach to the recognition of foreign awards.

[25] The Court must be alive to the fact that public policy is often invoked by a losing party in order to re-open the merits of a case already determined by the arbitrators[10]. Courts must accordingly be vigilant not to be seen as frustrating enforcement of the Award or affording the losing party a second bite of the cherry. To encourage such conduct would cut straight across the benefits to be derived from the arbitral process and undermine the efficacy of the parties' agreement to pursue arbitration[11].

[26] An expansive construction of the public policy defence would vitiate the Convention's attempt to remove pre-existing obstacles to enforcement and to accommodate considerations of reciprocity[12]. For all these and other reasons the Convention has a definite pro-enforcement bias and interpretation of what is contrary to public policy under the Belize statute should also reflect this bias. There is universal consensus that courts will decline to enforce foreign arbitral Awards only in exceptional circumstances. In particular, this restrictive approach is adopted in relation to Convention Awards therefore, only where enforcement would violate the forum state's most basic notions of morality and justice[13] would a court be justified in declining to enforce a foreign Award based on public policy grounds. Enforcement would be refused, for example, if the Award is "at variance to an unacceptable degree with the legal order of the State in which

[10] See: *A v. R (Arbitration: Enforcement)* [2009] 3 HKLRD 389 at page 395 [24]
[11] *A v. R* [2009] 3 HKLRD 389 at page 395 [25]
[12] *Parsons & Whittemore Overseas Co. Inc v. Societe Generale De L'Industrie Du Papier (Rakta) and Bank of America* 508 F.2d 969(2d Cir. 1974)
[13] *Parsons & Whittemore Overseas Co. Inc v. Societe Generale De L'Industrie Du Papier (Rakta) and Bank of America* 508 F.2d 969 (2d Cir. 1974)

enforcement is sought inasmuch as it infringes a fundamental principle".[14] In such a case the infringement must constitute "a manifest breach of a rule of law regarded as essential in the legal order".[15] In this vein, the Indian Supreme Court has stated that it will decline to enforce an Award only if enforcement would be contrary to (i) the fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.[16]

[27] The International Law Association (the "ILA") has recommended the use of the phrase "international public policy" as an appropriate description of the restrictive scope of public policy that should be applied to Convention Awards.[17] The phrase is used in contra-distinction to "domestic public policy". Its content includes such matters as (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; and (ii) rules designed to serve the essential political, social or economic interests of the State.

[28] We agree that to claim the public policy exception successfully the matters cited must lie at the heart of fundamental principles of justice or the rule of law and must represent an unacceptable violation of those principles. The threshold that must be attained by the State to establish the public policy exception is therefore a very high one.

Public Policy and the underlying Agreement

[29] The rival submissions of the parties raise two important preliminary questions. Is it permissible for the Court now to examine the underlying Agreement reflected in the Deed? Should the Court re-examine the legality of the Deed even after the Tribunal has specifically addressed that issue and found the Deed to be valid?

[30] In our view, the circumstances of this case lend themselves to a positive answer to both questions. There is no controversy as to the conduct of the parties in the making of the

[14] *Krombach v. Bamberski* [2001] 3 WLR 488 at [37]
[15] *Krombach v. Bamberski* [2001] 3 WLR 488 at [37]
[16] See: *Renusagar Power Company Ltd v. General Electric Company* (1994) AIR 860 at [66]
[17] See: ILA Final Report on Public Policy 2002, http://www.newyorkconvention.org/publications/full-text-publications/general/ila-report-on-public-policy-2002

Agreement. No one has any quarrel with the manner in which the Award sets out the basic terms of the Minister's Agreement with the Companies. The warranties and promises made to the Companies, the consideration given in exchange, these are all agreed. There is no dispute that in 2008, when a new Minister of Finance assumed office, further implementation of the Agreement was halted. The reasons put forward to justify premature termination of the Agreement are also undisputed. In short, this is a case where all the relevant facts are uncontested matters of public record accepted by both sides. It is necessary only to decide whether, on the basis of these uncontroverted matters, enforcement of the Award will violate "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal".[18]

[31] It may be possible here to make that decision by confining oneself to the dispositive aspect of the Award, but given the circumstance that the factual background is agreed and since the court is performing, essentially, a balancing exercise between the competing public policies of finality and illegality, the nature and seriousness of the alleged illegality and the extent to which it can be seen that the same was addressed by the arbitral tribunal are factors we must take into account.[19] If there is illegality we must also consider the extent to which it impacts on the society at large and is offensive to primary principles of justice.

[32] We respectfully disagree with the opinion of the trial judge that, because the Tribunal had considered and rejected the idea that the Deed was illegal, we are necessarily precluded from considering afresh that issue. We agree with Colman J who held in *Westacre* that any such estoppel must yield to the public policy against giving effect to transactions obviously offensive to the court[20]. In the context of the credible allegations of illegality put forward by the Government, in order to assess whether this transaction is truly offensive the court *must* examine the Agreement and the promises the Minister made to the Companies against the backdrop of fundamental principles and rules.

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[18] See Cardozo J in *Loucks v Standard Oil Co. of New York* 224 N.Y. 99 at 111
[19] *Westacre Investments Inc v Jugoimport-SPDR Holding Co. Ltd* [1999] 3 All ER 864 at 885 H
[20] See *Westacre Investments Inc v Jugoimport-SPDR Holding Co. Ltd* [1998] 2 Lloyd's Rep. 111, 118

The promises made by the Minister

[33] The promises made by the Minister were designed to affect, indeed to alter, the Companies' tax obligations under existing law. The Deed looked to past as well as future obligations. As to those of the past, whatever may have been the factual position in relation to the Companies' liabilities as at the date of its execution, the Deed determined that, for "all periods up to and including 31st March 2005", the Companies had "satisfied in full all and any such liabilities, assessments or claims". The Deed further assured the Companies that all their filings, in relation to any form of taxation required to be made on their behalf, were complete and up to date.

[34] As to the future, the Deed recites at Clause 4.1(c) that

> "to the extent that [the Companies] are liable to pay any Business Tax and/or Income Tax in respect of any period beginning on or after 1st April 2005, the calculation of the raising of any assessments or claims in respect of such Business Tax and/or Income Tax shall be calculated solely and exclusively on the basis that … "

The Deed at this point goes on at some length to construct in careful detail a special tax regime reserved for the Companies; a regime that all parties readily acknowledge is at variance with the extant revenue laws of Belize and one which conferred significant benefits on the Companies. To cite just one example of this variation, section 21(3) of the Income and Business Tax Act states:

> "The excess of any business tax paid by any person other than an employed person during the basis year over the income tax due on the chargeable income of such person shall be carried forward as an expense to the next basis year."

On the other hand Clause 4.1(c)(iii) of the Deed states

> "Business tax is a withholding tax and an advance payment of final Income Tax and any amount paid in Business Tax which is in excess of the amount due in Income Tax will constitute an overpayment of Income Tax and shall be offset on a quarterly basis against Business Tax and payable in subsequent financial years."

[35] The Award discloses that the Deed was buttressed by other assurances made to the Companies. The Deed was accompanied by a letter dated 21st June 2006 addressed to the Chairman of the Companies in which the Minister of Finance "*irrevocably confirmed*" that all business and income tax obligations of the Companies would be governed by the terms of the Deed. The Minister also confirmed that the Deed had "*irrevocably fixed*" the rate of income tax payable by the Companies for as long as BCB Holdings remained a Public Investment Company *notwithstanding anything contained in the Income and Business Tax Act to the contrary*" (the italics are all those of the Tribunal in its published Award).

[36] In sum, in exchange for settling the prior arbitral proceedings, the Deed purported to create and guarantee to the Companies a unique tax regime that was unalterable by Parliament. So, for the sake of argument, if BCB remained a Public Investment Company for the next 15 years, the State of Belize would be in breach of contract if its National Assembly, at any time during that period, without the Companies' concurrence, enacted any revenue measure applicable to the Companies that diverged from the Deed. The promises made by the Minister were thus intended to supplant and supersede all current and any future statutes enacted by the National Assembly.

[37] The Tribunal addressed the issue of the legality of the Deed by asking itself whether the Minister had actual and/or ostensible authority to make these promises to the Companies. The Tribunal held that the Minister did have such authority. The Tribunal rested this conclusion on two premises, firstly, the extensive prerogative powers of the Executive to make agreements and secondly, section 95 of the Income and Business Tax Act[21]. The Tribunal noted that it is commonplace in international investment contracts for a host country to promise a foreign investor or contractor tax incentives as an inducement to make the investment or carry out an activity which is the subject of such agreements. The judge at first instance affirmed these conclusions of the Tribunal.

[21] See [11] above where the section is set out

[38] We agree that the Minister does indeed possess wide prerogative powers to enter into agreements. The Executive may do so even when those agreements require legislative approval before they can become binding on the State. This was also the opinion of the Eastern Caribbean Court of Appeal in the Saint Lucian case of *The Attorney-General v. Francois*[22], an authority cited by the Tribunal. The judge's focus, however, ought logically to have extended beyond the issue of whether it was lawful *to make* the promises. The making of a Government contract may be a matter quite distinct from its enforceability against the State as the *Francois* case also demonstrates.

[39] It was necessary for the judge to consider whether the Award was contrary to public policy given the *implementation* of the underlying agreement *without parliamentary approval and without any intention on the part of the contracting parties to seek such approval*. This was an issue that was not at all considered by the Tribunal and the judge failed to advert to it. *Francois* concerned a guarantee entered into by the Saint Lucia Minister of Finance. No parliamentary approval had been given for the grant of the guarantee. The State was subsequently obliged to make good on the instrument. A citizen challenged its legality. The court held that nothing prevented the Minister from *giving* the guarantee, but the State only became *bound* by the same *after* Parliament had approved the funds necessary to discharge it. As Parliament had done so before the guarantee was honoured there was no basis for the citizen's complaint.

Executive prerogative and the Separation of Powers

[40] If it turns out that the Minister had no power to make or implement the promises he made, his lack of authority would be a potent factor in any assessment of the legality of the Agreement and the question whether enforcement of the Award is contrary to public policy. The Companies accept that the Minister's authority to make the Agreement could only have been premised either on prerogative power or on section 95 of the Income and Business Tax Act[23]. As to the former, the Companies submit that the Deed was "a detailed commercial agreement" between two parties dealing with matters of "a

[22] Civil Appeal No 23 of 2003, Judgment of the Court of Appeal delivered 29th March 2004
[23] See [11] above where the section is set out in full

significant financial value"; that both sides must have sought legal advice with its drafting; and that it was entered into in order to settle prior arbitral proceedings in which claims amounting to "considerable sums of money" were being made against the State. None of these points is disputed although it must be emphasised that this Court has no material before it to indicate the reasonableness or strength of the claims the Companies allegedly had against the Government. The Court also has no evidence before it of an approximate figure that might reasonably represent the "considerable sums" mentioned by the Companies for which the State may have been liable if the prior dispute had been settled or arbitrated upon terms favourable to the Companies. These are, however, not matters of great significance. The crucial question is whether any of the points made above to justify the exercise of prerogative power, or all of them taken together, serves to render enforceable an agreement made by the Executive branch of government, without parliamentary approval, to except a taxpayer from obligations contained in current and future revenue statutes.

[41] To negotiate an agreement with a company that can properly be described as a "detailed commercial" or "business" agreement or "settlement deed" does nothing to enhance the capacity of the Executive unilaterally to provide exceptions from the country's revenue laws on the strength of Executive prerogative. The Government either has or lacks such capacity. It is trite that whatever legal advice the Minister procured does not bind a court and, interestingly, the State today actually has radically different advice from that which apparently informed the making of the Deed. The idea that the Minister who signed the Deed (or his Government) was attempting, in good faith, to settle a prior dispute is also quite beside the point. Neither a noble motive, as may have been the case, nor an executed Deed excuses or repairs an obvious excess of jurisdiction or serious breach of the fundamental principle of Separation of Powers.

[42] The latter principle goes back to the writings of Montesquieu. So far as it relates to a strict division between the Executive and the Legislature, with the growing complexity of the machinery of government, the principle may have lost some of its lustre. In particular, in relatively small Parliaments like Belize's, and where the Executive is largely drawn

from the legislature, the separation between these two bodies often appears blurred. But it is erroneous to assume that there is not an important division between the functions performed by each branch. The struggle to maintain this important distinction is as old as the epic battles waged between Chief Justice Coke and King James I who sought to use Royal proclamations to make law without Parliament's approval.[24] The structure and content of the Belize Constitution reflects and reinforces the distinction. The Constitution carefully distributes among the branches the unique functions that each is authorised to exercise.[25] The rights and freedoms of the citizenry and democracy itself would be imperilled if courts permitted the Executive to assume unto itself essential law-making functions in the absence of constitutional or legislative authority so to do. It would be utterly disastrous if the Executive could do so, selectively, via confidential documents. In young States especially, keen observance by the courts of the separation of powers principle remains vital to maintaining the checks and balances that guarantee the rule of law and democratic governance. Caribbean courts, as part of their general function of judicial review, have a constitutional obligation to strike down administrative or executive action that exceeds jurisdiction or undermines the authority of the legislature.[26]

[43] Section 68 of the Constitution empowers the National Assembly to make laws. The power to impose, alter, regulate or remit taxes and duties is a power constitutionally vested in the legislature. Only Parliament, or a body specifically delegated by Parliament, may lawfully grant exceptions to the obligation to obey the country's revenue laws. Counsel for the Companies submitted that the Deed merely resolved "uncertainties and ambiguities" in the law, but the Executive Branch, whether for the purpose of "settling" claims made against it or otherwise, has no sovereign power to resolve such uncertainties and ambiguities. That is the function of the parliament and the courts. Governments in the region are authorised to make promises to public or private bodies that the latter may enjoy derogations from the revenue laws of the State, but whenever this occurs the

[24] See *Case of Proclamations* (1611) 12 Co. Rep. 74 which established the principle that the Executive has no general inherent power to alter the law of the land

[25] See in relation to the Constitution of Jamaica the judgment of Harrison JA in *Independent Jamaica Council for Human Rights and others v. The Attorney General*, Civil Appeals Nos 36-39 of 2004, at pages 11-13, judgment of the Court of Appeal delivered 12th July, 2004

[26] See for example: *J Astaphan & Co. (1970) Ltd v Comptroller of Customs of Dominica* (1996) 54 WIR 153 K

promises must be sanctioned by the legislature or a body specifically authorised by the Constitution or the legislature, before they can be implemented.

[44] There is and must continue to be a healthy relationship among the arms of government. The State certainly cannot function effectively with its three mighty branches strictly compartmentalised and sealed off one from the other. Indeed, to facilitate the efficient operation of government, the Constitution permits some overlap in the functions carried out by each Branch. But the judiciary has an obligation to uphold and promote the constitutional mandate that one Branch must not directly impinge upon the essential functions of the other. The principle that only Parliament should impose, alter, repeal, regulate or remit taxes is paramount. The National Assembly may in particular instances delegate aspects of its taxing powers but, absent such delegation, which in all cases must be strictly construed, the Executive branch is forbidden from engaging in such activity. To hold that pure prerogative power could entitle the Minister to implement the promises recorded in the Deed without the cover of parliamentary sanction is to disregard the Constitution and attempt to set back, over 300 years, the system of governance Belize has inherited and adopted.

[45] There is a more fundamental reason why the Minister's authority to make and implement the promises given in the Deed cannot be justified on the basis of prerogative power. This is because, as was noted by Lord Bridge in *Williams Construction v Blackman*[27], it is trite law that when the exercise of some governmental function is regulated by statute, the prerogative power under which the same function might previously have been exercised is superseded. While the statute remains in force, the function can only be exercised in accordance with its provisions. Since it is being put forward also that the Minister's authority sprang from his powers under section 95 of the Income and Business Tax Act[28], prerogative power is ousted and it is to the statute that one must turn to discover whether (a) section 95 authorised the Minister to do what he did and (b), assuming such authorisation, the Minister acted within the scope of the authority given.

[27] (1994) 45 WIR 94 at 99
[28] See [11] above where the section is set out in full

Section 95 of the Income and Business Tax Act

[46] The constitutionality of section 95 was challenged by counsel for the State. It is unnecessary now to rule on that challenge. Suffice it to say that, assuming its constitutional validity, the section must be interpreted in light of the Constitution. The Belize Constitution, like other Anglophone CARICOM Constitutions, places a specific and extremely high value on legislation dealing with taxation. Any Bill dealing with the imposition, repeal, remission, alteration or regulation of taxation is in the Constitution referred to as a "Money Bill"[29]. Money Bills are not enacted in the ordinary way. Sections 77, 78 and 79 of the Constitution contain special provisions with respect to the enactment of a Money Bill. In our view, given the extraordinary value the Constitution attaches to Money Bills, whenever the legislature delegates authority that touches on the powers contained in a Money Bill, the instrument containing the delegation should be construed strictly, narrowly, and the delegation should be accompanied by adequate safeguards to control arbitrary, capricious or illegal conduct. Further, if the power conferred is to be validly exercised, the accompanying safeguards must be scrupulously observed.

[47] Section 95 cannot properly be interpreted as being capable of granting the Minister the power to do what the Deed here purported to do. In particular, we fail to see how, in one fell swoop, the Minister could possibly "remit" tax payable in respect of business activity to be conducted over an indefinite time in the future. The Tribunal expressed a different view on this issue. The Tribunal also likened remission of tax to the cancellation or extinguishment of all or part of a financial obligation whether past or future. In our opinion there is a substantial difference between the remitting tax payable and extinguishing an obligation to pay tax. If the Minister was authorised by section 95 to do the former he certainly had no power whatsoever to promise the latter.

[48] Since the Minister is not the only official upon whom is conferred a power of remission, it is instructive to reason by analogy. Section 52(1)(d) of the Constitution confers on the Governor-General the power to "remit the whole or any part of any punishment imposed

[29]See s 80(1) of the Belize Constitution

on any person for any offence…" If the Tribunal's views on remission are correct, then the Governor-General would be acting within the scope of the power if he/she remitted all the future sentences likely to be imposed upon a known recidivist. This would be an absurd interpretation of the Governor-General's power.

[49] In the exercise of the statutory power to remit, section 95 imposes upon the Minister the obligation to comply with two rather weak safeguards. Failure so to conform would impugn and automatically render void the exercise of the power. Here, the Minister flouted *both* measures. Firstly, the Minister's power under the section is constrained to the extent that the Minister needs to satisfy himself, on objective criteria, that it is just and equitable to remit tax payable. Fore-knowledge of the actual tax payable (which may be remitted in whole or part) constitutes a crucial, if not indispensable, factor informing the Minister's exercise of discretion. Just as it would be perverse for the Governor-General (whose discretion is not ostensibly limited by what is "just and equitable") to remit punishment when no crime has as yet been committed, far less a sentence imposed, so too the Minister cannot properly satisfy himself of the justice or equity in remitting tax payable by a company where the business activity upon which the tax may or may not accrue has not yet commenced and there is no knowing whether the company would even be in business for the period the tax is supposedly "remitted". Apart from its absurdity, to construe the power to remit tax as capable of being exercised in respect of tax that may or may not become payable throughout the lifetime or existence of the taxpayer, evades section 95's first safeguard and easily opens the door to the arbitrary and unlawful exercise of the power delegated.

[50] Section 95 also required Notices of any remission to be published in the Gazette. Given the cloak of confidentiality that surrounded the making and implementation of the Deed, it is reasonable to conclude that there was never an intention on the part of the Minister to publish the required Notice. At any rate, the Minister had two years to fulfil this statutory obligation and no attempt was made to comply with it during that time. The trial judge accepted the Tribunal's view that the requirement of publication is merely "an administrative formality" and that publication may lawfully be done at any time. In light

of the importance the Constitution attaches to the remission of tax, we disagree. Parliament in its wisdom has decreed publication in the gazette so that the Minister's decisions on remission are open to public scrutiny. This might be a mild, after-the-fact legislative safeguard. But to strip it of all its content, to render it devoid of any force only emphasises the grave danger to public policy that flows from interpreting the first limb of section 95 in the manner in which the Companies suggest.

[51] Finally, as the Constitution clearly suggests, there is a distinction between the imposition, repeal, remission, alteration or regulation of taxation.[30] Even if one assumes that the Minister was entitled, by section 95, to remit tax in respect of future business activity; if one is prepared to assume further that the exercise of "remitting tax payable" includes excusing statutory obligations to pay tax, the jurisdiction exercised by the Minister exceeded each of these dubious ways of exercising the power delegated. The Deed purported to alter and regulate the manner in which the Companies should discharge their statutory tax obligations. The Deed impacted on a host of filing, administrative and other obligations imposed by Parliament's revenue laws. In essence, the framers of the Deed conceptualised and designed a whole new *tax policy* for the benefit of the Companies. This policy was then embodied in the Deed, executed by the parties and implemented with the objective of overriding all current and any future statutes enacted by the National Assembly.

[52] It is not the Court's function in this case to assess the wisdom of this special tax policy. The Government does of course have the power to settle, and to settle in confidence if it so desires, and on terms it considers prudent, claims made against it. But transforming the policy conceived here, effectively into the status of a Money Bill, necessitated the intervention of the National Assembly so that legislation consistent with the imperatives of the Constitution could be enacted to give force to it.

[30] See s 80(1) of the Constitution

[53] Prime Ministerial governance, a paucity of checks and balances to restrain an overweening Executive, these are malignant tumours that eat away at democracy. No court can afford to encourage the spread of such cancer.[31] In our judgment, implementation of the provisions of the Deed, without legislative approval and without the intention on the part of its makers to seek such approval, is indeed repugnant to the established legal order of Belize. In a purely domestic setting, we would have regarded as unconstitutional, void and completely contrary to public policy any attempt to implement this Agreement.

Should the Award be enforced?

[54] As stated before, competing policies contend with each other when one must decide whether the public policy exception may successfully be invoked to render a foreign Award not enforceable. Even if a judge determines that there are features of an award that may seem inconsistent with public policy, it does not at all follow that the court *must* decline to enforce the Award. Reference has already been made to the pro-enforcement bias that informs the court's approach and to the restrictive manner in which the public policy exception should be applied in the case of foreign awards.

[55] There is also the fact here that the State treated with indifference the arbitral process to which it had agreed. This was far from exemplary conduct and it is a factor to which one should have regard. For this purpose no useful distinction can be made between the Administration in Belize which occupied the seat of government prior to 2008 and the one which held the reins immediately after the General Elections of that year. The latter was contractually bound by the warranties of the former, provided that the implementation of those warranties was not by law, impliedly or expressly, subject to parliamentary or judicial approval. The agreement to arbitrate was a free standing agreement separable from the remainder of the Deed and it is unfortunate that the Government approached its obligations *under that agreement* in the way it did.

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[31] See in this regard Antigua Power Company Ltd v The Attorney General of Antigua and Barbuda & Ors (Antigua and Barbuda) (Rev 1) [2013] UKPC 24 at [51] – [60]

[56] We do not consider, however, that in each and every case, a failure to participate in the arbitral process should preclude a party from successfully arguing the public policy exception at the enforcement stage. The case law on this issue is far from coherent and it would not be right to lay down hard and fast rules. It seems to us that here also, a tension exists between various public interests. In resolving that tension the nature, quality and seriousness of the matters alleged to give rise to the public policy concerns must be weighed and placed alongside the court's desire to promote finality and certainty with respect to arbitral awards.

[57] There is actually nothing in the Act that suggests that a pre-condition for invoking the public policy exception is prior participation in the arbitral process. The Convention envisages that a court may *on its own motion* decline to enforce an Award on public policy grounds. This is hardly surprising. While it is public policy that arbitral awards, and in particular foreign awards, should be enforced, it is also public policy that awards which collide with foundational principles of justice ought *not* to be enforced. These two facets of public policy may sometimes appear to be, but are really not, mutually inconsistent. When a municipal court considers whether to decline to enforce an Award on public policy grounds, the court is not concerned with favouring or prejudicing *a party* to the arbitral proceedings. The Court is concerned with protecting the integrity of its executive function. In the process, the Court seeks simultaneously to guarantee public confidence in arbitral processes generally and to respect the institutional fabric of the country where the Award is to be enforced.

[58] This is a case where, as we have noted, it is clear that the Minister had no power to guarantee fulfilment of the promises he gave. It is equally clear that the signatories to the Deed, including the Companies' representatives, had no intention to seek the requisite parliamentary approval. There was nothing in the Deed to suggest any such intention. Implementation of the promises made, far from being suspended pending possible legislative approval, took effect immediately upon execution of the Deed. But even if Parliament had ratified the promises made, not even Parliament could have bound itself to legislation that was "irrevocable".

[59] The grounds for not enforcing this Award are compelling. The sovereignty of Parliament subject only to the supremacy of the Constitution is a core constitutional value[32]. So too is the principle of the Separation of Powers the observance of which one is entitled to take for granted[33]. To disregard these values is to attack the foundations upon which the rule of law and democracy are constructed throughout the Caribbean. It is said that public policy amounts to no less than those principles and standards that are so sacrosanct as to require courts to maintain and promote them at all costs and without exception.[34] The Committee on International Commercial Arbitration has endorsed "tax laws" as an example of an area that might fall within the scope of public policy, the breach of which might justify a State court refusing enforcement of an Award.[35] In our judgment, especially as the underlying agreement was to be performed in Belize, the balance here undoubtedly lies in favour of not enforcing this Award. This is a case where the Court actually has a duty to invoke the public policy exception.

[60] We have considered whether, notwithstanding all of the above, we should still enforce the Award because if we did not, the State of Belize may be unjustly enriched. There are powerful factors that weigh against this view. As mentioned above at [47], we have no evidence of the strength of the Companies' claims relating to the prior dispute between the parties. There is therefore only a tenuous basis for presuming any unjust enrichment. Even assuming there could conceivably be *some* unjust enrichment, there is no way of assessing its likely quantum. It is also significant that the Companies are *not* foreign entities. They are Belizean companies cognizant of and constrained by the public policy of special tax rates, exemptions and concessions being granted by Parliament. The Companies themselves are currently the beneficiaries of tax concessions which were obtained, not from the Minister but through the National Assembly.

[61] The public policy contravened in this case falls well within the definition of "international public policy" recommended by the ILA that might justify the non-

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[32] See *Methodist Church v Symonette* [2000] 5 LRC 196 at 208; (2000) 59 WIR 1 at 13
[33] See *Moses Hinds v. The A.G. of Jamaica* [1976] 1 All ER 353 at 359
[34] See Report, Committee on International Commercial Arbitration, International Law Association – London Conference (2000) pages 4-5
[35] See ILA Final Report on Public Policy 2002 at [30]

enforcement of a Convention Award. If this Court ordered the enforcement of this Award we would effectively be rewarding corporate citizens for participating in the violation of the fundamental law of Belize and punishing the State for refusing to acquiesce in the violation. No court can properly do this. Responsible bodies, including the Attorney General, have a right and duty to draw attention to and appropriately challenge attempts to undermine the Constitution.

JUDGMENT OF THE HONOURABLE MR JUSTICE ANDERSON

[62] An interesting question of general public importance raised by this case is the following: Did the enactment by the Parliament of Belize of the 1980 Arbitration Ordinance to give effect to the New York Convention before that treaty had been accepted by the Executive constitute a breach of the separation of powers doctrine thereby making the legislation unconstitutional?

Constitutionality of the 1980 Arbitration Ordinance

[63] In order to properly examine the constitutionality of the 1980 Arbitration Ordinance it is necessary to engage in a brief review of the historical background to the constitutional and legislative order in Belize. British Honduras was acquired by Great Britain by settlement becoming part of Her Majesty's dominions by 1817, at the latest. The British Honduras Constitution of 1870 vested power to make laws "for the peace, order and good governance of the … Colony" in the Governor "with the advice and consent of the … Legislative Council…" On 1st January 1964, the Colony achieved self-government through the British Honduras Letters Patent ("Letters Patent") and the enactment of the British Honduras Constitution Ordinance ("Constitution Ordinance"). These instruments, together with the common law relating to the Crown prerogative and executive power, delineated and delimited the boundaries of the three arms of governmental power in British Honduras: executive power was vested in the Monarch headed by Queen Elizabeth II; legislative authority vested in the colonial legislature; and judicial authority vested in the colonial judiciary.

[64] British Honduras became Belize on 1st June 1973. For ease of reference the Court will henceforth refer to "Belize" regardless of the date of the relevant event. Belize became independent on 21st September 1981. By letter dated 29th September 1982, the Prime Minister informed the Secretary General of the United Nations that Belize would continue to apply provisionally and on the basis of reciprocity, the treaties extended to it by the United Kingdom.

[65] On 10th October 1980, during the era of self-government, the Belize Legislature enacted the Arbitration (Amendment) Ordinance[36] ("the 1980 Ordinance") which came into effect on the same day. By the 1980 Ordinance the Legislature added Part III, sections 25 – 30 and a Fourth Schedule titled "*New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*" to the Arbitration Ordinance of 1932. The 1980 Ordinance was expressed to be: "*An Ordinance to amend the Arbitration Ordinance Chapter 13 of the Laws to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*." It provided for the staying of court proceedings in the absence of proof that the arbitration agreement was null and void and the enforcement in Belize of an arbitration award made in the territory of a country (other than Belize) which is a party to the New York Convention ("Convention Award"). The New York Convention had been ratified by the United Kingdom on 24th September 1975 and made applicable to Belize by Notice of Territorial Application (in the form of a Declaration by the United Kingdom) which was received by the Secretary General of the United Nations on 26th November 1980, some six weeks *after* the enactment of the 1980 Ordinance.

[66] The Appellants contend that the LCIA Final Award of 29th August 2009 was made in the United Kingdom, a party to the New York Convention and is therefore a Convention Award that ought to be enforced in Belize in accordance with the provisions of the 1980 Arbitration Ordinance inserted into the Arbitration Act. This is opposed by the Respondent who argues that the Ordinance was *ultra vires* the powers of the Legislature and therefore unconstitutional at the time of its enactment. In response the Appellants

[36] No. 21 of 1980

say that even *if* the 1980 Arbitration Ordinance was defective at its passage, which they strenuously deny, it could nevertheless be characterized as "having effect" immediately before Independence Day and was therefore "saved" as existing law by Section 134 (1) of the Constitution. Finally, the Appellants argue that Belize is estopped from contending that the New York Convention is not applicable given the 29th September 1982 letter of the Prime Minister to the Secretary General of the United Nations.

(a) Is *ultra vires* legislation saved as existing law?

[67] If the Appellants are correct that any defect in the passage of the 1980 Arbitration was cured by its being "saved" under the Independence Constitution then the issue would be resolved in their favour and this resolution would foreclose on the need to discuss whether the Ordinance was *ultra vires* the powers of the colonial legislature. For this reason it is convenient to consider this point first.

[68] Section 134 of the Independence Constitution of 1981 made provision for the saving of "existing laws" and where necessary, for the Governor General and the courts to bring those laws into conformity with the 1981 Constitution. "Existing laws" meant any Act, Ordinance, rule, regulation, order or other instrument "having effect as part of the law of Belize immediately before Independence Day." The Appellants argue that even if the 1980 Ordinance was *ultra vires*, it was still capable of being saved on the basis that section 136 (6) does not require that an Ordinance be "valid" to qualify as an existing law but only that it be an Ordinance "having effect" immediately before Independence Day. Having been saved by section 134 the only basis on which the Ordinance could be declared unconstitutional was for want of compatibility with the 1981 Constitution, since the section gave the same effect to saved laws "as if they had been made in pursuance of this Constitution."

[68] There is no merit in this argument. In order for a law to be saved as "existing" law that law must first exist. The purported enactment of a law by a legislature that has no power to enact that law does not result in the creation of law. Such a "law" does not exist and

never did; it is void *ab initio*: see *Murphy v R*.[37] There is therefore nothing to be saved. If the 1980 Ordinance was outside the legislative competence of the colonial Legislature then the Court agrees entirely with Pollard JA that the Ordinance could "not constitute 'existing law' within the meaning of Section 134 (1) of the Belize Constitution and amenable to being saved at the time of independence of Belize".[38] The real question, therefore, is whether the enactment of the 1980 Ordinance was in fact outside of the legislative powers of the Legislature.

(b) Was the 1980 Ordinance ultra vires the powers of the legislature?

[69] The Respondent argues that by enacting the 1980 Ordinance the colonial legislature acted outside its legislative competence and encroached on the authority of the Executive thereby breaching the Separation of Powers doctrine and thus rendering the legislation unconstitutional. The competence of the colonial legislature derived from the Letters Patent and from the Constitutional Ordinance, section 16 of which provided: "Subject to the provisions of this Ordinance, the Legislature may make laws for the peace order and good government of the Territory." Under the Royal Prerogative executive power was vested in the Crown and exercised by the Governor of Belize. For centuries it has been accepted that executive powers in the Royal Prerogative included the power to make international treaties, although the legislative implementation of the treaty was a matter for the legislature: *Roberts v Minister of Foreign Affairs*;[39] and *Attorney General v Joseph and Boyce*.[40] Section 16 of the Letters Patent and Section 2 (4) of the Constitutional Ordinance confirmed that the Governor acting in his discretion was responsible for "external affairs".

[70] The difficulty in this case arises from the fact that the 1980 Ordinance was expressly enacted "to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" at a time when the Executive had not yet accepted the

[37] 1982 Ir. 241
[38] At paragraph 46 of the Judgment in the court below
[39] [2007] UKPC 56
[40] [2006] CCJ 3 (AJ)

Convention. Pollard JA, who delivered the majority judgment in the court below, held as follows:

> "Section 16 of the Constitutional Ordinance 1963 empowered the colonial legislature of Belize to make laws for the peace, order and good government of Belize. However, when the colonial legislature purported to pass an ordinance "to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards" the colonial legislature was clearly encroaching on the royal prerogative in respect of the matter relating to foreign affairs. The 'enactment' of the Convention by the colonial legislature necessarily involved interference in foreign affairs which was exclusively the domain of the Crown.
> …
>
> On the evidence before this Court, the colonial legislative assembly of Belize presumed to apply in its domestic law, and I would venture to say without proper executive authority, express or implied, an international treaty, the New York Convention, which had not yet been extended by the Crown in the exercise of its exclusive prerogative powers to Belize…"

[71] The Appellants argue that the 1980 Ordinance dealt with the internal affairs of Belize, that is, the recognition and enforcement of arbitration agreements and arbitral awards by the courts of Belize within the territory of Belize. It does not purport to regulate or govern external affairs or the external relationships between the State and other States. This line of reasoning found favour with Mendes JA who put the matter this way:

> "The establishment of obligations on the international plane is the domain of the executive. The enactment of laws for the peace and good government of the people of [Belize] was the responsibility of the [Belize] Legislature. It seems clear to me that these plenary powers include the power to provide for the enforcement of arbitration awards, no matter where made and no matter who the parties to the award might be. It was also within the competence of the legislature to place such limitations on the enforcement of such awards as it deem fit. In this particular instance, it chose to identify the awards which are enforceable by reference in part to whether the country in which the award was made was a party to the New York Convention. That too was clearly within its plenary powers. It does not seem to me to make one jot of difference that the terms in which the legislative will of the [Belize] Legislature was expressed was inspired or was intended to replicate or indeed was intended to give effect to an existing treaty by which [Belize] was not yet bound. Such a legislative act does not intrude into the domain of external affairs. It concerns entirely the development of the domestic law of [Belize]."

[72] This Court finds the views expressed by Mendes JA utterly convincing and prefers them to those articulated by Pollard JA. The 1980 Ordinance in no way interfered with the exercise of the executive authority in foreign affairs. In legislating the 1980 Ordinance, the legislature was not engaged in the negotiation, signature or ratification of the New York Convention; matters which belonged to the prerogative powers of the Crown. Nothing in the 1980 Ordinance purported to make Belize a party to the New York Convention. The annexure of the Convention to the Ordinance appeared to have been for purposes of identifying the categories of foreign awards that would be recognized and enforced in Belize, not to undertake international law obligations on behalf of the State. By giving force to the obligations in a treaty at the domestic level the legislature does not usurp the executive's functions. Belize could not, by virtue of the 1980 Ordinance, assert an international law right to compel other parties to the Convention to enforce awards made in favour of Belizean nationals; equally, an amendment to or repeal of the 1980 Arbitration Ordinance could not engage the international responsibility of Belize. There is a normative separation between international rights and obligations under the New York Convention and domestic legislative enactment of that Convention.

[73] Further, the 1980 Ordinance was within the broad powers of the Belize legislature, "to make laws for the peace, order and good government of the Territory". These words are apt to connote the widest plenary law-making powers appropriate to a sovereign (*Ibralebbe v The Queen*[41] and *Regina (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)*[42]. It is, indeed, unanimously agreed that this law-making power includes the power to legislate for the incorporation of international treaties. What the Respondent argues, and Pollard JA accepted, was that there was state practice in so-called "dualist" jurisdictions that established a requirement for the prior executive act of acceptance of the treaty by the Executive.

[74] There is no such requirement. At best, state practice could amount to a customary rule of international law recognized as part of the common law but such a common law rule

[41] [1964] AC 900 at 923 (PC)
[42] [2009] 1 AC 453 at 486

could scarcely override the clear vesting by the Constitution of the widest plenary law-making powers in the Legislature. Furthermore, the emergence of customary law requires uniformity of state practice and state practice is by no means uniform on whether treaty acceptance must precede legislative incorporation. There are undoubtedly many instances in which the executive act of treaty acceptance has preceded legislative enactment of the treaty, although the authorities cited for the proposition that the timing of the 1980 Ordinance made it *ultra vires*, i.e., being enacted six weeks before executive acceptance of the New York Convention, do not establish that principle. *Attorney-General for Canada v Attorney General for Ontario*[43] held that the legislative enactment by the Dominion Parliament of the Versailles Treaty was *ultra vires* not because of a sequencing issue but, rather, because the domestic implementation of the relevant treaty obligations was within the exclusive competence of the legislatures of the provinces. The Dominion Parliament had therefore sought to usurp the jurisdiction of the Provincial Legislatures.

[75] It is also the case that there are many occasions where legislative incorporation of a treaty has *preceded* executive acceptance of that treaty.[44] The Arbitration Act 1975 of England was enacted to give effect to the New York Convention before the United Kingdom had acceded to the Convention, although in *Channel Group v Balfour Beatty Ltd*[45] it was said that "strictly speaking" the legislation should have followed Executive acceptance of the Convention. The UK Act to implement the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air was passed before the Convention was ratified by the Executive.[46] In some instances the New York Convention has been given effect in domestic law even though the State is not a party to the Convention, as in the British Virgin Islands,[47] an important Caribbean jurisdiction for the settlement of transnational commercial disputes. Pre-acceptance enactment has also been

[43] [1937] AC 326 (PC)
[44] McNair, The Law of Treaties, (Oxford University Press, 8th Edition, 1961) at p. 86, footnote 3; *Salomon v Commissioner of Customs and Excise* [1967] 2 QB 116, at p. 143-D; *The Hollandia* [1982] 1 QB 872 (CA) and [1983] 1 AC 565 at p. 571 per Lord Diplock
[45] [1993] AC 334 at 354 (HL)
[46] Judgment in the court below, Pollard JA at paragraph 52
[47] The UK colony of the British Virgin Islands enacted its Arbitration Ordinance dated 6 September 1976 to give effect to the New York Convention in domestic law although the Convention has never been extended to the BVI by the British Government.

recommended by colonial legal advisors as well as modern academic writers.[48] The rationale appears to be that if domestic legislation is required to enable the State to give effect to its treaty obligation then the legislation should be in place before the treaty comes into force so as to avoid a breach of the international obligation at the point when the treaty enters into force. In an ideal world both the treaty and the incorporating legislation would enter into operation at the same time. But the sequencing of these events has never, prior to the decision below, been held to displace the constitutional competence in the legislature to enact incorporating legislation. We do not think that any such fettering of the legislative competence was intended by the Constitution.

[76] We do not think that the majority in the court below gave sufficient weight to the Governor's assent to the 1980 Ordinance. The colonial Constitution vested executive authority in the Crown and provided for its exercise by the Governor; the Governor acting in his discretion had responsibility for "external affairs". The Governor could interrupt the legislative passage (section 27 (1)) or refuse his assent or reserve the Bill for the signification of Her Majesty's pleasure (section 28 (3)) if he felt the Bill infringed upon the prerogative powers or his special responsibilities. While not conclusive, it is reasonable to assume that by assenting to the Bill providing for the giving of effect to the New York Convention, the Governor must have considered that the legislation did not usurp the treaty making prerogative of Her Majesty or his special responsibilities. More crucially, the Bill was only fully enacted upon Assent of the Crown in the exercise of the Royal Prerogative. It is therefore difficult to see how a law which can only become so on the exercise of the Royal Prerogative could be inconsistent with the Royal Prerogative. It is not without significance that the Crown exercised its executive power to extend the Convention to Belize a mere six weeks after the enactment.

[48]See Diplomatic Telegram dated 31 December 1980 by the UK F&CO Advisers; UKFCO, Treaty Section, Information Management Department, "Treaties and MOUs, Guidance on Practice and Procedures," (2nd edition, May 2004), at p. 7; Joanna Harrington, "Scrutiny and approval: the Role for Westminster-style Parliaments in Treaty-making" in *International and Comparative Law Quarterly* (2006) Vol. 55 at p. 125).

[77] For these reasons the Court concludes that the enactment of the 1980 Ordinance was *intra vires* the powers of the legislature and did not encroach into the domain of the Royal Prerogative in treaty-making. We therefore find the 1980 Ordinance to be constitutional and saved as "existing law" under the 1981 Independence Constitution.

(c) Is Belize estopped from arguing that the New York Convention is not applicable?

[78] The Appellants argue that the declaration made by the Prime Minister of Belize in the *Note Verbale* of 29th September 1982 was legally binding and estopped Belize from denying the applicability of the New York Convention. In the *Note Verbale*, the Prime Minister informed the Secretary General of the United Nations that the Government of Belize, "…. had decided to continue to apply provisionally and on the basis of reciprocity, all treaties to which the Government of the United Kingdom of Great Britain and Northern Ireland was a party, the application of which was extended either expressly or by necessary implication to the then dependent territory of Belize." The Prime Minister requested that his letter be circulated to all Member States of the United Nations. The Appellants contend that this declaration fulfilled the conditions for estoppel to arise in International Law, namely, (a) the meaning of the statement is clear and unambiguous; (b) the statement or representation is voluntary, unconditional, and authorised; and (c) there is reliance in good faith upon the representation of one party by the other party to his detriment (or to the advantage of the party making the representation).[49]

[79] This issue of the binding nature of the declaration made by the Government of Belize raises very complex issues and not only those relating to estoppel in International Law. Diverse theories underpinning the law of treaties, state responsibility, state succession, and of unilateral declarations also come into play. Since this Court has already held that the 1980 Ordinance giving effect to the New York Convention was constitutional and

[49] These conditions are discussed by Professor Bowett, "Estoppel before International Tribunals and its Relation to Acquiescence", British Yearbook of International Law (1957) Vol. 33 at pp. 188-194.

saved as existing law at the time of independence, we consider it unnecessary and unwise in the circumstances to decide on the issue of estoppel.

Why the case was not remitted to the Court of Appeal

[80] There was no common ground between the parties as to the consequential disposal of the appeal in the event that this Court found the Arbitration Act to be constitutional, as we have. The Appellants submit that we should decide the issue of enforcement of the award without further ado while the Respondent seeks a remittal to the Court of Appeal. The remittal would enable the court below to decide the two other objections raised by the Respondent to enforcement, that is, that the subject matter of the dispute was not capable of settlement by arbitration, and enforcement would be contrary to public policy.

[81] The issues of constitutionality, arbitrability, and public policy were the subject of comprehensive written submissions and were fully argued over a three-day period in October 2011, before the Court of Appeal. At the request of the Court of Appeal made on 26th January 2012, the parties made further written submissions on the question of the constitutionality of the 1980 Ordinance. The judgment of the Court of Appeal was handed down on 8th August 2012, and dealt exclusively with the question of constitutionality. The judgment did not at all address the issues of arbitrability or public policy. This approach was lamented by Mendes JA who observed that "…. if there is an appeal and the decision of the majority is overturned, their Honours of the Caribbean Court of Justice are very likely to require the views of this court particularly on the question whether the enforcement of the award would be contrary to public policy."[50]

[82] We deeply regret that the Court of Appeal declined to make their views on these matters available to us. This Court places considerable weight on the opinions expressed in the Court of Appeal; opinions which are pre-eminent in providing vital juridical material to inform and shape the views of this final Court especially on such innate questions as

[50] At paragraph [30] of the judgment in the court below

arbitrability and public policy: *Boyce v Attorney General and Minister of Public Utilities*.[51] The scheme of adjudication in the Constitution contemplates review by this Court of decisions of the Court of Appeal. But this Court does have explicitly in relation to any appeal, all the jurisdiction and powers possessed in relation to that case by the Court of Appeal.[52] The Court's overriding objective is "to deal with cases fairly and expeditiously so as to ensure a just result".[53] In every case the most important objective is for the Court to ensure a fair and just result. Subject to that requirement, the question which arises is whether the natural reluctance to decide the issues without the benefit of the views of the Court of Appeal should prevail over the judicial impulse to settle litigation with expedition and finality.

[83] This question cannot be answered in the abstract but only by reference to the particular circumstances of the case at hand. In this case the arbitral award was made on 20th August 2009 and finalized on 29th August 2009, almost four years ago. Each subsequent cycle of litigation before the courts of Belize occasions additional substantial costs and expense. Under the terms of the award interest continues to accrue. The arguments on arbitrability and public policy were fully ventilated before the Supreme Court and in the judgment of the trial judge. That the Court of Appeal was aware of its responsibility to address the outstanding issues but chose not to do so argues against remitting the case: *Re James McDonald.*[54] Remitting the matter to the Court of Appeal could require a full rehearing before a new panel as Pollard JA is no longer a Judge of the Court of Appeal.

[84] It is also significant that there are no relevant disputes of fact and that the issues to be decided do not derive from peculiar constitutional or legislative provisions in Belize. Whether an agreement that includes matters relating to the imposition and collection of taxes is properly submitted to international arbitration and whether enforcement of an award resulting from such arbitration would be contrary to public policy are

[51] [2012] CCJ 1 (AJ) (R)
[52] Section 11 (6), Caribbean Court of Jurisdiction Act 2010
[53] Rule 1.3 of the Caribbean Court of Justice (Appellate Jurisdiction) Rules
[54] (1975) 13 JLR 12 especially at p 27 per Graham-Perkins, JA

quintessentially matters of judicial policy. Access to the views of the judges below remains important but the matters for decision are of broad significant public importance to the Caribbean polity as a whole. In these circumstances this Court must pay some attention to its determinative role in the further development of Caribbean jurisprudence through the judicial process.[55]

[85] For these reasons the Court decides that the balance was tilted in favour of deciding the outstanding issues in dispute rather than remitting them to the Court of Appeal.

Conclusion

[86] For the reasons so eloquently articulated in the judgment of our brother Saunders JCCJ the Court orders that enforcement of the arbitral award should be declined under section 30 (3) of the Arbitration Act.

Costs

[87] The award of costs in this case is complicated by a number of factors. The Respondent has prevailed on the central issue that enforcement of the Convention Award would be contrary to the public policy of Belize. However, the Respondent had sought to have this Court defer decision on the public policy issue and instead to remit the matter to the Court of Appeal. The Appellants succeeded on the primary ground of appeal arising from the decision of the Court of Appeal, namely, that the Arbitration Act of 1980 was constitutional and saved as existing law under the Independence Constitution. A further factor that complicates the issue was the non-participation by the Respondent in arbitration proceedings despite numerous invitations and opportunities to do so. It is not beyond the realm of possibility that had the Respondent mounted vigorous and comprehensive arguments before the arbitral tribunal as it did before us the tribunal might have been persuaded to decline to adjudicate upon the matter thereby saving

[55] Cf. *Eco Swiss China Time Ltd v Benetton International NV* [2000] 5 CMLR 816, 832

considerable expense. It is also the case that this Court has and must encourage the greatest respect for international commercial under the Arbitration Ordinance and by extension as well the New York Convention. In the circumstances we consider that the most appropriate award would be for each party to bear its own costs.

Disposition

[88] The appeal is dismissed. There is no order as to costs.

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The Right Hon Mr Justice Dennis Byron, President

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The Hon Mr Justice A Saunders The Hon Mme Justice D Bernard

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The Hon Mr Justice J Wit The Hon Mr Justice W Anderson