[2013] CCJ 4 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No CV 001 of 2013
BZ Civil Appeal No 6 of 2011

BETWEEN

BRITISH CARIBBEAN BANK LIMITED **APPELLANT**

AND

THE ATTORNEY GENERAL OF BELIZE **RESPONDENT**

Before the Honourables: Mr Justice D Byron
Mr Justice A Saunders
Mme. Justice D Bernard
Mr Justice J Wit
Mr Justice W Anderson

Appearances:

Lord Peter Goldsmith, QC and Ms Priscilla Banner for the Appellants

Mr Denys Barrow, SC and Ms Magalie Perdomo for the Respondent

JUDGMENT
Of
The President Mr Justice Dennis Byron and Justices Saunders, Bernard, Wit and Anderson

Delivered by
The Rt Hon Mr Justice Dennis Byron and The Hon Mr. Justice Anderson
on the 25th day of June 2013

Introduction

[1] This case raises an important question of law. What are the principles governing the jurisdiction to issue an injunction restraining international arbitration proceedings commenced in accordance with an arbitration clause agreed to by the parties to the court proceedings? This question arises against the following background.

Background

[2] British Caribbean Bank Limited ("BCB") appeals to this Court against the interlocutory order made by the Court of Appeal restraining it from continuing certain foreign arbitration proceedings. The arbitration proceedings were instituted to resolve disputes arising from the compulsory acquisition by the Government of Belize ("GOB") of loan and mortgage debenture facilities having a face value of US$24 million owed to BCB from Belize Telemedia Limited ("Telemedia").

[3] Recourse by BCB to arbitration was based upon a Bilateral Investment Treaty ("BIT")[1] concluded on 30th April 1982, between the governments of Belize and the United Kingdom. The Agreement contained a provision for the resolution of disputes arising from any breach of the BIT by international arbitration and it applied to nationals and companies of either contracting party. By Exchange of Letters the Agreement was extended to the Turks and Caicos Islands. BCB is a large financial institution registered in the Turks and Caicos Islands.

[4] The compulsory acquisition of BCB's property took place in the context where the Government of Belize, from 2009, has been taking steps to nationalize the

[1] United Kingdom of Great Britain and Northern Ireland and Belize. Agreement for the Promotion and Protection of Investments, signed at Belmopan, 30 April 1982, (No. 21315). United Nations Treaty Series 1294 (1982), pp. 199 – 205

Telecommunications industry in that country. Telemedia was in sole control of the telecommunications industry and was the primary target of GOB's take over efforts. GOB acquired the rights of BCB under the various loan and mortgage facilities with Telemedia by Orders[2] made pursuant to the *Belize Telecommunications (Amendment) Act 2009*[3] *("*2009 Acquisition Legislation"). The payment of principal and interest on the loan facilities discontinued and no compensation has since been paid to BCB.

[5] On 24th June 2011, the Court of Appeal in *AG v BCB*[4] struck down the 2009 Acquisition Legislation as being unconstitutional and declared it null and void. Within a couple of weeks, GOB passed the *Belize Telecommunications (Amendment) Act 2011*[5] ("2011 Acquisition Legislation") and made subsidiary Orders[6] to reacquire the same properties including the BCB loan and mortgage facilities. It also passed the *Belize Constitution (Eighth Amendment) Act 2011*[7] ("Constitutional Amendment Legislation") to further legitimize the acquisition.

[6] BCB filed proceedings challenging the constitutionality of the legislation and claiming ancillary relief. On 11th June 2012, a trial judge held that several sections of the 2011 Acquisition Legislation contravened the Constitution and were void, but upheld portions of the Constitutional Amendment Legislation which provide for the government to hold majority ownership of public utilities. At present an appeal against that judgment is pending before the Court of Appeal. BCB also submitted claims by way of letter to the Financial Secretary for compensation for the acquired property as was required by the acquisition legislation. These claims specified that they were made without prejudice to

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[2] *Belize Telecommunications (Assumption of Control Over Belize Telecommunications Limited) Order* No. 104 of 2008 and *Amendment Order* No. 130 of 2009
[3] *Belize Telecommunications (Amendment) Act 2009*, No. 9 of 2009
[4] *British Caribbean Bank Limited v. the Attorney General of Belize and the Minister of Public Utilities* Civil Appeal No. 30 of 2010
[5] *Belize Telecommunications (Amendment) Act 2011* No. 8 of 2011
[6] *Belize Telecommunications (Assumption of Control Over Belize Telemedia Limited) Amendment Order* No. 70 of 2011 ("2011 Order").
[7] *Belize Constitution (Eighth Amendment) Act 2011* Act No. 11 of 2011

Arbitration proceedings pursuant to the BIT. These claims have not been processed.

[7] In addition to seeking redress in accordance with the law of Belize, on 5th May 2010, BCB initiated international arbitration proceedings to seek redress under the BIT. Although GOB has not been participating in the process, the arbitration has reached the stage where a panel has been appointed and a preparatory meeting held in Washington DC on 26th August 2010.

[8] In the meantime, GOB decided that it would not compensate BCB for the loan and mortgage facilities it had acquired on the ground that they had been made for an unlawful purpose, namely, the acquisition of shares in Telemedia. On 4th June 2011, it commenced proceedings in the domestic courts with Telemedia as a co-plaintiff for related declaratory orders. These proceedings have been stayed upon the application of BCB, with the consent of GOB, until the constitutional proceedings reach finality.

[9] It was against this background that, on 16th August 2010, GOB initiated these proceedings aimed at stopping the arbitral proceedings permanently. It also, on the same day, applied for the interlocutory injunction that resulted in the orders now being appealed.

The Court Proceedings

[10] The Attorney-General claimed various declarations and orders relating to the arbitration proceedings initiated by BCB on 5th May 2010 including an order to restrain BCB from continuing with the arbitration. On the very same day, the Attorney General made another application by notice, this time for an "interim" injunction restraining BCB, "from taking any or any further steps in the continuation or prosecution of the arbitration proceedings." The application for the interim or interlocutory injunction has now consumed almost three years. This

delay may have been quite unnecessary. In effect the same relief was sought in relation to both the interlocutory and substantive matter. Moreover, both proceedings would have been supported by the same evidentiary and other materials. In the circumstances, an effective procedure available to the trial judge would have been to direct the prosecution of the fixed date claim form, with a short adjournment and upon appropriate undertakings by BCB if considered necessary.

[11] Be that as it may, the trial judge addressed only the application for interim relief. Having applied *American Cyanamid Co v Ethicon*[8] he concluded that there were serious issues to be tried to determine whether the BIT was in force in Belize and whether it created any binding obligations on the GOB either at municipal or international law. He doubted that, in the event he wrongly refused to grant the injunction, damages would be an adequate remedy for the GOB. The Judge decided that, in the circumstances, the balance of convenience lay with the GOB because it would be vexatious or oppressive to allow the arbitration to proceed simultaneously with the proceedings before the domestic courts relating to the constitutionality of the acquisition and the legality of the loan facility. Since, in his view, resolution of the disputes through the domestic courts was preferable, he restrained the parties from continuing with the arbitral proceedings until the completion of the related domestic cases.

[12] A majority in the Court of Appeal upheld the grant of the interim injunction but arrived at their decision by another route. They considered that the trial judge exercised his discretion on wrong principles and erred in not limiting the interlocutory injunction to the date of trial of the merits of the substantive application for a (permanent) injunction. They decided to reconsider the matter and exercised their own discretion. They concluded that the BIT was in force and created binding obligations but that the right to go to international arbitration was qualified by the context of the BIT. In the opinion of the majority, the right to

[8] [1975] AC 396.

arbitrate needed to ripen by the completion of the proceedings in the domestic court. Applying the "three-pronged" test for the award of interim injunctions as laid down in *American Cyanamid Co v Ethicon Limited*[9] and developed in *National Commercial Bank Jamaica Limited v Olint Corporation Limited*,[10] they held that the injunction should remain in place because there was "a serious issue to be tried" as to whether the multiplicity of claims in the courts of Belize rendered the arbitration vexatious and oppressive. Apart from the expense of the international arbitration proceedings there might be inconsistent awards and, in any event, the domestic proceedings could provide relief that may make the arbitration unnecessary. They ordered that the parties be restrained from continuing with the arbitration proceedings until the hearing and determination of the substantive claim or further order. The dissenting judgment emphasized that the 1982 Agreement had conferred on the Appellant, "an indefeasible" and "an unqualified" right to initiate international arbitration proceedings and that by granting the injunction the court was facilitating the breach of those international obligations.

The Issues

[13] The dispute became narrower before our court as a number of issues, which were carefully considered and clarified at the Court of Appeal, were no longer contested. The issues that remain outstanding are three-fold:

(a) Whether the BIT provided BCB with an unqualified or indefeasible right to proceed to international arbitration;

(b) Whether, if there was a power to restrain the arbitral process, the Court should make a determination of the merits of the claim for a permanent

[9] [1975] AC 396
[10] [2009] 1 WLR 1405

injunction or should limit its enquiry and determine only whether there was a serious issue to be tried; and,

(c) Whether, if the court addressed the merits, there was any or any sufficient basis, for the grant of the injunction to restrain the arbitration.

Did the BIT provide an unqualified or indefeasible right to arbitrate?

[14] BCB contended that the BIT provided it with an unqualified or indefeasible right to have any disputes under the BIT resolved by an international arbitral process and that consequently it could not be open to the Court to make any order restraining the continuation of the arbitral proceedings. We cannot agree. The exercise by one individual of his or her rights often infringes on the rights of other individuals or the society as a whole and the courts are and must remain the final arbiter of the relative distribution of those rights.

[15] The grant of the right in the 1982 BIT to arbitrate is not a unique but is, rather, a common feature of such agreements. The first bilateral investment treaty was concluded between Germany and Pakistan more than half a century ago for the Promotion and Protection of Investments. There are at least some 3000 analogous investment protection treaties concluded by states worldwide[11] with the purpose of creating a stable international legal framework to facilitate and protect foreign investments by providing rights and guaranteeing substantive standards for treatment that are to be accorded an investor by a host State and by providing for recourse to international arbitration in the event of dispute. Such investment protection treaties are now widely recognized by States in the modern world as a mechanism for promoting economic relations and for increasing investment and prosperity. It seems fair to say that such investment treaties form an important feature of the modern economic jurisprudence and that they constitute an important developmental option for capital-importing developing countries such

[11] UNCTAD (2007 – June 2008) 11A Monitor, No. 2 (2008)

as those in the Caribbean. The bilateral investment treaty was developed to remedy the vulnerability of the foreign investor and ameliorate the conditions of their investments and the success of the treaty regime depends upon the acceptance and fulfillment by the host state of the legal obligations imposed by the treaty.

[16] The BIT in this case was made between Belize and the UK. In brief, it states that its objectives are to promote and protect investment of the nationals or companies of the other in their respective territories. It contains promises not to subject the nationals and companies of the other to less favourable treatment than their own nationals or nationals of a third state. It agreed on a regime for dealing with losses occurring in war and armed conflict and the like causes. Article 5, which is particularly relevant to the dispute between the parties to this appeal, contained promises not to take action having the effect of expropriation of investments of nationals or companies of either contracting party except for a public purpose related to the internal needs of that party and against just and equitable compensation. Such compensation shall amount to the fair market value before the expropriation became public knowledge and shall include interest at the rate prescribed by law until the date of payment. The compensation shall be made without undue delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the contracting party making the expropriation, to prompt review by a judicial or other independent authority of that party of his, her or its case and of the evaluation of the investment. The other articles made provisions for the unrestricted right to repatriate investments. Article 8, important to this case as well, provides for the settlement of disputes between an investor and a Host State by international arbitration. Article 8(1) prescribes:

> "Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not be amicably settled shall after a period of three months from written

notification of a claim be submitted to international arbitration if either party to the dispute so wishes."

[17] Other articles provide for the resolution of disputes concerning the interpretation of this agreement, in effect to oust the jurisdiction of the domestic courts by agreeing to submit such disputes to the selected international arbitral tribunal. There are provisions for subrogation and for extending the agreement to other territories by exchange of notes. It was specifically agreed that the agreement would come into force on signature. It was also agreed that the agreement would continue for 10 years and thereafter for one year after notice of termination given by either contracting party.

[18] In the early stages of this litigation GOB had contended that the BIT was not binding on Belize because it had not been incorporated into domestic law. These submissions were not made before us, the matter having been authoritatively settled by the Court of Appeal. It is now common ground that the BIT became binding under international law when it was signed in 1982 and remains in force. The Court of Appeal of Belize in the case of *Jose Alpuche & Anor. v. AG*[12] has already ruled that this BIT is binding on the State.

[19] Belize has still not passed any legislation to incorporate the 1982 BIT into domestic law. The legal effect of treaties that are not incorporated into domestic law has already been examined in the decision of this Court in *Boyce and Joseph*.[13] The orthodox view that an unincorporated treaty does not form part of the law of Belize and creates no rights or obligations which are enforceable domestically was critiqued. It is sufficient to note that the notion that an unincorporated treaty is incapable of conferring any rights on private entities in the municipal system has been rejected. At a minimum they could yield legitimate expectations cognizable under domestic law.

[12] *Alpuche et al. v. Attorney General* BZ 2010 CA 16
[13] *Attorney General v. Joseph*, [2006] CCJ 1 (AJ)

[20] There is relevant jurisprudence on the specific juridical effects in domestic law of an arbitration provision in a bilateral investment treaty. In *Republic of Ecuador v Occidental Exploration and Production Co*.[14] the court held that an investment treaty, similar to that between the United Kingdom and Belize, had resulted in an agreement between the investor and the host state to arbitrate. This agreement to arbitrate was not itself a treaty but flowed from the treaty provisions. It may be said that in important ways the constitution of the agreement to arbitrate from the terms of the investment treaty is not unlike making a contract from an advertisement containing certain terms to get a reward. Such an advertisement constitutes a binding unilateral offer that can be accepted by anyone who performs its terms: *Carlill v Carbolic Smoke Ball Co.*[15] Thus the relevant question is *not* whether the 1982 *Treaty* became part of Belizean law but rather whether the *right* to initiate arbitration (which may have been generated out of the treaty) is cognizable in the courts of Belize. This way of framing the issue admits of the possibility that provisions in the bilateral investment treaty could have given rise to the formation of a *contract* along the lines of reasoning adopted in *Carlill v Carbolic Smoke Ball Co.* and that it is this contractual right to arbitrate and not the treaty (albeit the terms of the contract are found in the treaty) of which the courts take notice.

[21] Thus BCB, the investor, is not a party to the treaty but Article 8 makes a free standing offer which is accepted on submission of the dispute to arbitration and becomes a binding contract between the investor and the State party. The provision is clear and unambiguous. It evidences the intention of the State parties to provide private investors with the right to have the specified disputes settled by international arbitration. The plain wording of the article also demonstrates that there are no preconditions to the right to submit the dispute to international arbitration. This right encompasses any dispute between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of

[14] [2006] QB 432, especially at paragraph 33 per Mance LJ.
[15] [1891-94] All ER Rep 127

the latter under this agreement. In this case the disputes include allegations of breaches of the obligations relating to expropriation of property. The right is one of direct access that is not contingent on any one or thing. Once there is a dispute that is not amicably settled, a national or company of one contracting party after giving three months' notice is entitled to submit the dispute to international arbitration. The right to proceed is clearly independent; no permission or authorization is required from anyone or any state party. There is no language in the agreement from which one could infer that there is a requirement that the parties must first exhaust domestic remedies. It is reasonable that there should be none because the effectiveness of this type of dispute settlement would be undermined if the investor was required to exhaust remedies in domestic courts before proceeding to international arbitration: see *Mytilineos Holdings SA v the State of Union Serbia & Montenegro and Republic of Serbia)*[16] and *Compania de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie General des Eaux) v Argentine Republic.*[17] An important objective of international arbitration is to avoid possible pitfalls of domestic litigation.

[22] The right to commence the arbitral proceedings that BCB seeks to exercise arises from a legally binding agreement by the state of Belize to submit to arbitration. It is unconditional, apart from the procedural requirement of three months' notice, in the sense that the BIT does not require the fulfillment of any precondition or the exhaustion of any domestic remedies. It gives rise to an autonomous procedure through which BCB may vindicate rights under international law which are distinct and separate from rights vested as a matter of domestic law. The Court of Appeal was therefore in error when it stated that:

> "… since under Article 8 of the Treaty only disputes which are not amicably settled can be referred to arbitration, the dispute between the appellant and the Government of Belize would not be ripe for arbitration

[16] *Mytilineos Holdings SA v the State of Union Serbia & Montenegro and Republic of Serbia* (UNICTRAL, Partial award on jurisdiction 8 September 2006)
[17] *Compania de Aguas del Aconquija SA and Vivendi Universal (formerly Compagnie General des Eaux) v Argentine Republic* ICSID case no ARB/97/3 decision on annulment 3 July 2002

> until it is determined whether any assets belonging to the appellant have been lawfully expropriated."

[23] This is an error which affected the outcome of the case. The courts of Belize do have and retain the jurisdiction to restrain international or foreign arbitral proceedings which are oppressive, vexatious, inequitable, or would constitute an abuse of the legal process. This is a point to which we will return. In this sense there is no unqualified or indefeasible right to arbitrate. Equally, however, there is no requirement to exhaust local remedies before exercising the right to arbitration. Under the doctrine of *kompetenz-kompetenz*, the arbitrators are competent to determine their jurisdiction although the effective exercise of that jurisdiction remains subject to the inherent competence of the court to decide, in relation to an injunction to restrain international arbitration, whether a particular dispute falls within the scope of the arbitration agreement. In the case before us it is clear that the expropriation of Appellant's property fell within the scope of the 1982 Investment Treaty. Article 5 deals specifically with expropriation of investments. The very purpose of the arbitration contract created or generated by the arbitration clause in the investment treaty was to provide for the protection of the investments of foreign investors, among other things, by providing them with a right to pursue disputes about their investments through international and neutral arbitration as an alternative to submitting themselves to the national courts. The standards by which expropriations of investment are to be judged are the standards set out in the investment protection agreement and international law principles and not necessarily those set out in the domestic system of the host State. An expropriation that is perfectly lawful under the national law could nonetheless trigger a successful investment claim under the investment treaty. Any condition to strive for an amicable settlement before initiation of arbitration cannot include an obligation to litigate the constitutionality of the expropriation. There is therefore no requirement that domestic remedies be exhausted before arbitration can be engaged. Whether the arbitrators choose to stay the arbitral proceedings properly brought before them whilst related domestic proceedings are

in train is entirely a matter for them under the doctrine *kompetenz-kompetenz* and the circumstance that arbitrators may do so cannot form an appropriate basis for the domestic court to restrain the arbitration.

Should the Court determine the merits of the application for the injunction or only the question of whether there is a serious issue to be tried?

(a) Interlocutory injunctions in international arbitration

[24] The jurisdiction to grant an interlocutory injunction is governed by section 27 (1) of the Belize *Supreme Court of Judicature Act*,[18] which is similar to section 45 (1) of the United Kingdom Supreme Court of Judicature (Consolidation) Act 1925 (an Act replaced by subsequent UK legislation). The Court may grant an injunction by an interlocutory order "in all cases where it appears to the Court to be just and convenient to do so." It is on this statutory provision that the case law was based. *American Cyanamid Co v Ethicon* laid down guidelines that require an applicant for an interlocutory injunction to fulfill three conditions before the court will grant his application, namely, he must show that (1) there is a serious question to be tried, (2) he will suffer irreparable injury, for which damages would not be an adequate remedy, if refused the interlocutory relief, and (3) the balance of inconvenience resulting from granting or denying the interlocutory relief lies with him rather than with the respondent.

[25] It was not long before it was understood that it would not be just and convenient to apply that rule inflexibly in all cases. This was clearly expressed by Lord Kerr in *Cambridge Nutrition Ltd v British Broadcasting Corp.*[19] He said that:

> "It is important to bear in mind that the *American Cyanamid* case contains no principle of universal application. The only such principle is the statutory power of the court to grant injunctions when it is just and convenient to do so. … The American Cyanamid case provides an

[18] Cap 91
[19] [1990] 3 All E.R. 523

> authoritative and most helpful approach to cases where the function of the court in relation to the grant or refusal of interlocutory injunctions is to hold the balance as justly as possible in situations where the substantial issues between the parties can only be resolved by a trial."[20]

[26] There were a number of cases "in which the grant or refusal of an injunction at that stage would, in effect, dispose of the action finally in favour of whichever party was successful in the application, because there would be nothing left on which it was in the unsuccessful party's interest to proceed to trial."[21] Circumstances could also exist where there is no material dispute over the facts, and where even at the interlocutory hearing there is already a complete factual record. In these cases the *American Cyanamid* reasons for refusing to venture into the merits of the case, are absent. It is thus now accepted that *American Cyanamid* does not apply to all domestic applications for interlocutory injunctions to preserve rights pending trial.[22]

[27] In this case, there are no factual issues in dispute, and during oral argument, counsel for the respondent actually stated that there is no further material which could be presented to the trial court on the full hearing of the matter. The case turns on the legal consequence of the existence of the specified proceedings before the domestic court, and the extent to which it would be vexatious or oppressive to hear the arbitration simultaneously with or before the hearing of those proceedings.

[28] For these reasons alone, the application of the "three-pronged test" laid down in *American Cyanamid* necessarily resulted in error. In the circumstances of this case, where all the relevant materials were before it without any complex issues of facts to be resolved, the court below ought to have decided whether it was just and convenient to uphold the injunction. The Court of Appeal having decided the

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[20] [1990] 3 All E.R. 523 (C.A.) at 534 - 535
[21] *N.W.L. Ltd. v. Woods* [1979] 3 All ER 614 at 625 (H.L.).
[22] See e.g., *N.W.L. Ltd v Woods [1979] 3 All ER 614 (HL); RJR – MacDonald Inc. Canada (A.G.*) *[1994] 1 S.C.R. 311*; *Miller v Cruikshank (1986) 44 W.I.R. 319;* Jean-Philippe Groleau, "Interlocutory Injunctions: Revisiting the Three-Pronged Test", (2008) 53 McGill LJ 269.

matter on a wrong principle, this Court cannot now limit itself to a review of that decision but must consider afresh the material before it and make a finding on the merits while observing the underlying statutory power to impose the injunction if it is just and convenient to do so: see *Hadmor Productions Limited v Hamilton and Others*.[23]

(b) Was there sufficient basis for granting the injunction restraining the arbitration?

[29] The Government of Belize contends that the continuation of the arbitral proceedings should be restrained. It has submitted that it is vexatious or oppressive to pursue those proceedings simultaneously with the domestic proceedings regarding the constitutionality of the acquisition legislation and compensation and the validity of the loan and mortgage facility. It claims that the multiplicity of proceedings, including the risk of conflicting or overlapping orders renders the process vexatious and oppressive.

[30] The power to issue an anti-arbitration injunction is contained in the *Supreme Court of Judicature (Amendment) Act 2010* ("the Amendment Act") which amended the *Supreme Court of Judicature Act* by introducing a new section 106A. The Amendment Act entered into force on 1st April 2010. Section 106A (8) vests in the Supreme Court power to issue an anti-arbitration injunction and to nullify arbitral awards made in breach of such injunction. The precise wording of the provision is as follows

> (8) "Without prejudice to the generality of the foregoing provisions, the Court shall have jurisdiction
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> (i) to issue an injunction against a party or arbitrators (or both) restraining them from commencing or continuing any arbitral proceedings (whether sited in Belize or abroad), or an injunction against a part restraining it form commencing or continuing any proceedings for enforcement of an arbitral award (whether in Belize or abroad), where it is

[23] [1985] 1 AC 191

> shown (in either case) that such proceedings are or would be oppressive, vexatious, inequitable or would constitute an abuse of the legal or arbitral process;
> (ii) to void and vacate an award made by an arbitral tribunal (whether in Belize or abroad) in disregard of or contrary to any such injunction."

[31] Section 106A (8) has had a chequered career. On 22nd December 2010, the Supreme Court of Belize declared that section 106A (8) was unconstitutional. On 8th August 2012, the Court of Appeal (by majority) upheld the interim injunction, that court being careful to base its reasoning, not on the statutory provision which remained inoperative under the judicial declaration of unconstitutionality, but rather on common law and equity. Following that judgment, however, the constitutionality of section 106A (8) was restored by a unanimous Court of Appeal in *Zuniga et al v Attorney General of Belize and others* on 8th August 2012. The provision is, therefore, the current law of Belize but it should be noted an appeal from the decision in *Zuniga* is currently under review before this Court.

[32] The instant case is exclusively concerned with a limited aspect of the power in section 106A (8), namely, the power to restrain a party from proceeding with a foreign arbitration proceedings on the ground that such proceedings would be oppressive, vexatious, inequitable, or would constitute an abuse of the legal or arbitral process. The concepts of "oppression", "vexation", "inequity" and "abuse of process" have been known to the common law and equity for centuries, being the primary theories used by the court to regulate its process pursuant to its the inherent jurisdiction. In giving its unanimous judgment in *Zuniga* the Court of Appeal ruled that with the exception of the power to restrain an arbitration on the ground that its continuation would be an abuse of the arbitral process, the section did not make significant changes in the common law that had been applicable prior to its passage. It concluded that the concept of inequity had been embraced within the framework of vexation and oppression. Moreover, the extreme caution which the Supreme Court has traditionally exercised in granting such injunctions is not displaced by section 106A (8) either. This is in recognition in part of the

fact that the parties have voluntarily chosen to settle their disputes by arbitration and that the arbitrator is competent to determine matters concerning his or her own jurisdiction. We accept this as the current statement of the law of Belize on this matter subject to the outcome of the appeal to be heard by us.

[33] The concepts of vexation and oppression are derived from the old common law cases of *McHenry v Lewis*,[24] *Peruvian Guano co v Bockwoldt*,[25] and *Hyman v Helm*[26] and are elucidated by two examples from Jessel MR in the *Peruvian* case; namely, one of pure vexation where the proceedings are so absurd that they cannot succeed, and the other where there is no intention to harass or annoy but the litigant seeks some fanciful advantage by suing in two courts at the same time under the same jurisdiction. But it would not be vexatious to bring an action in each country where there are substantial reasons of benefit to the plaintiff. There is no presumption that a multiplicity of proceedings is vexatious, or that proceedings are vexatious merely because they are brought in an inconvenient place.

[34] Proceedings may be restrained not only because they are vexatious in the sense of being frivolous or useless but also because they are oppressive. An example of oppression occurs where a litigant may be encouraged to pursue proceedings in a forum, having no connection with the subject matter of the dispute, by inducements of enhanced remedies including punitive damages. In normal circumstances, the widely recognized principle of *forum non conveniens* will apply but the court will restrain proceedings where a party acting under the colour of seeking justice acts in a way which necessarily creates injustice to others: see *Castanho v Brown & Root*[27] and *Spiliado Maritime Corporation v Consulex Ltd*.[28]

[35] Moreover since the courts are concerned with the ends of justice, account must be taken not only of the injustice to the defendant if the plaintiff is allowed to pursue

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[24] McHenry v. Lewis. [1881 N. 2327.] - (1882) 22 Ch.D. 397
[25] *Peruvian Guano Co v Bockwoldt and others* - [1881-85] All ER Rep 715
[26] *Hyman v. Helm.* [1882 H. 4284.] - (1883) 24 Ch.D. 531
[27] *Castanho v Brown and Root (UK) Ltd* [1981] AC 557, [1981] 1 All ER 143
[28] *Spiliado Maritime Corporation v Consulex Ltd* . [1986] 3 All ER 843

the foreign proceedings, but also of injustice to the plaintiff if he is not allowed to do so. So the courts will not grant an injunction if by doing so they will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. This problem can be overcome by appropriate undertakings or granting appropriate terms for the order.

[36] Lord Goff's opinion in *Societe National Industrielle Aerospatiale v Lee Kui Jak*[29] is now generally accepted as clarifying the law in England with regard to the granting of orders restraining the continuation of proceedings in a foreign jurisdiction while there are domestic proceedings pending. The jurisdiction is to be exercised when the ends of justice require it. The order is not made against the foreign court but against the parties proceeding or threatening to proceed. An injunction will only be issued against a party who is amenable to the jurisdiction of the court; and that since such an order indirectly affects the foreign court, the jurisdiction must be exercised with caution. There is another line of cases starting with *British Airways v Laker,*[30] not argued before us, but nonetheless relevant because it sheds light on the concepts of inequity, unconscionable conduct and abuse of process. The case law was examined and the principles explained by Lord Hobhouse in *Turner v Grovit*.[31] In brief, his speech reaffirmed the principles set out in the speech of Lord Goff in *Lee Kui Jak*. He went on to explain them in the context of the equitable origins of jurisdiction to grant injunctions. In that sense, the power to make the order is dependent upon there being wrongful conduct of the party to be restrained which the applicant has a legitimate interest in seeking to prevent. Lord Hobhouse suggested that the concept of unconscionable conduct embraced other tests like vexation and oppression and abuse of process, although his speech carries the implication of an additional element of wrongful conduct of the person to be restrained.

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[29] [1987] AC 871
[30] *British Airways v Laker* (1985) AC 58
[31] *Turner v Grovit and others* [2001] UKHL 65

[37] The Court exercises heightened vigilance when asked to restrain international arbitration because the parties have contracted to arbitrate their dispute. The acceptance of international arbitration has a long and respected genealogy. In the 19th Century Lord Watson declared that the law has, "from the earliest of times, permitted private parties to exclude the merits of any dispute between them from consideration of the Court by simply naming their arbiter": *Hamlyn & Co. v Talisker Distillery*.[32] In numerous cases an injunction to restrain foreign arbitral or judicial proceedings was refused and instead the English action was stayed in order to force the parties to abide by their agreement to litigate in the foreign arbitration or the foreign court. The fact that there had been the instigation of domestic proceedings was never a reason to allow a party to renege on the bargain to litigate abroad. Even in the ordinary case of concurrent proceedings (i.e., where the parties had not expressly agreed to the foreign trial) the concurrency of local and foreign actions did not necessarily make the foreign action vexatious or oppressive.[33]

[38] The approach to modern arbitration agreements contained in investment treaties is for the court to support, so far as possible, the bargain for international arbitration.[34] Belizean cases have affirmed that it is "only with extreme hesitation" that the court will interfere with the process of arbitration.[35]

[39] What then are the specific principles governing the circumstances when the court will, in exceptional circumstances grant an injunction restraining international or foreign arbitration? The nature of the exceptional circumstances was considered in the case of *Elektrim S.A. v Vivendi Universal S.A.*.[36] The court held that there

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[32] [1894] AC 202 at 214

[33] *McHenry v Lewis* (1882) 22 Ch.D 397; *Peruvian Guano Co. Bockwold* (1883) 23 Ch.D 225; *Cohen v Rotherfield* [1918] 1 KB 410

[34] *Channel Group v. Balfour Beatty Ltd.* [1993] A.C. 334, at 341 per Lord Brown-Wilkinson; *Occidental Exploration and Production Co.* v *The Republic of Ecuador* [2005] EWCA Civ. 1116, at paragraph 32 per Mance LJ; *Carter Holt Harvey Limited v Genesis Power Limited and Rolls Royce New Zealand Limited* (Civ-2001-404-1974, Judgment delivered on 22 February 2006 per Randerson J.

[35] *The Attorney General of Belize v Carlisle Holdings Limited* (Claim No. 15 of 2005) (Conteh CJ); see also (*Belize Telemedia Limited v Attorney General of Belize* (Claim No. 317 of 2008) (Conteh CJ)

[36] *Elektrim SA v Vivendi Universal SA and others* [2007] EWHC 571 (Comm)

were only two bases on which an injunction to restrain an international arbitration could be granted:

> "First, if the proceedings are an infringement of a legal or equitable right of a party; secondly where those proceedings are vexatious, oppressive unconscionable. The first analysis is usually applied to cases where the parties have contractually agreed to submit disputes to a particular court or arbitration and one party has started proceedings in breach of that agreement. The second analysis applies where there is not such agreement but the court concluded that the ends of justice require an injunction to restrain foreign proceedings that are vexatious or oppressive."

A party is, therefore at liberty to challenge the validity of the arbitration contract or the agreement of which the arbitration contract is an integral and non-severable part. But once the validity of the arbitration bargain has been established the court will only grant an injunction to restrain the arbitration if it is positively shown that the arbitration proceedings would be oppressive, vexatious, inequitable, or an abuse of process. The burden is on the party seeking the injunction and he must discharge that burden to a higher level than that required to restrain foreign proceedings which do not involve a contract to litigate in the foreign court.

[40] In applying these principles to the instant case, the factual basis for the finding of vexation or oppression was that there were a multiplicity of proceedings and that those in the domestic courts should be completed first. The case law has elucidated that there is no presumption that the pursuit of multiple proceedings is vexatious or oppressive or an abuse of process in itself, nor is there vexation or oppression if there is an advantage to the party seeking the arbitral proceeding: *Lee Kui Jak*. This was further clarified in the case of *Elektrim* where Aikens J said:

> "…. can Elektrim demonstrate that continuation of the LCIA. Arbitration now that the ICC arbitration has started is oppressive or vexatious? The only basis on which it can seriously do so is by asserting that it should not

> have to face two arbitrations at once. However, it is clear that the two arbitrations concern different subject matters. The LCIA arbitration is dealing with disputes concerning the TIA. The ICC arbitration is dealing with disputes concerning the Settlement Agreement. Neither arbitration could deal with the subject matter of the disputes that is being dealt with by the other. Both arbitrations were started pursuant to contracts."[37]

[41] The principles that are to be applied to the case before us are the following. The provisions in section 106A (8) (i) of the Supreme Court of Judicature Act of Belize, as they currently stand, are applicable. In a case where the substantive remedy is the grant of the injunction the principles in making an order for an interim injunction are much the same as those governing the making of the final order and the primary power is to make the order where it is just and convenient to do so. In a case where there is no significant dispute on the facts and the record before the court is materially complete the court should in the interests of doing justice consider the merits, at least in a preliminary manner, to determine whether there are any violations of the rights of the claimant and not limit itself to determining whether there is a serious issue as to whether there could be such a violation. In particular, the jurisdiction to grant an anti-arbitration injunction must be exercised with caution and only granted if the arbitral proceedings are vexatious or oppressive. Proceedings could be vexatious where they are absurd or the litigant seeks some fanciful advantage by suing in two courts at the same time but they would not be so held where there are substantial reasons of benefit to the plaintiff to bring the two sets of proceedings. There is no presumption that a multiplicity of proceedings, or that merely bringing the proceeding in an inconvenient place, is vexatious. In normal circumstances the widely recognized principle of forum *non conveniens* will apply but in anti-arbitration injunctions cases the mere fact that the court is the natural forum for the case is not sufficient for it to grant the injunction. The equitable basis of the jurisdiction makes it a remedy based on the wrongful conduct of the person to be restrained. In cases of restraining international arbitration proceedings, the court must re-double the caution it normally exercises in restraining foreign proceedings because of the

[37] *Elektrim SA v Vivendi Universal SA and others* [2007] EWHC 571 (Comm) at [65]

importance of recognizing and enforcing the agreement of parties to the mechanism for dispute resolution and the accepted principle of international law that the arbitral tribunal should not be subjected to the control of the domestic courts before it makes an award. There is a role in the undertaking for damages in supporting the refusal of an injunction.

[42] The factual matrix on which the GOB case was built was that it was vexatious or oppressive to continue with the arbitration before related domestic proceedings were completed. The anti-arbitration injunction was said to be required to avoid the inconvenience and expense of having to participate in the foreign arbitration proceedings when aspects of the dispute could be resolved which may impact on the arbitral proceedings, minimizing the risk of inconsistent awards which could prejudice GOB by risking double compensation. Domestic litigation could also make the arbitration unnecessary. The proceedings are *Suit 874 of 2009*; *Suit 360 of 2011 AG and Telemedia v BCB;*[38] *Claim 597 of 2011 BCB v AG;*[39] and the claim for compensation under the 2011 acquisition legislation.

[43] In *Claim 874 of 2009* the Appellants had sought declarations that the 2009 legislation compulsorily acquiring their property was unconstitutional null and void, and the award of punitive damages. The Appellant was unsuccessful in the High Court but prevailed in the decision of the Court of Appeal handed down on 24th June 2010, where the Act was condemned as unconstitutional, null and void. Apart from costs the Court of Appeal awarded no consequential relief no doubt believing that the Government would respect all the consequences of the legislation being declared void. That was not to be. BCB appealed, ultimately to this Court, for relief consequential upon the decision of the Court of Appeal. A majority in this Court declared a "stay of the appeals pending the outcome of the challenge in the normal manner to the 2011 legislation." In the circumstances,

[38] *The Attorney General* of Belize *and Belize Telemedia* v. *The British Caribbean Bank,* Claim No. 360 of 2011

[39] *The British Caribbean Bank v. The Attorney General* of Belize and *The Minister of Public Utilities* Claim No. 597 of 2011

this action by the Appellant cannot in any good conscience be said to constitute vexatious or oppressive conduct so as to justify the restraint of their right to go to international arbitration. Neither could it in conscience be said that recourse to arbitration was abusive in light of the circumstances attending this action undertaken in Belize.

[44] *Suit 360 of 2011 AG* and *Telemedia v BCB* is the case in which GOB applied to have the loan and mortgage facilities declared invalid on the ground that it was used for an unlawful purpose. It contends that there is a risk that the loan may be declared illegal by the domestic court after the arbitral tribunal has made an award for compensation. This would prejudice the GOB because it could have to pay compensation for property which it did not get. A declaration of invalidity would entitle Telemedia to refuse to repay the loan for which GOB may have had to pay compensation to BCB. *Suit 597 of 2011*[40] is a challenge to the 2011 Acquisition Legislation, 2011 Order, and Constitutional Amendment Legislation for failing to meet the requirements of the Belize constitution. GOB contends that it could be prejudiced if the arbitral tribunal awards compensation for the expropriation of the property and in the constitutional proceedings the expropriation is declared to be unlawful and the court orders the return of the property conferring double benefit on BCB. The fourth and final proceeding that was alleged in this context was the claim for compensation under the 2011 Acquisition Legislation by letter to the financial secretary. This is not, however, a proceeding before the courts. The law required BCB to file a claim for compensation within specified time limits. This claim could be no more than ancillary to the constitutional claim. It was filed without prejudice to the arbitral proceedings.

[45] In the case before us there are many advantages to BCB to pursue the arbitral proceedings because the relief it seeks for breach of the BIT is qualitatively different from the relief it could obtain from the domestic courts. The fact that it

[40] *The British Caribbean Bank v. The Attorney General* of Belize and *The Minister of Public Utilities Claim No. 597 of 2011*

may be inconvenient or expensive for GOB to litigate before the arbitral tribunal is not an issue that could justify a finding of vexation or oppression.

[46] The subject matter of the claims before the arbitration is qualitatively different from the claims regarding the constitutionality of the acquisition legislation and the validity of the loan and mortgage facilities. The arbitral claims are for compensation for breach of BCB's rights under the BIT in international law. It is common ground that the arbitral tribunal does not have jurisdiction to make any declarations under the Constitution. The cause of action before the tribunal is breach of the BIT, not breach of the Constitution or existing legislation. Similar principles apply to the validity of the loan and mortgage facilities, although in this case, the validity of the loan itself must be a matter within the ambit of the arbitration to which the parties had freely entered as BCB must be able to establish that it owned the property allegedly expropriated.

[47] There can be no doubt that there is benefit to BCB in going to arbitration. The rights that it alleges were violated exceed the rights it might have under the Constitution. The entire scheme of the BIT is contractual and it is clear that Belize consented to the international arbitration as the method of dispute resolution under the BIT. The likelihood that either the court or the tribunal would make an order that would afford BCB double relief or impose a double jeopardy on the GOB is remote. It would be contrary to elementary judicial principles that would be applied by both the arbitral tribunal and the domestic court.

[48] In *suit 360 of 2010*, there is no allegation of a wrongful act by BCB. It was GOB who made the acquisition order and then brought this action in August 2010 after the arbitration was commenced in May 2010. There was no contention that the claims as to the validity of the loan could not be taken before the arbitral tribunal which was already operational at the time the suit was launched. As we have already discussed, there is no obligation for matters to be resolved by the

domestic court before the commencement of the arbitral proceedings. It is beyond dispute that BCB had undertaken a step it was entitled to take.

[49] GOB contended that there was abuse of process and inequity because BCB applied for and obtained with the consent of the GOB a stay of those proceedings until the conclusion of the constitutional case tying up those proceedings while intending to proceed with the arbitration. However, it was common ground that the GOB would have no standing in the constitutional action if the acquisition was invalid, so it was logical for that action to be determined before the hearing of the arbitration otherwise the parties would have to advocate that same issue in both proceedings. On a purely factual basis, therefore, there seems to be no conduct of BCB in relation to this action which could support a conclusion of vexatious or oppressive conduct.

The Undertaking

[50] BCB has offered that if the injunction issued by the Court of Appeal is discharged, it would suspend proceedings under the statutory claim and ensure that there will be no double recovery. It reserved the right to proceed, however, if the arbitrators declined jurisdiction or in the event that it received any award that was not paid within 90 days.

[51] The giving of undertakings of this kind is scarcely foreign in international commercial disputes. Neither does it reflect adversely upon the sovereignty of domestic judicial decision-making if it is borne in mind that the undertaking is meant to facilitate trial of the dispute in accordance with agreement of the parties. As early as the turn of the Twentieth Century an undertaking was accepted by an English court as part of the measures that facilitated a stay of English proceedings in favour of enforcing the agreement by the parties to litigate their dispute in a German Court: *Kirchner & Co. v Gruban.*[41] An undertaking was accepted in

[41] [1909] 1 Ch. 413 at 423

Jarvis and Sons Limited v Blue Circle Dartford Estates Limited[42] to reduce the risk that concurrent proceedings in England and in the foreign arbitration could result in the party that was resisting arbitration being mulcted in damages twice over. In light of that undertaking the court held that risks posed by the concurrent proceedings were now so low that the arbitration could not be characterized as oppressive. It is significant in the case before us that a majority in the Court of Appeal accepted that the undertaking by the Appellant nullified any vexation or oppression that might otherwise be caused by the simultaneous pursuit of the arbitration and the local claim for compensation, although Mendes JA qualified his acceptance in an important regard which we must now address.

[52] When the matter was being considered, the Court of Appeal accepted that the undertaking nullified any vexation or oppression in respect of the statutory claim for compensation. But it also concluded that the undertaking would not avoid: a) the paradox of arbitrating over the quantum of compensation when one would not yet know whether the property will or will not be returned to BCB; and b) the risk of inconsistent decisions as to the validity of the loan. The consideration of these issues resulted from the erroneous approach of the Court of Appeal limiting its determination to whether there was an arguable case of oppression or vexation. These considerations would not have any significance in rejecting the offer of the undertaking had the court considered whether the case for vexation or oppression had been made out. The undertaking against receiving double damages is merely an additional protection to GOB. In the circumstances, the Court of Appeal erred in not concluding that the undertaking properly worded would further minimize the risk of double recovery and any prejudice that may result from that circumstance.

[53] Under the doctrine of *kompetenz-kompetenz* the arbitrators are competent to determine their jurisdiction although the effective exercise of that jurisdiction remains subject to the inherent competence of the court to decide, in relation to an

[42] [2007] EWHC 1262 (at paras. 27-29, 44

injunction to restrain international arbitration, whether a particular dispute falls within the scope the arbitration agreement.

[54] Admittedly, the ostensibly odd situation could arise whereby litigation in the domestic courts produces results that are incongruous with the results of arbitration. In the present dispute, for example, it may be that if concurrent proceedings were to run their course, the arbitral tribunal could award compensation for the expropriation of the Appellant's property whilst the Belizean courts subsequently nullified the legislation under which property was expropriated and order the return of the property to the Appellant as its rightful owner. Quite apart from any undertaking given it would appear that the doctrine of estoppel and/or unjust enrichment would operate to prevent double dipping. For this reason it is not now necessary to extract the undertakings discussed in the Court of Appeal. The Appellant will be stuck with the remedy first received, or, if the equity of the situation so requires, be put to his election.

Costs

[55] The Court of Appeal made an order nisi that the Respondent should have 80% of his costs, certified fit for three counsel, including two Senior Counsel. That order was later made absolute. Before this Court the parties have made written submissions on costs. BCB has argued that having pointed out several errors of the Court of Appeal, it should have its costs before this Court and also before the Court of Appeal. GOB has submitted that the costs order was the exercise of a careful discretion made after investigation and submissions and should not be disturbed. We have noted that BCB did not address one of the determinative features of the appeal that is the applicable threshold for the court to award the injunction in any detail, if at all. Had this been a plank of their armoury it may have prevented the Court of Appeal from slipping into error on this decisive area of the case. In these circumstances, justice will be done if the order of the Court

of Appeal on costs is set aside and no order as to costs is made to replace it. GOB must pay the costs of appeal before this Court.

Disposition

[56] For the reasons given above, the orders of the Court of Appeal are set aside. The interlocutory injunction is discharged with costs.

The Rt Hon Sir Dennis Byron (President)

The Hon Mr Justice A Saunders

The Hon Mme. Justice D. Bernard

The Hon Mr Justice J Wit

The Hon Mr Justice W Anderson