

“Public Policy, and the Enforcement of Arbitral Awards: Lessons from BCB Holdings v AG of Belize & Belize Bank Ltd v AG of Belize”

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1. Introduction

The case of *BCB Holdings Ltd. v AG of Belize* [2013] CCJ 5 (AJ) (“*BCB Holdings Ltd. (2013)*”) is the starting point for a series of cases that marked a pivotal moment in Caribbean jurisprudence on the enforcement of arbitral awards when confronted with the public policy exception. At the heart of these cases lies the tension between the international public policy in favour of enforcement of arbitral awards to protect the sanctity of the arbitral process and the reliance on the public policy exception to prevent enforcement.

In the world of international commercial agreements between governments and investors, arbitration is known to often be the selected mechanism for the settlement of disputes. When parties are issued an arbitral award in the territory of a state which is a party to the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) the winning party can seek to enforce it in a state in which the losing party has assets that is also a party to the New York Convention, almost anywhere in the world,. The enforcement element of the arbitration process has a closer interaction with domestic courts as they have the power to recognize the award as valid and binding. Therefore, it compels the losing party to make good on the award. However, the New York Convention does allow courts to refuse recognition or enforcement where the recognition or enforcement of the award would be contrary to the public policy of that country.

The Caribbean Court of Justice (“CCJ”) in *BCB Holdings Ltd (2013)* has examined the public policy exception in relation to protecting the constitutional order of Belize and inherent principles such as the doctrine of separation of powers. The Court found that the doctrine prevented it from ordering the enforcement of the arbitral award against the Belizean government. Later, in *Belize Bank Ltd v AG of Belize* [2017] CCJ 18 (AJ) (“*Belize Bank Ltd (2017)*”), under similar circumstances, the exception of public policy was relied upon once again however, on this occasion the Court declined to use it as a bar to enforcement. Together, these cases raise important questions on the balancing exercise that Courts must undertake in understanding the nature and extent of the domestic public policy exception versus international public policy in favour of enforcing arbitral awards considering the premise of reliability of international commercial arbitration agreements. This article explores the law surrounding the domestic public policy exception as discussed by the CCJ, examines the sequence of cases in relation to its application and argues that its application may take a varying nature when confronted with international public policy in favour of enforcing arbitral awards.

We are pleased to share an article entitled “Public Policy, and the Enforcement of Arbitral Awards: Lessons from BCB Holdings v AG of Belize & Belize Bank Ltd v AG of Belize” written by Deborah Bryan, a member of the winning team of our inaugural Berrys International Commercial Arbitration Moot Competition. We hope you find it engaging.

2. BCB Holdings Ltd. (2013) and the Public Policy Exception

BCB Holdings Ltd (2013) centered around enforcement proceedings by two companies, BCB Holdings and Belize Bank Ltd, who brought an action against the Government of Belize for breaching a Settlement Deed (“Settlement Deed”). The Settlement Deed which was granted by a previous government administration allowed the companies to enjoy a special tax regime. When a new government administration came into power, it refused to comply with the Settlement Deed because the tax regime had not been formally legislated. As a result of this breach, the companies brought arbitral proceedings against Belize, under the London Court of International Arbitration (“LCIA”) arbitration rules, and an award was issued in their favour. They sought to enforce the award through applications to the courts of Belize pursuant to the Arbitration (Amendment) Ordinance No 21 of 1980. In contest, the government resisted the application citing that enforcing this award would be contrary to public policy among other things and the trial courts disagreed. On appeal, the CCJ considered whether public policy would serve as an exception to the prevention of the enforcement of the award based on its infringement of the doctrine of separation of powers. The Court accepted the defense of public policy refusing the enforcement of the arbitral award.

The CCJ in BCB Holdings Ltd (2013) examined the high threshold to invoke the public policy exception for the non-enforcement of arbitral awards in more detail. It acknowledged that the New York Convention reflected international public policy that was ‘pro-enforcement’ and as such, the exception is not to be used to easily escape the enforcement of arbitral awards. The Court determined that applying a proportionality test is useful to balance the international public policy with domestic public policy considerations. In this context, the CCJ assessed whether the Settlement Deed violated Belize’s foundational doctrine of separation of powers between the Executive and Parliament. The Court concluded that only Parliament possessed the authority to enact such tax exemptions included in the Settlement Deed, which rendered the executive's actions contrary to the laws of Belize. They looked at balancing this domestic public policy argument with international public policy in favor of enforcing arbitral awards and decided that the LCIA award should not be enforced.

The CCJ stressed that the defense must be applied in a restrictive manner even if “features of an award may seem inconsistent with public policy” (para 54). However, they prioritized the fundamental principle evidencing a threat to the constitutional fabric of Belize if the award were to be enforced. In their view, enforcement of the award would validate the power of the Minister making promises for certain tax exemptions without the required legislation enacted by Parliament. The Court noted such actions “... disregard the Constitution and attempt to set back, over 300 years, the system of governance Belize has inherited and adopted.” (para. 44). The Court was of the view that the law was clear and the requirement that only Parliament could approve the exemptions in the Settlement Deed was unquestionable. Further, that if enforcement was to be made, the Belizean government would have to make provisions for the terms in the Settlement Deed. While the decision clarified the application of the domestic public policy exception, it also raised questions about whether the application of the standard for refusing enforcement was sufficiently rigorous when measured against international public policy in favour of enforcement in international commercial arbitration.

3. Practical Implications for Non-Enforcement

Following BCB Holdings Ltd. (2013), the issue of enforcing the contested arbitral award was not laid to rest. After, the companies sought enforcement abroad and were initially successful in the United Kingdom. As a result, the Government of Belize enacted a new statute that penalized parties who attempted to enforce arbitral awards locally and abroad in violation of Belizean Supreme Court injunctions. These ‘anti-arbitration injunctions’ were further reinforced by this statute aimed at restricting enforcement abroad, but the CCJ struck the criminal statute down 2 years later as unconstitutional.

Subsequently, the companies sought to have the award enforced in the United States. The public policy exception was not upheld, as seen in *BCB Holdings Limited and the Belize Bank Limited v. The Government of Belize*, US District Court, District of Columbia, Civil Action No 14-1123 (CKK). Here, the government of Belize advanced a number of arguments before the US District Court against enforcement including the violation of US public policy. The judge maintained that public policy will always be construed “extremely narrowly” citing its rare success. In consequence, she failed to accept that public policy against corruption (i.e. the alleged “corrupt agreement and tainted award”) outweighed international public policy in favour of enforcement of arbitral awards. There was no US precedent indicating successful reliance on corruption, and enforcement being denied on these grounds was found to “implicate politics abroad”. Therefore, the judge was inclined to grant the enforcement of the foreign arbitral award. This case further solidifies the high threshold of invoking the domestic public policy exception and it may be argued that it reflects the pro-enforcement stance that judges are inclined to support in favor of international public policy.

In *Belize Bank Ltd* (2017), the CCJ again revisited the issue of public policy in the context of the enforcement of the arbitral award. The Court reaffirmed the principles established in *BCB Holdings Ltd* (2013) but highlighted the significance of international public policy in favour of enforcement in advancing “certainty and reliability within the global framework of arbitration agreements” (para. 8). While the jurisprudence concerning public policy remained consistent and the facts closely echoed those of *BCB Holdings Ltd* (2013), the CCJ reached a different conclusion opting to enforce the arbitral award.

4. Reconciling the Role of Public Policy in the Enforcement of Arbitral Awards: The CCJ’s Second Bite at the Public Policy Exception

Returning before the CCJ in *Belize Bank Ltd* (2017), the Belizean government contested the arbitral award from the LCIA. The issues before the Court bore similarities to those considered in *BCB Holdings Ltd* (2013), as the central question remained as to whether the enforcement of the arbitral award (in this case based on a Loan Note) would run counter to the public policy of Belize. The Court examined the decision of the Judicial Committee of the Privy Council (“JCPC”) in *The Belize Bank Limited v The Association of Concerned Belizeans & Others* (the “ACB Proceedings”) concluding that they were precluded from assessing the legality of the underlying transaction (para. 26). Thus, it could not be accurately determined if enforcing the arbitral award (i.e. the execution of the Loan Note) would be contrary to domestic public policy on the basis of illegality. The CCJ disagreed with the lower courts citing the minority decision as more agreeable and distinguished the application of *BCB Holdings Ltd. (2013)* as in that case there was evidence of a violation. They found that to enforce foreign awards, they must treat them as if they were judgements of the domestic court, i.e. they must be “registered within the domestic sphere” (para. 34). In addition, this meant that the government was required to pass the relevant legislation in order to initiate payment of the arbitral award in accordance with the Belizean Constitution (para. 36). In this case, the enforcement of the arbitral award was more in terms of recognising payment of the debt while allowing the government to obtain legislative approval first before issuing payment.

From this reasoning, the CCJ crafted a decision that balanced domestic public policy considerations with international public policy of enforcing arbitral awards. It is reasonable to conclude that the Court conducted a fitting balancing exercise as they still considered the argument of domestic public policy but ultimately held that it was inapplicable. While some may argue that there was a need for further clarification, the decision recognizes that public policy might also require the government to pay certain debts, requiring a state to take the necessary steps to settle such obligations. In *Belize Bank Ltd* (2017), the responsibility to adopt statutes to authorize payment was left to the Belizean government. This position was later affirmed by the CCJ in *Belize Bank Ltd v AG Belize [2018] CCJ 14 (AJ)* where they noted that “...legislative approval is required in the form of a General Appropriation Act or a Supplementary Appropriation Act” (para. 6).

5. Conclusion: Final Assessment and Lessons Learned

A pertinent question arises as to whether any significant distinguishing factors prompted the Court to alter its stance. One suggestion is that potentially the absence of illegality in the underlying Loan Note compared to the Settlement Deed in *BCB Holdings Ltd. (2013)* warranted the Court taking a different route. It is also worth considering the legal reasoning behind the Court's apparent shift and whether their rationale served to advance legal certainty in applying the domestic public policy exception. Perhaps we can say for certain that in *Belize Bank Ltd. (2017)*, the Court made a distinction between the recognition of a foreign arbitral award and ordering the enforcement of such an award. It was recognized by the Court as a debt owed by the Belizean Government. Thus, it would have legal status under the Laws of Belize capable of later enforcement. However, the decision indicates that it did not require direct or immediate enforcement (actual payment of the arbitral award). Rather, the CCJ held that enforcement required the necessary judicial and legislative actions normally required for debts, including any required statute or bill authorizing payment.

In conclusion, these cases collectively demonstrate that while the domestic public policy argument is well-founded and represents sound law, its practical application within the context of international commercial arbitration proves to be more complex. Generally, it seems that the threat to domestic public policy is not often so severe that it would require the refusal of the enforcement of arbitral awards. Perhaps in *BCB Holdings Ltd. (2013)*, one might argue further considerations could have been made regarding the risk of invoking the domestic public policy exception. For instance, like weighing the importance of domestic public policy with international public policy for enforcement seeing as Belize was the most convenient place for enforcement and subsequent complications involving its commercial assets abroad, given that the award was ultimately enforced in the UK and US. After such considerations, it is arguable that the approach taken in *Belize Bank Ltd. (2017)* could have also been applied in *BCB Holdings Ltd. (2013)*. Ultimately, whether such a balancing exercise would have altered the Court's conclusion remains speculative.

What is clear, however, is that the protection of constitutional supremacy and inherent principles is considered sacrosanct within Caribbean jurisprudence. And at the same time, we also glean the delicate task courts have in reconciling domestic public policy with the international public policy in favour of the enforcement of arbitral awards that exists in the international commercial arbitration dialogue.

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Please note: The views expressed in this article are those of the author and do not necessarily reflect the views of Berrys Attorneys & Arbitrators, Barbados.