IN THE SUPREME COURT OF BELIZE, A.D. 2015

CENTRAL DISTRICT COURT

CLAIM NO. 418 of 2013

BETWEEN:

The BELIZE BANK LIMITED Claimant

AND

THE ATTORNEY GENERAL OF BELIZE Defendant

Before: **Hon. Madam Justice Shona Griffith**
Date of Hearing: **29th September, 2014**
Appearances: **Mr. Eamon Courtenay S.C. of Courtenay Coye LLP with Ms. Pricilla Banner, Attorneys-at-Law for the Claimant.**
Mr. Denys Barrow S.C. with Ms. Naima Barrow of Barrow & Co, Attorneys-at-Law for the Defendant.

DECISION

International Arbitration – New York Convention – Enforcement of Final Award – Challenges to Enforcement – Tribunal not Appointed in accordance with Parties' Agreement – Enforcement of Award contrary to Public Policy – Sections 30(2)(e) and 30(3) Arbitration Act, Cap. 125, Belize.

Introduction

1. The Belize Bank Ltd, seeks the order of the Court, pursuant to the provisions of the Arbitration Act, Cap. 125 of the Laws of Belize, for the enforcement of an arbitral award obtained against the Government of Belize in July, 2013 in the London Court of International Arbitration. The arbitral award is in the sum of thirty six million eight hundred and ninety-five thousand five hundred and nine Belize dollars (**BZ$36,895,509.46**) plus interest, costs of the arbitration in the sums of seventy eight thousand nine hundred and forty three pounds **(£78,943.30**) and four hundred and fifty

seven thousand, eight hundred and seventy four pounds **(£457,874.41**), (collectively 'the Arbitral Award'), arising out a Loan Note issued by the Government of Belize to the Bank in March, 2007. The Government defaulted upon the Loan Note in April, 2007 and in accordance with the provisions of the agreement out of which the Loan Note arose, the Bank initiated proceedings for arbitration, successfully obtained the award upon conclusion of the arbitration and now seeks enforcement of same. The Government resists enforcement of the arbitral award, thus giving rise to what is essentially the central issue of the claim, viz – should enforcement of the Arbitral Award be granted in favour of the Bank. Notwithstanding what appears to be a singular question, the Court's decision and answer to this central issue requires consideration of a number of issues of varying degrees of complexity. The first task however, is to isolate and identify the relevant parties and facts.

The Facts

The Parties

2. In addition to the parties the following introduces the other individuals or entities involved in the series of events which have led to this current application for enforcement of the arbitral award.

   (i) The Belize Bank Ltd. – '**the Claimant**' or '**the Bank**' – is a company incorporated in Belize which carries on business as a commercial bank.

   (ii) The Government of Belize – '**the Defendant**' or '**the Government**'.

   (iii) Universal Health Services Co. Ltd. – '**UHS**' – a predecessor company providing health care in Belize and the beneficiary of a loan from the Bank.

   (iv) Development Finance Corporation – '**DFC**' – a statutory corporation established under Cap. 279 of the Laws of Belize, charged with carrying out functions, inter alia, of promoting and facilitating financial development in Belize.

   (v) The London Court of International Arbitration – '**LCIA**' – the international arbitral court before which the arbitration proceedings took place and which granted the award.

(vi) Belize Healthcare Partners Ltd. – '**BHPL**' – the successor to UHS.

Chronology of Events

3. With thanks to Counsel on both sides for their comprehensive submissions which included detailed accounts of the facts (which were not in dispute), the Court sets out its understanding of the factual matrix (verified from the evidence submitted in the form of affidavits along with supporting documentation, from both parties) as follows:-

(i) In December 2004, UHS held a loan from the Bank, the existing amount of which totaled BZ$19,000,000.00 through a series of advances. The purpose of the loan was to fund expansion of UHS including construction of a hospital. The DFC had guaranteed the loan in February, 2003 but the financial condition of the DFC deteriorated and the Government intervened.

(ii) On 9th December, 2004 the loan agreement between the Bank and UHS was amended and increased to the amount of BZ$29,000,000.00. At this time, the Government became a party to the loan agreement and agreed as 'primary obligor and not merely as surety' to guarantee the liabilities of UHS to the Bank under that agreement or subsequent amendments thereto. This guarantee is hereinafter referred to as '**the 2004 guarantee**'.

(iii) In early 2007, UHS was unable to service its loan however the debt was not discharged by the Government in furtherance of the 2004 Guarantee. The UHS debt as guaranteed by the Government in March, 2007 stood in the amount of BZ$33,545,829.00 comprising both principal and interest.

(iv) With respect to this debt, the Government and the Bank, entered into a 'Settlement Deed' on 23rd March, 2007 (hereinafter '**the 2007 Settlement Deed**'). This agreement essentially provided for the Government to be released from its obligations under the 2004 guarantee (which obligations were in respect of all debts and liabilities at any time owing by UHS to the Bank) in consideration of (a) the payment of BZ$1 and (b) the execution by the Government in favour of the Bank, of a Loan Note to pay the sum of BZ$33,545,820 (the amount of the UHS debt at that time, hereinafter called '**the Loan Note**').

(v) The 2007 Settlement Deed was expressed to be 'in full and final settlement of all and any claims arising out of or in connection with the 2004 Guarantee. By this Settlement Deed the Government also represented and warranted (inter alia) that it was executed and would be performed, in full accordance with all legal requirements and that the agreement contravened no law or other obligations of the Government. The Settlement Deed further provided for arbitration under the LCIA rules and the seat of arbitration was London, England.

(vi) The Loan Note was appended as a schedule to the Settlement Deed in the sum due of BZ$33,545,820 as principal with interest thereon compounded monthly at the rate of 13% per annum. The sum due was payable on demand but in any event until such demand was made, no later than September 23rd, 2007. The Government was obliged to pay to the Bank, monthly interest payments commencing in April, 2007. The Loan Note was executed on behalf of the Government by the then Prime Minister and Minister of Finance, Said Musa and Francis Fonseca, Attorney General.

(vii) The Government failed to pay the first installment of interest under the Loan Note and the Bank treated Government as having defaulted under the agreement and on 9th May, 2007 demanded payment in the full principal amount together with interest. Prior to this demand for full payment however, a group of concerned Belizeans instituted an action in the High Court - **Claim No. 217 of 2007, Association of Concerned Belizeans v The Attorney General** – (given the moniker '**the Belize public law proceedings**') - challenging the 2004 Guarantee and the 2007 Settlement Deed and Loan Note. The Government gave an undertaking not to satisfy the Guarantee until the determination of that claim.

(viii) On 31st May, 2007, the Claimant initiated LCIA proceedings pursuant to the agreement to arbitrate as contained in the 2007 Settlement Deed. The Government participated in the initial stages of the arbitration by filing a response to the Bank's request for Arbitration on the 26th June, 2007.

The Arbitral Tribunal was constituted (without the participation of Government) and determined that it had jurisdiction over the claim as submitted by the Bank. On 30th October, 2007 a hearing on the merits of the arbitration took place. The Government took no part.

(ix) Whilst the outcome of this arbitration was pending, the parties entered into an oral agreement referred to as '**the 2008 oral settlement**' in January, 2008 intended to dispose of the Government's obligations under the 2007 Loan Note. This 2008 oral agreement entailed inter alia the use of funds essentially provided by the Government, out of funds it received respectively from the Government of Venezuela (US$10m) and the Government of Taiwan (US$10m). The execution of this oral agreement involved the provision of this US$20m to the Bank and the Bank in turn providing BZ$39 million to BHPL to purchase the assets of UHS under an Asset Transfer Agreement and held under a particular trust structure. This 2008 oral agreement resulted in the termination of the 2007 Arbitration.

(x) In respect of this oral agreement a number of other events unfolded, the most significant of which was a change of Government following general elections in Belize in February, 2008. The new administration instituted legal proceedings against the Bank in respect of the 2008 agreement, contending that certain aspects of the agreement were invalid (these proceedings, **Claim no. 228 of 2008** were dubbed **'the Belize civil law proceedings'**). Attempts were made by the Bank to halt these proceedings on the basis of them being in breach of the arbitration agreement as contained in the 2007 Settlement Deed, which it was claimed by extension, covered the 2008 oral agreement. The Bank's suit to halt the Belize Civil Law Proceedings was instituted in England as the seat of the arbitration, and an injunction was granted against the Government (by the English Court) to restrain any further proceedings in the action instituted by the Government.

(xi) The Government (who neither appeared nor made representations in the English anti suit injunction) obtained ex parte relief from the Belize Court to restrain the Bank from taking any further steps in the proceedings except in a Court in Belize.

Albeit granted, this relief was later set aside on the basis of the existence of the arbitral agreement as contained in the 2007 Settlement Deed, and the Belize civil law proceedings were stayed. With that injunction to restrain the Bank from proceeding outside the Courts of Belize set aside and the Belize civil law proceedings stayed, the Bank, in July 2008, re-commenced arbitral proceedings before the same Tribunal as was constituted in the 2007 arbitration. This became known as the '**2008 arbitration**'. The Arbitral Tribunal, the same as was constituted in the 2007 arbitration comprised Ms. Hillary Heilbron Q.C., Mr. Toby Landau Q.C. (presiding arbitrator) and Mr. Zachary Douglas. [*The manner of selection and appointment of this Tribunal will be more fully described below*.]

(xii) The Bank's claim before the 2008 Tribunal (again, the Government did not participate) was for enforcement of the 2008 oral agreement as referred to in paragraph ix above. The Tribunal found the 2008 oral agreement to be void for illegality as it pertained to the use by the Bank, of the US$10 million obtained by the Government from the Government of Venezuela. This US$10 million was found to have been a gift from the Government of Venezuela to the Government of Belize for the benefit of the people of Belize to be used for specified purposes. The funds were found to have been paid directly to the Bank in contravention of the financial controls provided in the Constitution and the Finance and Audit (Reform) Act and diverted away from the specified purpose for which they were granted by the Venezuelan Government insofar as they were used by the Bank towards the extinguishment of the UHS debt. Aside from ruling the 2008 oral agreement illegal, the Tribunal reserved for further proceedings, its deliberation on the question of the validity of the 2007 settlement agreement and Loan Note, as well as costs.

(xiii) The ruling of the Arbitral Tribunal regarding the Bank's receipt and use of the US$10m Venezuela funds (referred to as the 'first phase' of the 2008 arbitration) is contained in Part V, paragraphs 239 – 330 of the Tribunal's Partial Award which was delivered on 4th August, 2009.

The specific illegality was the contravention of section 114(1) of the Belize Constitution and section 3 of the Finance and Audit (Reform) Act and that the Bank was aware of these violations of law. The Bank was made to repay the US10m to the Government of Belize pursuant to a Central Bank directive which had also been the subject of earlier litigation by the Bank.

(xiv) The 2008 oral agreement having been found void and unenforceable (with respect to the use of the Venezuelan US$10m), the Bank intended to pursue its claims in respect of the 2007 Settlement Deed and Loan Note. By that time however, the Bank was forced to await the outcome of the Belize public law proceedings (paragraph vii above) concerning the validity of the 2007 settlement agreement and Loan Note. These proceedings eventually advanced on appeal by the Bank to the Privy Council, (the first instance court and the Court of Appeal having found the Loan Note to be invalid). The Privy Council's decision (**The Belize Bank Limited v The Association of Concerned Belizeans et al**[1]) decided that the 2007 Settlement Deed and Loan Note were valid and that the Loan Note had extinguished the UHS debt and 2004 Guarantee.

(xv) With that decision in hand (by that time, October 2011) the Bank resumed its claims in the 2008 arbitration (the second phase) seeking to enforce the 2007 Settlement Deed and Loan Note. The Government in response to an inquiry from the Tribunal as to its participation, advised that it would participate in this aspect of the 2008 arbitration and retained a firm in the United States to represent it. The Government objected to Mr. Toby Landau's continued service on the panel and Mr. Landau resigned in February, 2012. In March, 2012 the Government also objected to the service of Ms. Zachary Douglas on the panel on the basis that he was a member of chambers (Matrix Chambers) from which other barristers had acted in matters against the Government.

[1] **[2011] UKPC 35**

Specifically, that barristers from Matrix Chambers had represented Lord Michael Ashcroft in at least one matter and may have advised or represented in relation to two other matters involving the Government, and that Lord Ashcroft's interests included the Bank.

(xvi) The Government requested answers in relation to some 30 questions from Professor Douglas and advised that they would file a formal challenge should he refuse to step down. Professor Douglas declined to answer the 30 questions and instead responded with a letter which confirmed that he engaged in a conflicts check prior to accepting the appointment as arbitrator, confirmed his personal lack of involvement (to the best of his knowledge) with any matter concerning Lord Ashcroft or his interests, declined to accept any obligation to enquire into the practice of other members of Matrix Chambers and confirmed his nationality as Australian, resident in Geneva, Switzerland. The Government filed a formal challenge to Professor Douglas as Arbitrator and renewed a previous request made to have the entire Tribunal reconstituted on the basis that it had not appointed an arbitrator in the 2007 arbitration and the arbitration had entered a new phase.

(xvii) Aside from this challenge, following upon the resignation of Mr. Landau as Chair, the two remaining members (Heilbron Q.C. and Professor Douglas) selected the new Chair – Mr. Yves Fortier Q.C. The disputes relating to the constitution of the Tribunal were raised pursuant to the LCIA Rule 10.4 and paragraph D3(c) of the Constitution of the LCIA and were referred to a Division of the Court for determination. The Government's objections to the constitution of the Arbitral Tribunal were dismissed by the Division of the LCIA and the Government once more took no further part in the arbitration.

(xviii) The arbitration proceeded and the Tribunal rendered its final award upholding Government's obligations under the 2007 Settlement Deed and Loan Note. The Government was found liable to pay upon default of its obligations under the Loan Note, the sums of:

(a) **BZ$36,895,509.46** (standing as the principal amount due under the Loan Note as at 7th September, 2012) plus interest at the rate of 17% compounded per month from 8th September, 2012 until payment;

(b) Costs associated with the first phase of the arbitration in the amount of **£78, 943.30**; and

(c) Costs and legal and management costs associated with the second phase of the arbitration in the sum of **£457,874.41**.

It is this award that the Bank (hereinafter called 'the Claimant') has come before the Court to seek enforcement of pursuant to the provisions of the Arbitration Act, Cap. 125 of Belize. The Government (hereinafter called 'the Defendant') objects to such enforcement being ordered by the Court.

4. With this factual matrix in mind, the Court now sets out the case for the respective parties (the Claimant and Defendant). The Claimant's case will first be presented simpliciter, then the Defendant's case, which consists of its objections to the action for enforcement. Thereafter the Court will set out the Claimant's responses to the Defendant's objections to enforcement, the latter of the two cases is where the bulk of the Court's consideration and ultimate determination of the issues will lie.

The Case for the Claimant:

5. The Claimant seeks enforcement of the final award of the LCIA Arbitral Tribunal issued on 15th January, 2013 against the Government of Belize. The operative parts of the award for purposes of enforcement are set out at paragraph 3(xviii) above. The award is a Convention award within the meaning of section 25(1) of the Arbitration Act, Cap. 125 of the Laws of Belize ('the Act') – Convention meaning the **United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards** ('the New York Convention') 1958. The award being a Convention award pursuant to section 28 of the Arbitration Act, Cap. 125 of the Laws of Belize requires certain formalities to be fulfilled. These were all complied with by the Claimant and the action for enforcement is properly before the Court.

6. Additionally, the Claimant advocates as the overall approach, the clear statements made by the CCJ in **BCB Holdings Ltd & The Belize Bank Ltd v The Attorney-General**[2], regarding the pro enforcement bias towards Convention awards and the universal recognition that a court should only decline to enforce an international arbitral award in exceptional circumstances. The Claimant further advocates as a broad consideration that the Defendant bears the burden of establishing the existence of the grounds in section 30 of the Arbitration Act, in order to mount a successful challenge against the Court granting permission for enforcement of the arbitral award.

The Case for the Defendant.

7. The Defendant objects to the enforcement of the award. In the first instance the grounds for such objection are statutorily contained in section 30 of the Arbitration Act. In particular, the Defendant bases its objections firstly upon section 30(2)(e) – that the arbitration was conducted by a panel not properly constituted according to the agreement of the parties; and secondly in accordance with section 30(3) – that to enforce the award would be contrary to public policy.

The composition of the Tribunal argument –

(i) The Defendant in the second phase of the 2008 arbitration challenged the retention of Professor Douglas to the Arbitral Tribunal on the basis of an apparent lack of impartiality or independence. The basis of this charge was that members of the same chambers of Professor Douglas – Matrix Chambers, in England, had acted for or advised Lord Ashcroft in matters adverse to the Government of Belize. Lord Ashcroft, had interests in the Claimant – Belize Bank Limited. These facts were brought to the attention both of the LCIA and Professor Douglas, the latter of whom upon being so requested by the Defendant, declined to investigate the

[2] **[2013] CCJ 5 (AJ)**

existence of any connections between Matrix Chambers and Lord Ashcroft or the Claimant. Further, Professor Douglas declined to answer questions intended to establish the nature of the relationship of barristers in his chambers.

(ii) The Defendant's submission was that the importance of being able to ascertain the nature of the relationship of the barristers in Matrix Chambers was to enable a determination to be made whether the barristers were merely a collection of independent barristers, or a collaborative venture as held in the case of **Hrvatska Elektroprivreda, d.d. v The Republic of Slovenia**[3]. In this regard it was submitted, the website of Matrix Chambers confirmed that it was a collaborative venture. The LCIA Division dismissed the Defendant's challenge to Professor Douglas' continued service on the Tribunal.

(iii) The Division dismissing the Defendant's challenge to Professor Douglas was wrong for the following reasons:-

- The challenge to Professor Douglas was wrongly rejected
- The conclusion that Professor Douglas should not be disqualified because of his failure to disclose information was incorrect
- The conclusion that Professor Douglas should not be disqualified because of the appearance of impartiality was incorrect
- The rejection of the Defendant's request for reconstitution of the entire panel was incorrect
- The Defendant's challenge to the appointment of the Chair was wrongly rejected.

In respect of this ground the Defendant's rely upon the affidavit of Mr. Juan C. Basombrio, Counsel for the Government in the second phase of the 2008 arbitration. The Government in this affidavit, set out its challenges to Professor Douglas.

[3] **ICSID Case No. ARB05/24 (6 May 2008)**

(iv) The basis upon which the Defendant asserts that the decision of the LCIA Division on the Douglas challenge is wrong is that the Division failed to properly appreciate and apply the ***Hrvatska*** case as the Division failed to consider what the fair minded and informed observer would make of the relevant facts and in particular the nature of the business in which Professor Douglas participated. Additionally, insofar as the ***Hrvatska*** decision concluded that the justifiability of an apprehension of bias depended on all relevant circumstances and not only on whether a collaborative venture or chambers of independent barristers exists – the Tribunal's failure require Professor Douglas to answer the questions posed relating to the practice of his Chambers – prevented them from considering all the relevant circumstances, as they were obliged to do.

(v) As a consequence, the Tribunal was not properly constituted according to the agreement of the parties as it included a person in relation to whom there was an appearance of bias. In this regard, parties would not agree to an arbitration conducted by an arbitrator in respect of whom there is a justifiable concern as to the appearance of bias. With respect to the law on bias the Defendant relied upon **Belize Electricity Limited v Public Utilities Commission**[4] and **Porter v Magill**[5].

<u>The Public Policy Argument</u>

8. The Defendant contends that the arbitral award ought not to be enforced on the basis that to do so would be contrary to public policy as is provided under section 30 of the Arbitration Act. The basis of this objection is section 114(2) of the Constitution which provides:-

> *"No moneys shall be withdrawn from the Consolidated Revenue Fund except to meet expenditure that is charged upon the Fund by this Constitution or any other law enacted by the National Assembly or where the issue of those moneys has been authorised by an appropriation law or by a law made in pursuance of section 116 of this Constitution."*

[4] Belize Civil Appeal No. 8 of 2009
[5] [2001] UKHL 67

According to the evidence of Financial Secretary Joseph Waight, the National Assembly of Belize neither authorized nor approved the payment of the Loan Note and the effect of such absence of authorization would be to render any payment on the Loan Note illegal. As illustrated by the Eastern Caribbean Supreme Court decision **Attorney General [of St. Lucia] v Martinus Francois**[6], whilst Government may enter into contracts involving expenditure of public funds without prior legislative approval, moneys may not be paid out from the Consolidated Fund without the necessary approval. Such contracts whilst not void are unenforceable until approved by the Legislature. With reference to the Tribunal award therefore, the payment obligation is unenforceable without legislative approval thus to enforce it would be contrary to public policy.

9. The argument in favour of declining to enforce the arbitral award it was submitted, is firmly supported by the dicta of the **CCJ in BCB Holdings Limited & The Belize Bank Ltd v The Attorney General**[7] regarding the Court's refusal to enforce the arbitral award therein for being contrary to public policy. Further illustration in support of the submission to refuse enforcement on the grounds of public policy was put forward in relation to the Tribunal's decision in the first Partial Award which refused to enforce the oral Settlement Deed of the parties as it pertained to the use of the US$10 million supplied by the Venezuelan Government.
10. The underlying basis of the public policy asserted as rendering unenforceable the Tribunal award, is the 'injury that is done to the public interest' in breaching the provisions of section 114 of the Constitution and the provisions of the Finance and Audit (Reform) Act, which are intended to ensure legislative oversight over the Executive's expenditure of public funds. It was for the Legislature by subjecting the debt to public examination in the National Assembly to determine whether a debt truly exists and whether public monies should be used to pay the debt.

[6] ECSCJ No. 46 of 2004
[7] [2013] CCJ 5 (AJ)

Additionally, the extent of the violation of constitutional rules as to public finance and representative control over the expenditure of public funds was to be found reflected in the extent of public outrage over the attempt to have the Loan Note approved in the National Assembly. The illegality found in relation to the contract which gave rise to the arbitral award in ***BCB Holdings*** thus rendering the award unenforceable as being contrary to public policy is the approach strongly urged upon the Court by the Defendant in the case at bar.

<u>The Double Compensation Argument</u>

11. In addition to the two positions taken by the Defendant as outlined above, the Defendant also put forth the argument that the Bank had been paid in full for the UHS debt, with the result that an order for enforcement would result in double compensation for the Bank, thus adding to the public policy argument. This proposition is based the Defendant says, on the Claimant's own evidence (2nd Affidavit of Angeline Welsh @ para 41), that '*one of the consequences of the 2008 Settlement Agreement was the acquisition of UHS' assets by BHPL*'. In this regard, whereas the entire 2008 settlement agreement was found unenforceable, the UHS assets were acquired by the Asset Transfer Agreement which was unaffected by the illegality of the 2008 oral agreement. Further, the Tribunal made a specific finding of fact in the 2008 Partial Award – at paragraphs 132 and 133, firstly that "*BHPL made payment for the UHS assets by remitting BZ$39 million to the Claimant*"; and thereafter *"…the indebtedness to the Bank arising out of the UHS funding had been discharged by BHPL in accordance with the terms of the Asset Transfer Agreement…*"
12. The effect of what is described above as the Tribunal's findings is that UHS' assets were sold to BHPL and the purchase price therefor was paid to the Bank in discharge of the UHS debt. As submitted by learned Senior Counsel, 'the Bank was paid the specific debt that GOB promised to pay in the Loan Note'. It was recognized that whilst Government did not pay the Loan Note directly, the principle of law regarding double compensation is that a person cannot recover payment of a debt where that debt has already been satisfied by a another person.

Learned Senior Counsel for the Claimant during submissions acknowledged that no issue was taken with respect to the principle of double compensation as it was stated on behalf of the Defendant and if so found, the claim to enforcement of the award would fall. The correctness of the principle as stated by learned Senior Counsel for the Defendant aside, it was not acknowledged that any question of double compensation arises. In the circumstances the Court sees no need to further set out the statements of principle as submitted on this argument.

The Claimant's responses to the objections to enforcement

Composition of the Arbitral Tribunal not in accordance with the Parties' agreement:-

(i) The Procedural Defect

13. The Claimant submits that the Tribunal was appointed in accordance with the agreement of the parties (as contained in clause 9(2) of the 2007 Settlement Deed). By this clause 9(2), the LCIA Rules were incorporated into the arbitration agreement and the agreement with respect to appointment of arbitrators was for one to be appointed by each party and the third appointed jointly by the parties' two appointees.
14. With reference to the LCIA Rules as incorporated by the parties' agreement, Rule 5.5 provides that the LCIA alone is empowered to appoint arbitrators and will do so '*with due regard for any particular method or criteria of selection agreed in writing by the parties*'. Additionally, Rule 2.1(d) provides that the Respondent to a Request for Arbitration has within 30 days of service of that Request to send a written response thereto, but more importantly, if the arbitration agreement calls for a party to nominate an arbitrator, the Respondent has within 30 days of service to submit the name and other particulars of the Respondent's nominee.
15. The Rules additionally provide (Rule 2.3) that a party's failure to nominate either within time or at all shall constitute an irrevocable waiver of that party's opportunity to nominate an arbitrator.

Also (Rule7.2) that the LCIA provides that where there is failure of a Respondent to nominate an arbitrator within time or at all, the LCIA may appoint an arbitrator notwithstanding the absence of the nomination or without regard to any late nomination.

16. By reason of these rules, the Claimant says there was no defect in the composition of the arbitral tribunal so as to ground an objection under section 30(2)(e) of the Act. The combined effect of the LCIA rules referred to above, was that when on 9th July [2007] the arbitration commenced and the Bank nominated Ms. Heilbron Q.C., the Government had 30 days within which to file a response and nominate an arbitrator. Having failed to nominate an arbitrator in its response, the Government irrevocably waived its right to do so and pursuant to the parties' agreement (the LCIA Rules having been incorporated), the LCIA appointed the Bank's nominee Ms. Heilbron Q.C., Professor Douglas (in the absence of the Government's nominee) and the two arbitrators appointed Mr. Landau Q.C. as the Chair.
17. With respect to the further argument of the Government in February, 2012 (the second phase of the 2008 arbitration), that upon the resignation of Mr. Landau, the entire panel was to be reconstituted, such entire reconstitution was provided for neither in the parties' agreement nor the LCIA Rules. Rule 11.1 pursuant to which the replacement of Mr. Landau fell to be appointed, did not provide for replacement of the entire panel neither did the entry of the arbitration into a 'new phase' as contended by the Defendant, give rise to a revival of the Government's right to appoint an arbitrator. The irrevocable waiver to appointment resulting from the Government's initial failure to nominate an arbitrator remained in effect thus the nomination of Mr. Fortier Q.C. as replacement Chair by the two remaining arbitrators, was effected in accordance with the LCIA Rules and by extension, in accordance with the parties' agreement.

(ii) **Challenge to Professor Douglas and appearance of bias**.

18. The Claimant responds to the challenge to Professor Douglas by firstly observing the absence of challenge to his appointment for more than three and a half years after such appointment.

Particularly, no challenge was made in the first Partial Award which gave rise to a finding against the Claimant. Further, that the Government initially requested that Professor Douglas be appointed as Chair when the former Chair Mr. Landau Q.C. resigned. Even further, when the Government's request for Professor Landau to be made Chair was rejected, the objection to his continued service was initially made on the basis that he was British and thereby two persons of British nationality would comprise the panel – Professor Landau turned out to be Australian.

19. The LCIA's Division was fully presented with the facts upon which the Government's challenge was made and delivered a reasoned decision according to relevant legal principles. Additionally, the construction of section 30(2)(e) does not envisage refusal to enforce an arbitral award based upon an alleged incorrect decision of the Division in relation to a challenge to an arbitrator.

Enforcement of the Final Award would be contrary to public policy

(i) The section 114(2) of the Constitution argument

20. The Claimant regards the Government's objection that the absence of legislative approval authorizing the payment of the 2007 Loan Note pursuant to section 114(2) of the Constitution as giving rise by extension, to an argument that the absence of legislative approval would render unlawful in any given case, any money judgment issued by the Court against the Government. This argument says the Claimant, fails to take into account the true construction of section 114(2), which also authorizes withdrawal of monies from the Consolidated Fund *"…to meet expenditure that is charged upon the Fund…by any other law enacted by the National Assembly."*

21. The words '*by any other law*' therefore provide an additional source of authority for withdrawal of monies from the Consolidated Fund, other than the Constitution itself. Such 'other law' says the Claimant, includes the **Crown Proceedings Act**, **Cap. 167 of the Laws of Belize**, which by section 25 sets out a procedure to be followed in respect of an order for payment of money against the Crown. Thereafter, it is provided that upon receipt of the certificate generated by the procedure set out in section 25, the appropriate Government department shall (subject to provisions relating to appeal) pay to the person

entitled to the order or his Attorney, the amount appearing by the certificate to be due. The operation of this section is illustrated by **Gairy v The Attorney General of Grenada**[8]; **HMB Holdings Ltd v Harold Lovell**[9]; and **National Bank of Solomon Islands v Attorney General**[10].

(ii) The double recovery argument

22. In respect of the Defendant's argument that enforcement of the Final Award would result in the Claimant recovering the debt twice, the Claimant asserts that this new objection amounts to an abuse of process. Reference was made to the need for vigilance cautioned by the CCJ in ***BCB Holdings*** with respect to a losing party invoking the public policy defence to enforcement as a means to re-open the merits of a case already decided by the arbitrators. It was further urged as was stated in that case, that the public policy defence is not to be allowed to frustrate enforcement of the Award or to afford the losing party a second bite of the cherry[11]. Taking the argument further, learned senior counsel cited **A v R (Arbitration; Enforcement)**[12] with reference to a similar caution, that courts "*must also prevent abuse of the public policy objection in circumstances where 'matters have been (or ought to have been) determined in an arbitration'*…"

23. The Claimant states, that the Government's conduct with respect to the arbitration, makes it clear that the new objection now raised is an abuse of the Court's process. In this regard says the Claimant – the Government did not raise this double recovery or any argument on the merits [at the arbitration hearing]; the Final Award was not challenged at the seat of the arbitration, i.e. before the English Courts; there was no resistance to enforcement of the Final Award before the English Courts either. In these circumstances, the Government ought not to be allowed to raise this argument as to double recovery at this stage of enforcement.

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[8] [2001] UKPC 30
[9] ANUHCV20012/0727
[10] [1997] SHBC 108
[11] BCB Holdings @ para 25
[12] [2009] HKLRD 389

24. In addition to the question of abuse of process, in any event the Claimant says that the double recovery argument is factually incorrect. Whereas the Government's argument was that the $39 million was paid to the Bank by BHPL in settlement of the UHS debt pursuant to the 2008 Asset Transfer Agreement which was valid, the true factual position was that no money was paid to the Bank by UHS or by the Government to settle the UHS debt. The UHS debt was settled by an exchange of obligations which gave rise to the UHS debt being settled on the books of the Claimant and the 2007 Loan Note replacing the Government's obligation under the 2004 Guarantee. In consideration of the 2007 Loan Note the Government became the owner of UHS with approximately 98% of its issued shares.
25. The $39 million says the Claimant, was paid to the Bank under the 2008 Settlement Agreement, from which $20 million was required to be returned by the Central Bank Directive. Upon the attempt of the Bank to recover that $20 million under the 2008 Settlement Agreement, the Tribunal found that the entire Agreement was void as being contrary to public policy. With this position in existence in relation to the 2008 Settlement Agreement, the Claimant recalls the Tribunal's finding - *"…the Tribunal found that the 2008 Settlement Agreement was a legal fiction and the position should be reversed to the legal position under the 2007 Settlement Agreement and Loan Note*". The 2008 Arbitration (second phase) was thus for payment of the amount due under the 2007 Loan Note (the $39 million less the $20 million repaid pursuant to the Central Bank Directive plus interest). The Tribunal found that there was owed under the 2007 Loan Note, the sum of $36, 895, 509.46, which the Government is therefore bound to pay. There is therefore no question of double recovery.

The Court's consideration.

26. The Defendant's objections to enforcement of the Final Award are threefold, arising out of section 30 of the Arbitration Act, Cap. 125. Section 30 is set out as applicable, as follows:

30. (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.

(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves-
…(e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or…

(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of a settlement by arbitration, or if it would be contrary to public policy to enforce the award.

A. The Issue of Double Compensation

27. Learned senior counsels were both in agreement with respect to the equitable principle of double compensation and its effects as submitted on behalf of the Defendant. It therefore suffices to briefly state the principle to frame the context of the Court's consideration of its applicability to the instant case. A party, submits learned senior counsel on behalf of the Defendant, is precluded from obtaining satisfaction of a debt twice. This principle is to be found stated from as early as Lord Mansfield in **Bird v Randall**[13]. In response to the Claimant's challenge for the Government to establish that they paid any monies to the Bank, the Defendant states that the principle applies where even a third party has paid the debt of another – **B O Morris Ltd v Perrott & Bolton**[14].

28. In applying this principle to the instant case, learned senior counsel's argument is that the Claimant received payment for the UHS debt from BPHL which purchased UHS' assets. The Defendant's case (written submissions at paragraphs 82 – 90) is that *"the Tribunal made a specific finding of fact that in the Partial Award that 'BHPL made payment for the UHS assets by remitting BZ$39 million to the Claimant…'".* This reference as cited in the Defendant's submissions extracts this text from paragraph 132 of the Tribunal's Partial Award.

[13] 37 ER 866
[14] [1945] 1 All E.R. 567 (C.A.).

The argument continues (paragraph 85 of the Defendant's submissions) – *"….the indebtedness to the Bank arising out of the UHS funding had been discharged by BHPL in accordance with the terms of the Asset Transfer Agreement…"* The Defendant cites these utterances by the Tribunal as conclusively adjudicating as between the Claimant and Defendant that the Bank had been paid the UHS debt and the debt was discharged.

29. The Court has considered paragraphs 132-133 of the Tribunal's First Partial Award and observes that these statements were not the findings of the Tribunal. Paragraphs 132-133 fall under the Tribunal's account of the facts put before it, particularly under Section III entitled 'Relevant Factual Background' commencing from paragraph 93 and ending at paragraph 238. Section III contains 12 different heads under which the various aspects of the factual background are laid out. Paragraphs 132-133 occur under head number (7) – 'Receipt and application of the Venezuelan funds'. The findings of the Tribunal are not contained in this account of the relevant factual background. In this regard, the Court examines the First Partial Award in the following manner:-

    (i) In section IV, following upon Section III (Relevant Factual Background), the Tribunal examined its 'Jurisdiction with respect to the 2008 issues'. The purpose therein was to ascertain whether the arbitration agreement in the 2007 Settlement Deed (Clause 9) could be extended to cover the 2008 issues. At paragraph 177 the Tribunal firstly concluded that Clause 9 of the 2007 Settlement Deed was broad enough to capture a subsequent and connected agreement. The question then remained whether the 2008 oral agreement was sufficiently connected to the 2007 Settlement Deed to qualify as a 'subsequent and connected agreement'.

    (ii) Paragraph 180 of the First Partial Award continues (emphasis mine) with respect to the question of whether the 2008 issues were sufficiently connected to be considered a 'subsequent and connected agreement' -

> *"Integral to this analysis is the Arbitral Tribunal's conclusion that the 2008 Settlement Agreement was intended to settle the Government of Belize's outstanding obligations arising out of the March, 2007 Settlement Agreement and Loan Note – as distinct*

> *from a purported settlement of the underlying UHS debt itself, as is alleged by the Claimant. Had the 2008 Settlement Agreement been designed to side-step the March 2007 agreements, and to settle the underlying UHS debt itself (i.e. obligations arising from the earlier loan facilities and agreements and relating to a different entity from the Government), it is the Arbitral Tribunal's view that it would then – by definition – fall outside the scope of the Clause 9 arbitration agreement.*

The Tribunal continued at paragraph 181 –

> *"The 'nexus' issue turns upon whether or not the underlying UHS debt was still alive by the time of the 2008 Settlement Agreement, or whether it had already been discharged by the March 2007 Settlement Agreement and Loan Note. If it had already been discharged in 2007, then the 2008 Settlement Agreement could only have been a purported settlement of (and therefore part of) the March 2007 arrangements."*

At paragraph 182 –

> *"Given its relevance to the issue of jurisdiction here, and also its possible wider significance with respect to the 2007 issues (a matter for a subsequent award), the Arbitral Tribunal sets out below in some detail its reasoning on the discharge of the underlying UHS debt."*

(iii) The Tribunal from paragraphs 183 – 228 then indeed went on to examine the issue of the discharge of the UHS debt in detail, including reference to the Claimant's submissions, evidence of the Claimant's witness Mr. Johnson and the UHS Share Transfer Agreement (Clauses 2 and 3). At paragraph 190, the Tribunal rejects the Claimant's argument that UHS' indebtedness to the Bank had actually to be paid before the debt could be discharged. The Tribunal's analysis continued through paragraph 214 which is titled 'Conclusions on the Evidence. The Court finds it useful to extract the text in full:-

> *"The intention behind the overall scheme of the four agreements, i.e. the March 2007 Settlement Agreement; the March 2007 Loan Note; the UHS Share Sale Agreement and the Additional Loan Facility, was known to the Claimant, which was a party to three of them and aware of the contents of the fourth. This intention was, in the Arbitral Tribunal's view, to discharge the underlying UHS debt and the Government of Belize's 2004 Guarantee, and to replace these with a Loan Note and the Additional Loan Facility to provide working capital to UHS, then owned by the Government. It also would appear from all the evidence before the Arbitral Tribunal that the UHS Share Sale Agreement was performed, and that the shares were sold, and hence the consideration paid. But even if this was not the case, whether or not there was a subsequent breach of that agreement by either the Sellers or the Government may not matter. It was clearly the intention that the Government of Belize would be discharging the UHS debt, which it did by virtue of the March 2007 Settlement Agreement and in particular the March 2007 Loan Note. Irrespective of any other terms in the UHS Share Sale Agreement the Government did pay a sum which would extinguish the UHS debt to the Claimant and therefore discharged the indebtedness of UHS.*

At paragraph 219:-

> *"The Arbitral Tribunal therefore concludes, because the evidence permits of no other result, that notwithstanding the Claimant's assertion that the 2008 Settlement Agreement was based on the existence of the UHS debt, it was in fact concluded at a time when both the Claimant and the Government knew, and certainly ought to have known, that the UHS debt had been discharged.*

(iv) Finally, in relation to the Court's consideration of the argument of double compensation, the Arbitral Tribunal concluded at paragraph 226:-

> *"The Arbitral Tribunal therefore concludes that the underlying UHS debt had been discharged at the time of the 2008 Settlement Agreement, such that the latter can only be analysed as an arrangement in relation to the March 2007 Settlement Agreement and Loan Note, as opposed to the UHS debt itself.*

30. But where does all this leave us in relation to the Defendant's argument in respect of double compensation? At paragraphs 84-85 of the Defendants submissions and further in learned senior counsel's speaking note, reference was made to the finding of the Tribunal at paragraphs 132 and 133 as well as other paragraphs within that section. As stated already, these statements were not the findings of the Tribunal but merely the recount of facts as presented to them, in particular from paragraphs 93 to 164. The findings are as the Court has detailed above. In light of those findings, the factual basis of the Defendant's argument as to double compensation is incorrect.
31. However, even overlooking the incorrectness of the factual basis of the Defendant's argument, from a different perspective, this exercise by the Court with respect to highlighting the Tribunal's findings in relation to the discharge of the UHS debt (for value in the form of the 2007 Loan Note), does not address the argument that the Bank was paid the $39 million to discharge Government's obligations to the Bank, in pursuance of the Asset Transfer Agreement which was perfectly valid. In finding to the contrary, the Court once again examines the Tribunal's findings, on this occasion in relation to the said 39 million.
    (i) In section V of the Tribunal's ruling entitled 'Legality of the 2008 Settlement Agreement with Respect to the Venezuelan Funds', the Tribunal examined the circumstances surrounding the 2008 settlement agreement, particularly with respect to the receipt of the US$10 million Venezuelan funds. The origin of the $39 million that the Defendant argues to have been paid by BHPL to settle the Government's debt (on the Asset Transfer Agreement), includes this US$10 million Venezuelan funds. By whatever 'elaborate trust structure' that formed part of the 2008 oral agreement, the Bank was to be 'put in funds' of this US$10 million which was then to be 'made available' to BHPL which would in turn then pay to the Bank in settlement of the Government's debt.

(ii) According to the Tribunal, the Bank never received those funds. The US$10 million was found to be raised or received by the Government of Belize and as such required to be paid into the Consolidated Fund in accordance with section 114(1) of the Constitution. Not only was this not done when the monies were credited directly to the Bank's account, the monies were also diverted from the purpose for which they were given to be utilized in settlement of the Government's debt. At paragraph 319, after examining the evidence of the Bank's witness, the circumstances surrounding the receipt and payment of the Venezuelan $US10 million, the Tribunal concluded as follows:

> *"In conclusion, the Arbitral Tribunal finds that, on the balance of probabilities, there was an agreement between the Claimant and the Government of Belize to the effect that the Venezuelan Funds that had been gifted by BANDES to the Government of Belize pursuant to the First Venezuela Agreement would be transferred to the Claimant for the purposes of executing the Trust Structure that had been agreed by all the relevant parties. The monies at all times remained those of the Government of Belize, imputed with a trust for the purpose set out in the Venezuela Agreement as described above. [Emphasis mine].*

32. In light of the above finding, the US$10 million received by the Bank could not have been 'made available' to BHPL in furtherance of the Trust Structure under which BHPL was to have in turn 'paid the Bank', in settlement of the Government's debt. Those monies were found to have been received by the Bank in trust for the Government and subsequently repaid under directive from the Central Bank.
33. The Court's analysis of the issue relating to double compensation as put forward by the Defendant is that the UHS debt was settled and discharged by the March 2007 Loan Note, which created a new liability on the part of the Government. The $39 million paid to the Bank by BHPL originated from the monies received by the Government from the Governments of Venezuela and Taiwan. As part of the 2008 oral settlement the $39 million was intended to discharge the 2007 Loan Note issued by the Government to the Bank.

The $39 million having been paid as part of the 2008 oral settlement, failed to discharge the Loan Note as the agreement was found to be illegal and unenforceable. Of the $39 million, $20 million (US$10 million) was never actually lawfully received by the Bank so as to be made available to BHPL, as these funds were found to have been received by the Bank in trust for the Government to be applied towards the purpose for which they were paid over by the Venezuelan Government.

34. Given the failure of the 2008 oral agreement to settle the 2007 Loan Note the said Loan Note remained in existence and became the subject of the second phase of the 2008 Arbitration. A Credit for the $20 million returned by the Claimant to the Central Bank was deducted from the amount owed under the Loan Note. The argument that the Claimant received $39 million for settlement of the Government's debt accordingly fails.

B. The Tribunal was not duly constituted.

35. This ground of the Defendant's objection is based on section 30(2)(e) of the Arbitration Act which as stated above provides that enforcement of a Convention award may be refused if

> *"…(e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place;…"*

The Defendant's argument appears twofold. On the one hand, that procedurally, the Tribunal's appointment was not according to the parties' agreement (Clause 9 of the 2007 Settlement Agreement) because the Government was not afforded the opportunity of nominating an arbitrator. On the other hand, that the appointment of Professor Douglas was tainted by an appearance of bias, thus there was a breach of a term existing by necessary implication into the agreement, that the appointment of an arbitrator would be free from bias or any appearance thereof. The main thrust of the objection however, was that Professor Douglas' appointment was tainted by an appearance of bia

36. The Court will firstly examine the procedural aspect of the objection and will also consider whether and if so, the extent to which the Defendant's argument of bias can subsist under this ground - s.30(2)(e).

With respect to the procedure adopted by the LCIA in appointing the Tribunal, the Court recalls the submissions of the Claimant set out in paragraphs 13 – 17 above. As it relates to the clear incorporation of the LCIA Rules into the parties' agreement on arbitration (Clause 9 of the 2007 Settlement Deed), the Court is entirely in agreement with the Claimant's submissions as to the correctness of the procedure adopted by the LCIA in appointing the Tribunal.

37. The arbitration commenced with the Request for Arbitration filed by the Claimant on 7th July, 2007, thus bringing into operation Rule 2.1(d) of the LCIA Rules 1998. Rule 2.1(d) required the Respondent (the Government) to issue a response within 30 days of service of the Request and as Clause 9 of the 2007 Settlement Agreement provided for the parties to 'appoint' an arbitrator each – more particularly within that Response, to provide the LCIA with the name and particulars of the Government's nominee. (Note – the agreement provided for the parties to 'appoint' but Rule 5.5 provides that the LCIA appoints arbitrators with due regard to any method of selection agreed by the parties and Rule 7.1 provides that where the parties' agreement provide for appointment, the agreement is treated as one to nominate the arbitrators. Rule 7.1 also provides for the LCIA to refuse to appoint a nominee of found to be unsuitable or not independent or impartial).

38. On commencement of the Arbitration the Government did not include in its response its nominee for appointment within the 30 days or at all. As the Claimant submits and with which submission the Court agrees, pursuant to Rule 2.3, the Government irrevocably waived its right to nominate an arbitrator in accordance with the parties' agreement. The appointment of what ought to have been the Government's nominee thus fell to the LCIA in accordance with Rule 7.2 which provided that where a party failed to nominate within time or at all, the LCIA may appoint regardless of such absence of or late nomination. In the instant case, the LCIA appointed Professor Douglas in the absence of any nomination by the Government.

39. It is to be recalled that this 2007 Arbitration was terminated upon the parties entering into the 2008 oral agreement in January, 2008. After political circumstances changed in Belize in February, 2008 the dispute reverted to arbitration proceedings and the Tribunal made its first partial award in August, 2009. The Government did not make any challenges to the Tribunal in the 2007 proceedings nor in respect of the first partial award in respect of which the Tribunal remained constituted as it was for the 2007 proceedings.
40. The Government's challenge was raised in the second phase of the 2008 Arbitration where it was contended that the proceedings were entering a 'new phase'. The challenge to Professor Douglas was preceded by the resignation of Tribunal Chair Mr. Toby Landau Q.C. further to Government's request for him so to do. Upon the commencement of the second phase of the 2008 proceedings, Chair, Mr. Landau Q.C. (independent barrister) disclosed that during the hiatus of the proceedings he had undertaken work which required him to work closely with Allen & Overy LLP, which was the Bank's legal counsel. The Government posed certain questions to Mr. Landau Q.C. upon disclosure of this information and as a result requested his resignation on the basis that his disclosures created an appearance of impropriety. The Bank resisted this request but Mr. Landau Q.C. nonetheless resigned, his appointment was revoked by the LCIA and the Chair of the proceedings became vacant.
41. In light of the vacancy created by the resignation of Mr. Landau, the LCIA advised the parties that they would decide pursuant to Article 11.1 whether to follow the original nomination process. The Government requested that the original process be followed and they be allowed to nominate an arbitrator pursuant to the parties' agreement. The Bank opposed the reconstitution of the entire panel and the LCIA on the basis that the Government had failed to nominate an arbitrator within the time provided at the outset of the proceedings and thus irrevocably waived its right of nomination, decided that the two remaining arbitrators would appoint the Chair. The Defendant submitted a formal challenge and the LCIA's Division delivered its ruling rejecting the Defendant's challenge.

The Defendant's challenge to the enforcement of the Final Award did not question the entitlement of the LCIA to proceed without reconstituting the entire panel but for completeness the Court finds that the procedure adopted by the LCIA pursuant to Article 11.1 was in accordance with the parties' agreement on the basis of the incorporation of the LCIA Rules into Clause 9 of the 2007 Settlement Agreement.

42. The substance of the Defendant's challenge to enforcement was in relation to Professor Douglas and the appearance of bias with respect to his continued service on the Tribunal. The Court had alluded earlier to the question of the extent to which the challenge to Professor Douglas on the basis of an appearance of bias could be entertained under section 30(2)(e) of the Arbitration Act. Having found that procedurally, the Tribunal was appointed in accordance with the parties' agreement, it is now a question whether the Court accepts that the Defendant's challenge on the appearance of bias, is properly grounded under section 30(2)(e.

43. The Court considers that the question is to be considered with regard to the narrow basis upon which enforcement of Convention awards can be refused. In **Pacific China Holdings Ltd. v Grand Pacific Holdings Ltd.[15],** George-Creque CJ examined the extent of discretion exercisable under section 36(2) of the Arbitration Act, 1976 of the Virgin Islands (identical in all respects to section 30(2) of the Act of Belize. The narrow exercise of discretion referred to in Pacific Holdings addressed the question of the enforcement court's right to nonetheless order enforcement where a statutory defence to enforcement had been made out. At paragraph 47, George-Creque CJ concluded after a review of a competing line of British versus Asian authorities, that the discretion to nonetheless enforce where a Convention defence was made out was limited to a waiver of the Respondent's rights, issue estoppel, or where the breach was de minimis.

44. In the instant case, the Court considers the question of the extent of its discretion in relation to the ambit of the grounds set out under section 30(2) and in particular section 30(2)(e).

[15] [2010] HCVAP 2010/007 Eastern Caribbean Court of Appeal.

In light of this narrow discretion expressed as stated and the widespread acknowledgment of the pro enforcement bias of advocated by the Convention the Court considers that the extent of the section 30(2)(e) defence is restricted to breaches in procedure or methodology contrary to the parties' agreement or the law of the seat of arbitration. Learned senior counsel on behalf of the Claimant referred to **Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention**[16]. It is observed that the discussion therein presented the challenge to enforcement on this ground as a matter of procedural conformity. The question of a refusal to uphold a challenge to an arbitrator on the basis of a charge of an appearance of bias does not therefore fall within the ambit of section 30(2)(e).

45. This view notwithstanding, learned Counsel for the Defendant had in any event addressed the possibility of this finding by the Court and contended that if not available as a challenge under section 30(2)(e) the challenge to the composition of the Tribunal on the basis of apparent bias of an arbitrator was nonetheless a ground to be considered under the ground of public policy. A party is entitled submitted learned Counsel, to have their dispute adjudicated by a fair and independent tribunal and a tribunal comprised of an arbitrator tainted with an appearance of bias violated that right. The Court agrees with this submission that the issue of the challenge to the Tribunal's independence can be entertained under consideration of whether enforcement of the final award should be refused on the grounds of public policy. Support for this view is found in the Privy Council judgment of **Cukurova Holding A.S. v Sonera Holding B.V.**[17]**.**

46. This case involved the challenge to a final arbitral (Convention) award in excess of US$932 million on the basis of the UK's equivalent to Belize's section 30(2)(c) – that the party resisting enforcement was deprived of the opportunity of presenting its case. It was acknowledged at paragraph 31 of the judgment that being deprived of presenting one's case contemplates the enforcee having been prevented from so doing by matters outside of the party's control and that would include a denial of natural justice.

[16] Kronke, Nacimiento, Otto & Port, Kluwer Law International, 2010 pgs. 288 et seq.
[17] [2014] UKPC 15

In further acknowledgment that a particular breach of natural justice may fall outside of the section, the Board accepted the Appellant's submission that in such a case, it was open for the Court to refuse to enforce the award on the grounds that it would be contrary to public policy. In the circumstances, it is found open for this Court to consider the issue of the apparent bias of Professor Douglas on the basis of enforcement of the award being contrary to public policy.

C. The additional questions of public policy.

47. The first issue which related to a charge of double compensation was in fact being considered under the ground of public policy. The Court now continues its consideration of the objections under section 30(3) as they relate to enforcement of the award being contrary to public policy, with respect to two issues – (i) the challenge to Professor Douglas; and (ii) the alleged breach of section 114(2) of the Constitution that would be occasioned by enforcement of the 2007 Loan Note. It is necessary to state, that ***Pacific China Holdings*** (paragraph 43 above) establishes the strict 'no merits review' at the stage of enforcement. ***Cukurova*** also at paragraph 4 of the judgment delivered by Lord Clarke, affirms the narrow grounds upon which enforcement of a Convention award can be refused and expressly states *"…In particular the court cannot refuse to enforce an award on the ground of error of law or fact."* In this respect, given that the LCIA's Division has already ruled in relation to dismissing the challenge, the question is raised whether the Court is precluded from examining this issue of the challenge to Professor Douglas.

48. The Court finds its answer in paragraphs 29 – 32 of the judgment of ***BCB Holdings***. The question is first raised in paragraph 29 with two questions expressly posed by the Court:-

> *"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?"*

Further, at paragraph 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. 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."*

49. In applying this dicta to the instant case, the Court acknowledges its understanding to be that the LCIA's Divisional ruling dismissing the challenge to Professor Douglas is not a bar to this Court considering the issue under the ground of refusing enforcement on the basis of public policy. On further application of the approach of the CCJ, the Court will have to assess the allegation of the appearance of bias on the part of Professor Douglas, and if so found, will further have to consider whether such a finding would be sufficient to justify the exercise of the Court's discretion in favour of a refusal to grant enforcement of the award on the grounds of public policy. In this regard, in the event of a finding of an appearance of bias, the Court recognizes that its consideration of the issue of enforcement of the Award would entail balancing the Defendant's right to determination of his dispute by a fair and independent tribunal, against the competing interest of ensuring finality in arbitral awards, along with those other factors which give rise to a pro enforcement bias of the Convention

(i) <u>The challenge to Professor Douglas</u>

50. The Court now examines the complaint in respect of Professor Douglas in greater detail. In March 2012 (in the second phase of the 2008 arbitration), Government informed the LCIA that Matrix Chambers, of which Professor Douglas was a member, had represented and/or advised Lord Michael Ashcroft (who held interests in the Bank) in prior litigation adverse to the Government. Matrix Chambers represented the Belize Alliance of Conservation Non-Governmental Organisations (BACONGO) in the case of

BACONGO v Department of Environment and Belize Electric Co. Ltd. Additionally, the Government is said to have learned that Matrix Chambers may have advised or been sought out by Lord Ashcroft in connection with two other matters in the UK which bore connections to Belize. The Government therefore claimed that as members of Arbitrator Douglas' Chambers had been involved in litigation adverse to the Government his participation as arbitrator in the proceedings was 'ill-advised and prejudicial to the Government'. This was especially so as Lord Ashcroft, who had interests in the Bank had been involved in a number of highly publicized and political disputes with the Government. The Government requested that Professor Douglas step down as arbitrator.

51. The LCIA responded by adverting to the fact that Matrix Chambers was not a law firm but a set of barristers' chambers comprising independent practitioners. The Government invoked the case of **Hrvatska** (supra paragraph 7(ii)) with respect to barristers' chambers being regarded as a 'collaborative venture' and not merely a collection of independent practitioners. In relying on this case, the Government contended that there must be an analysis of the circumstances of the operation of Matrix Chambers in order for a determination to be made regarding the suitability of Professor Douglas to continue in service as an arbitrator. With this aim in mind the Government posed a series of questions to be answered by the LCIA and Professor Douglas. Professor Douglas provided a statement affirming his independence and impartiality in accordance with Article 5.3 of the LCIA Rules prior to and since the commencement of the arbitration. Professor Douglas declined to inquire as to the practice of other members of Matrix Chambers on the basis that those other members were not required to provide the details requested and that for them to do so would be in breach of their obligation of confidentiality. Professor Douglas stated that to the best of his knowledge he had never worked on matters in which Lord Ashcroft had an interest or was affiliated and that to the best of his knowledge he had not been instructed by Allen & Overy in the past nor was he currently working on any matters with them.

52. The Government had also discovered that in January, 2010 during the break in the arbitration, Professor Douglas and lead counsel for the Bank, Ms. Gill of Allen & Overy LLP had collaborated on a three person faculty panel at a Conference on International Investment Arbitration sponsored by the National University of Singapore. The Government complained that neither Professor Douglas nor the Bank's counsel had disclosed (under their continuing duty of disclosure) their participation on this panel. The Government filed their challenge to Professor Douglas' continuing participation on the Tribunal pursuant to LCIA Rule 10.3. The basis of the challenge was stated as follows:

    (i) Professor Douglas has refused to answer questions from, and disclose information to, the Government that directly relate to the Government's articulated circumstances that give rise to justifiable doubts concerning his impartiality or independence; and

    (ii) The evidentiary record confirms that circumstances exist that give rise to the justifiable doubts concerning the impartiality or independence of Professor Douglas.

The Decision of the LCIA Division

53. The Division firstly found that the Government's challenge was untimely. The BACONGO case cited by the Government in which a member of Matrix Chambers represented Lord Ashcroft occurred in 1994 and as to the manner in which the Chambers conducts its business, this was in the public domain since 2000 when the Chambers was founded. With this in mind, the Government's challenge was first made three and a half years after Professor Douglas' appointment in the 2007 arbitration; some two and a half years after the start of the current (2008) arbitration and some three months after the arbitration recommenced in 2011. The time limit for challenge under LCIA Rule 10.4 is fifteen days after becoming aware of the circumstances giving rise to the challenge. Notwithstanding that the challenge was found to be untimely, the Division proceeded to consider the challenge and so determine it on its merits.

54. After considering the Government's challenge which was based on ***Hrvatska***, the Division noted at paragraph 47 that

> *'Hrvatska does not endorse the Government's novel, if not unprecedented proposition that a barrister can be disqualified from acting as an arbitrator*

> *solely because of the activities of other barristers in the same chambers, regardless of the relationship of those activities to the arbitration proceeding'*.

The Division went on to state that ***Hrvatska*** affirmed that chambers are not law firms and that no test of 'collaborative venture' had been formulated by which chambers could be deemed law firms for conflict purposes. Also at paragraph 47, the Division said

> *"The Government has taken Hrvatska's reference to certain chambers marketing themselves with a collective connotation and used it to craft a test of its own devising, and propounding intrusive interrogatories to Professor Douglas based upon it, notwithstanding Hrvatska's injunction to avoid any such hard and fast rule.*

Further at paragraph 48

> *"Instead, Hrvatska holds that the acknowledged independence of barristers in chambers ought not to be used as a shield to preclude a fact based inquiry as to whether a justifiable doubt may be raised by barristers from the same chambers acting as arbitrator and party counsel in the same proceedings. There is no suggestion, however, that any barrister from Matrix Chambers, other than Professor Douglas, has acted in the present proceeding. Hence, the Division finds that there is no basis to impose upon him an obligation to disclose the activities of other barristers in his chambers; therefore non-disclosure of such activities does not give rise to 'justifiable doubts' under Article 5.3's disclosure requirement."*

55. The Division therefore found that Professor Douglas did not violate the requirement to disclose under LCIA Article 5.3 nor did the circumstance of other barristers in Matrix Chambers acting against Government in prior matters, give rise to any apprehension of bias. With respect to Professor Douglas' appearance with Allen & Overy LLP's Ms. Gill (lead Counsel for the Bank) at a three person panel in Singapore in January, 2010 this fact neither required disclosure nor raised any justifiable doubt as to impartiality. This was the Division's treatment of the challenge to Professor Douglas.

The Court's consideration of the Challenge to Professor Douglas.

56. The Court firstly considers the underlying basis of the challenge in the manner set out below. LCIA Rule 5.3 requires an arbitrator to confirm the absence of any circumstances which would give rise to any justifiable doubts as to his independence or impartiality. LCIA Rule 10.3 enables a challenge to an arbitrator on this same basis. The 'circumstances which would give rise to any justifiable doubts as to independence or impartiality' were considered in **Laker Airways Inc. v FLS Aerospace Ltd et anor**[18] albeit under section 24 of the Arbitration Act, 1996 of England but which mirrors the provisions of LCIA Rules 5.3 and 10.3 as pertains to circumstances giving rise to justifiable doubts as to independence or impartiality. The test was regarded as an objective one and that equivalent to the common law test for bias in England and upon further discussion found to give rise to considerations of apparent bias. The Court has no issue with respect to the law on the question of apparent bias as set out by learned counsel for the Defendant, particularly as referred to in ***Porter v Magill*** as '*whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that a judge was biased*.' The Court is more concerned with whether the challenge put forward by the Claimant is such to found an apprehension of bias in accordance with the law so laid down.
57. Within the context of international arbitration there are standards which have been articulated to guide arbitrators and parties in the conduct of arbitration proceedings. These standards include the International Bar Association Guidelines on Conflict of Interest in International Arbitration – first published in July, 2004 and just recently reviewed and expanded in October, 2014. Whilst these Guidelines are not legal authority and must give way to the domestic law of a state involved in arbitration proceedings, they can serve as a useful guide in considering issues relevant to arbitration proceedings, particularly given the specialized field of international arbitration and the desirability of ensuring uniformity in practices and standards to be applied.

[18] [1999] All ER (D) 410

58. The Court has examined the background information published with respect to the 2004 Guidelines.[19] The Working Group (which compiled the background information) drew up a list of recurring situations based on statutes and case law from a cross section of jurisdictions, as well as their own and other practitioners' experiences in developing the practical application of the General Standards. The Working Group then divided the practical situations into three lists - Red, Orange and Green. The Red List sets out specific situations giving rise to justifiable doubts as to an arbitrator's impartiality and independence. This list is divided into situations that can be waived or not waived by the parties. The Orange List sets out specific situations that in the eyes of the parties may give rise to justifiable doubts as to an arbitrator's impartiality or independence. The Green List sets out specific situations in which there is no appearance of a lack of impartiality and independence and so no conflict of interest exists.[20]
59. By way of example in order to illustrate the relevance of these Guidelines, the Court firstly has regard to General Standard 1 which provides

> *Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final award has been rendered or the proceedings have otherwise finally terminated.*

The specific risks associated with a compromise to independence or impartiality, are said to be conflict of interest (a party acting for more than one person in relation to the same or connected dispute) and the risk of leaking confidential information which may also be privileged[21]. For this reason the firm or partnership of lawyers is treated as a single identity and the barristers are not, both because of the relationships implicit in those respective structures.

[19] Background Information on the IBA Guidelines on Conflict of Interest in International Arbitration, Business Law International Vol 5 No 3 433.
[20] Ibid.
[21] Barristers, Independence and Disclosure Revisited. John Kendall, Arbitration International, Vol. 16 No. 3 343.

In recognition however of the changing landscape of barristers' chambers where the chambers are marketed primarily as a 'collaborative venture', it is acknowledged that the possibility of arbitrators being disqualified from acting opposite members from chambers increases[22].

60. IBA Guidelines General Standard 2 speaks directly to conflicts of interest and requires an arbitrator to decline an appointment where the arbitrator has any reasonable doubts as to his ability to be independent or impartial. The same obligation is placed upon an arbitrator where a third party having knowledge of the facts and circumstances would have justifiable doubts as to the ability of an arbitrator to be independent or impartial. Justifiable doubts are said to arise in situations enumerated on the non-waivable red list and situations caught under this list result in automatic disqualification of an arbitrator from acting as such. The objective test of apparent bias is thus incorporated into the IBA Guidelines on Conflict of Interest in International Arbitration.
61. General Standard 6 governs relationships and for the purposes of an arbitration an arbitrator bears the identity of his firm. In this regard therefore, counsel from the same firm as the arbitrator would find himself on the non waivable red list which subjects an arbitrator to automatic disqualification from appointment. With respect to barristers from chambers, the Working Group explains[23] that whilst the independence of barristers in chambers at the English Bar is accepted, the situation in other common law countries did not necessarily reflect the same perception of independence, thus where the arbitrator and another arbitrator or counsel for one of the parties are members of the same barristers' chambers the situation required full disclosure as on the orange list – but not necessarily disqualification.

[22] Barristers, Independence and Disclosure Revisited. John Kendall, Arbitration International, Vol. 16 No. 3 343
[23] Background Information on the IBA Guidelines on Conflict of Interest in International Arbitration, Business Law International Vol 5 No 3 433.

62. The point of this exercise is that the situations in which a conflict of interest and thus appearance of bias arise, have been documented and considered with respect to potential conflicts or other appearances of bias arising from the relationship of parties within the same arbitration proceedings. No material has been found which speaks to doubts as to independence or impartiality arising from relationships of other members of chambers not connected with the arbitration proceedings. That does not preclude a finding of apparent bias in such a case, but the absence of these usually regarded situations makes it more difficult for the Defendant to establish the claim of appearance of bias.
63. When this position is examined against the actual circumstances of the instant case, what is put forward is the involvement of a member of Professor Douglas' Matrix Chambers in a case against the Government of Belize which occurred in 1994, some 16 years prior to these arbitration proceedings and challenge by the Government. Additionally, the charge in relation to the other involvements was that barristers from Matrix Chambers *may* have been consulted or *may* have advised Lord Ashcroft (who had interests in the Claimant) in proceedings in the UK, which in some way concerned his dealings in Belize. These barristers were not identified and moreover the allegation never was that these barristers had any part in the arbitration proceedings. Additionally, aside from the relationships in question not having any connection to the actual arbitration proceedings nor the particular barristers identified, there is the lack of timeliness in the Government's challenge insofar as relevant information was discoverable prior to the issue of the challenge. There was also the fact that the First Partial Award which Professor Douglas would have arbitrated with the same circumstances thereafter known to the Government, posed no issue for the Defendants; and the progression of events leading up to the challenge cast some doubt as to the conviction of any justifiable doubts as to independence or impartiality on the part of the Defendants.
64. For completeness, it is considered whether the **Hrvatska** decision is applicable in the instant case as it relates to ascertaining the true nature of the relationship between barristers in chambers.

The Court regards the situation in this case as such that the relationships at the root of the Defendant's challenge were firstly not those usually contemplated in considering questions of bias within the context of arbitrators and the proper discharge of their duties. Additionally, the circumstances alleged to give rise to the challenge were of a tenuous nature given their lack of temporal application and their imprecise definition. The Court therefore finds that there was no basis for requiring Professor Douglas to answer the questions posed with the result that his failure to answer them did not breach any duty of disclosure. Additionally, the involvements with Lord Ashcroft imputed to other members of Matrix Chambers did not raise any question of bias within the test applicable, as those involvements were neither timely nor connected to the arbitration in question.

65. Finally on this issue, in relation to the failure of Professor Douglas and the Claimant's lead counsel to disclose their participation on a panel at an international conference, this fact raised no justifiable doubts as to independence or impartiality. This activity is specifically included on the green list under the IBA Guideline as one in respect of which disclosure is not required and neither does it give rise to any question of a conflict of interest. The Court is content to be guided in this respect.

66. With respect to the challenge to Professor Douglas therefore, the Court finds that the involvement alleged in relation to other members of Matrix Chambers of which he is a member, gave rise to no apparent bias or justifiable doubts as to his independence or impartiality. The basis of this finding is that the involvements did not concern persons who were connected with the arbitration nor did it concern the subject matter of the arbitration. The allegation that other members of chambers were involved in matters adverse to the Government's interest did not give rise to justifiable doubts as to the independence or impartiality of Professor Douglas in carrying out his duties as arbitrator.

D. Enforcement of the Final Award would be contrary to public policy

67. As stated before, the Defendant's argument is essentially that as section 114(2) of the Belize Constitution stipulates that no monies can be paid out of the Consolidated Fund except as authorized by a law (paragraph 37 et seq. of the Defendant's submissions) and there being no law in the instant case which authorized the payment out of the Consolidated Fund, it would be illegal for the Loan Note to be paid and thus contrary to public policy to enforce the Final Award. The Claimant on the other hand points to section 25(2) of the Crown Proceedings Act, Cap. 167 regarding the mode of satisfaction of judgments against the Crown as the law authorizing payment. The Defendant countered whilst acknowledging the Court's power to enter judgment against the Government without need for legislative approval, that where as in the instant case, entry or enforcement of a judgment would give rise to an illegality the Court is obliged to refuse enforcement.

68. In considering this argument the Court finds it necessary to examine with some measure, **section 114** and more generally **Part IX (Finance) of the Constitution**; **Part II (Finance) of the Finance and Audit (Reform) Act, No. 12 of 2005** (this Part was unaffected by the 2010 amendments to the Act); and **section 25 of the Crown Proceedings Act, Cap. 167**. The cited cases of **Attorney General v Martinus Francois** (supra) and **BCB Holdings Ltd v Attorney-General** (supra) of Belize will also be of importance in considering this issue. The legislation is hereinafter extracted (with my emphasis) and analysed where relevant. Prior to considering the legislation however, the Court considers it useful to contextualize the origins of the Government's financial system by very briefly citing an historical account of the British system of public finance which for all intents and purposes has been inherited and remains to date.

The standards of public finance.

69. All public revenue is vested in the Crown and public revenue is generally considered income raised from taxation, sale of properties, shares or levy of other fees and charges[24] as well as monies received from other means such as development aid. This public revenue whether raised or received is required to be deposited and held in a collective account known as the Consolidated Fund – section 114(1) of the Constitution. Expenditure required for the day to day operations and conduct of Government business is drawn from this Consolidated Fund. Such monies required for expenditure however, must be approved for withdrawal from the Consolidated Fund – section 114(2) by the Constitution or other Act of Parliament. This requirement derives from centuries past and a useful judicial exposition of the history of this system is found in the Irish Supreme Court's contrast of the British financial system with its own in the case of **In the Matter of the Irish Employers Mutual Insurance Association Limited (In Liquidation)[25]** per Moore J @ 211 et seq. It is noted (emphasis mine):-

> *"American and European authorities have extolled the British system of public finance as at once the most elastic and the most efficient which has yet been devised. In its developed form it achieves three important political objects. The initiative in finance lies with the executive, the control with the popular house of the legislature, the auditing and examination is entrusted to an official who is independent of politics and whose tenure of office is analogous to that of the judiciary."*

Further[26]

> *The king opens each session of Parliament by a speech from the throne and this speech always demands a grant of money from the House of Commons as an annual supply for the public services, and intimates that detailed estimates of the amount required will be laid before its members. If further supplies become necessary during the session they are demanded by a special message from the king asking for pecuniary aid or a vote of credit.*

[24] Halsbury's Laws of England, 2014 Vol 20 paragraph 468.
[25] [1955] IR 176 @ 211 et seq.
[26] Ibid.

No money can be provided unless on an express demand from the king or, where a motion or a bill only incidentally involves a charge on public revenues, unless such charge is the subject of royal recommendation by the mouth of one of the king's ministers who sponsors the motion or bill. This procedure preserves the initiative of the executive.

As soon as the estimates are presented, they are considered by a Committee of the whole House, known as the Committee of Supply, and relevant sums, are voted by resolutions couched in the form, "That a sum not exceeding £ be granted to his Majesty to defray the charges [specified]." Next the House resolves itself into a Committee of Ways and Means which grants to the king out of the Consolidated Fund the sums already voted. It remains to give effect to the votes by legislation which takes the form of a Consolidated Fund Bill for interim supply and an Appropriation Act at the end of the session to grant the remainder of the sums voted and appropriate them to the various purposes therein set out at length.

*These Acts are introduced by a special formula designed to emphasise the fact that the money is granted to the king in person…The king's assent to these bills is also in a special form, The money now belongs to the king and is payable to the "Account of His Majesty's Exchequer at the Bank of England." **But it cannot as yet be paid out. The king must authorise the payment of his own moneys.** Accordingly a royal order has to issue under the sign manual.*

Certain grants have been made pursuant to statute and are charged directly on the Consolidated Fund.

70. Wade & Bradley on Constitutional and Administrative Law[27] states with respect to Financial Procedure under the functions of Parliament:

"The requirement of statutory authority before a government can impose charges on the citizen is a fundamental legal principle which gives the citizen protection in the courts against unauthorised charges. Another fundamental principle is that no payment out of the national Exchequer

[27] 10th Ed. @ 197 et seq.

> *may be made without the authority of an Act, and then only for the purposes for which the statute has authorised the expenditure"*

Further, regarding charges on the public revenue[28]:-

> *"1. A charge does not become fully valid until authorised by legislation; it must generally originate in the Commons and money to meet authorised expenditure must be appropriated in the same session of Parliament as that in which the relevant estimate is laid before Parliament*
> *2. A charge may not be considered by the Commons unless it is proposed or recommended by the Crown….This rule gives the government formal control over almost all financial business in the Commons and severely restricts the ability of Opposition and backbenchers to propose additional expenditure or taxation.*
> *3. A charge must first be considered in the form of a resolution which, when agreed to by the House, forms an essential preliminary to the Bill or clause by which the charge is authorised…"*

71. This illustration is intended to demonstrate that the principles derived from the historical account above continue in existence today in this British system which Belize has inherited:-

> *"It is a constitutional principle that any charge upon the public revenues[1], whether payable out of the Consolidated Fund or the National Loans Fund or out of money to be provided by Parliament, including any provision for releasing or compounding any sum of money owing to the Crown, must be authorised by resolution of the House of Commons.[29]*

72. It is recognized that as a sovereign nation, with its supreme Constitution and its own laws, the operation of public finance in Belize is to be governed by its local law. The purpose of the illustrations above however, was merely to provide context and to foster an appreciation of how entrenched the system ought to be regarded, having regard to its origins. With that in mind, one looks at the Belize legislative provisions:-

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[28] Ibid.

[29] Halsbury's Laws of England, 2014 Vol. 20 paragraph 480 with footnote - *(A charge 'upon the public revenue' or 'upon public funds' normally means an obligation to make a payment out of the Consolidated Fund or the National Loans Fund)"*

(i) Section 114 of the Constitution:-

Marginal Note – Establishment of Consolidated Revenue Fund

114.-(1) All revenues or other moneys raised or received by Belize (not being revenues or other moneys payable under this Constitution or any other law into some other public fund (established for a specific purpose) shall be paid into and form one Consolidated Revenue Fund.

(2) No moneys shall be withdrawn from the Consolidated Revenue Fund except to meet expenditure that is charged upon the Fund by this Constitution or any other law enacted by the National Assembly or where the issue of those moneys has been authorised by an appropriation law or by a law made in pursuance of section 116 of this Constitution.

(3) No moneys shall be withdrawn from any public fund other than the Consolidated Revenue Fund unless the issue of those moneys has been authorised by a law enacted by the National Assembly.

*(4) No moneys shall be withdrawn from the Consolidated Revenue Fund or any other public fund **except in the manner prescribed by law**.*

The relevant parts of this section are subsections (2) and (4). The Court's interpretation of subsection (2) is that two categories of withdrawals from the Consolidated Fund are expressed as follows:-

1(a) No moneys shall be withdrawn from the Consolidated Revenue Fund **except to meet expenditure that is charged upon the Fund by this Constitution**; or

1(b) No moneys shall be withdrawn from the Consolidated Revenue Fund **except to meet expenditure that is charged upon the Fund by any other law enacted by the National Assembly**;

2(a) No moneys shall be withdrawn from the Consolidated Revenue Fund **except where the issue** [the paying out of] **of those moneys has been authorised by an appropriation law**; or

2(b) No moneys shall be withdrawn from the Consolidated Revenue Fund **except where the issue** [the paying out of] **of those moneys has been authorized by a law made in pursuance of section 116 of this Constitution.**

(ii) Section 115 of the Constitution is set out as follows:-

Marginal Note – 'Authorisation of Expenditure from Consolidated Revenue Fund'

115.-(1) The Minister responsible for finance shall prepare and lay before the House of Representatives in each financial year estimates of the revenues and expenditures of Belize for the next following financial year.

(2) The heads of expenditure contained in the estimates (other than expenditure charged upon the Consolidated Revenue Fund by this Constitution or any other law) shall be included in a Bill, to be known as an Appropriation Bill, providing for the issue from the Consolidated Revenue Fund of the sums necessary to meet that expenditure and the appropriation of those sums for the purposes specified therein.

(3) If in respect of any financial year it is found-

(a) that the amount appropriated by the appropriation law for any purpose is insufficient or that a need has arisen for expenditure for a purpose for which no amount has been appropriated by that law; or

(b) that any moneys have been expended for any purpose in excess of the amount appropriated for the purpose by the appropriation law or for a purpose for which no amount has been appropriated by that law, a supplementary estimate showing the sums required or spent shall be laid before the House of Representatives and the heads of any such expenditure shall be included in a Supplementary Appropriation Bill.

Section 115(2) separates '*expenditure contained in the estimates*' from '*expenditure charged upon the Consolidated Revenue Fund*' by the Constitution or any other law and is the authority for the enactment of the 'appropriation law' referred to in section 114(2).

(iii) Section 118 of the Constitution provides for the remuneration of holders of certain offices according to the salaries either prescribed by the National Assembly or prescribed by a law enacted under the National Assembly. Section 118(2) then goes on to provide

"The salaries and allowances prescribed in pursuance of this section in respect of the holders of the offices to which this section applies shall be a charge on the Consolidated Revenue Fund."

The offices to which this section applies include that of the Governor General, Chief Justice, Justices of the Court of Appeal and Supreme Court, Director of Public Prosecutions and Auditor General. This section is extracted as an example of expenditure that is 'charged upon the Consolidated Fund' by the Constitution itself as provided in section 114(2).

(iv) Section 119 of the Constitution speaks to 'public debt' which likewise constitutes a charge upon the Consolidated Fund, and is defined as including

"interest, sinking fund charges, the repayment or amortization of debt, and all expenditure in connection with the raising of loans on the security of the Consolidated Revenue Fund 114(2)"

73. In furtherance of the Constitutional provisions outlined above the Court extracts (with emphasis) certain aspects of the Finance and Audit (Reform) Act, No. 12 of 2005 ('the Finance Act').

(i) Section 3 firstly provides, inter alia –

(1) "Pursuant to section 114(1) of the Belize Constitution, all revenues or other monies raised or received by Belize, not being revenues or other moneys payable under the Belize Constitution or under any other law into some specific fund established for the purpose, shall be paid into and form one Consolidated Revenue Fund.

(2) No warrant shall be issued and no moneys shall be withdrawn from the Consolidated Revenue Fund except to meet expenditure that is charged upon the Consolidated Revenue Fund by the Belize Constitution, this Act or any other law, or where the issue of the warrant and withdrawal of those moneys has been authorized by an appropriation law made pursuant to section 116 of the Belize Constitution or is authorized to meet a statutory expenditure not elsewhere provided in this section.

(3) The moneys referred to in subsection (2) shall not be withdrawn except under the authority of a warrant duly executed under the hand of the Minister or a person duly authorized by him in writing.

(4) …

(5) …"

(ii) Sections 4 through 6 of the Finance Act thereafter deal respectively with issue of warrant authorizing expenditure for periods ahead of the start of the financial year; special warrants (for new goods or services or additional expenditure for existing goods or services) and advances (particularly defined). These sections do not bear relevance to the deliberation at hand.

(iii) Section 7 on the other hand speaks to loans and the Court considers it useful to set out this section notwithstanding the instant case is by Judgment of the Privy Council, not dealing with a loan. Section 7 provides in most part as follows:-

(1) The National Assembly may, subject to sub-section (2), from time to time by resolution authorize the Government to borrow monies or raise loans and to offer security for such monies or loans, from any public or private bank or financial institution or capital market in or outside Belize, upon such terms and conditions and in an amount not exceeding in the aggregate the sum specified in that behalf in the resolution, to meet the current or capital expenditure.

(2) Any agreement, contract or other instrument effecting any such borrowing or loan to the Government of or above the equivalent of ten million dollars shall only be validly entered into pursuant to a resolution of the National Assembly authorizing the Government to raise the loan or to borrow the money.

Provided that …

Provided further that, subject to the foregoing the Government may raise loans, borrow monies and secure financing to meet its capital requirements in amounts of less than ten million dollars at any one time without the authority of a resolution as aforementioned on the condition that the total aggregate amount so raised or borrowed in any one fiscal year does not exceed ten million dollars.

(3) A resolution referred to in subsection (1) or (2) shall not have effect for any period exceeding twelve months.

(4) The principal and debt charges of all the monies and loans so authorized shall constitute a charge on the Consolidated Revenue Fund.

(5) …

(6) Before the Government offers any guarantee or some other form of security in support of any loan made directly to a private sector entity or statutory body by any public or private bank, financial institution or capital market in or outside Belize, the Government shall seek the approval of the National Assembly, signified in a resolution made in that behalf, specifying

(a) The terms and conditions under which the Government shall make the guarantee

(b) That the National Assembly is satisfied that the loan will lead to the growth of the economy of Belize.

Provided that the National Assembly shall only issue a resolution under this sub-section if the National Assembly is satisfied that

(a) The lending institution requires as part of its overall lending policies or in respect of the specific loan, a sovereign guarantee by the Government of Belize; and

(b) *The private section entity or the statutory body which will be the recipient of the loan has the financial ability to make payments in*

respect of the loan, including assets of a value equivalent to the extent of the Government's guarantee.

(7) – (9) impose further regulatory obligations and requirements regarding resolutions passed under this section 7.

(10) This subsection requires the House of Representatives before adopting a resolution under this section (7) to refer the resolution to the Finance and Economic Development Committee for consideration and report to the House at its next sitting.

(iv) Finally under this Finance Act, the Court refers to Part IV – Government Procurement and Sale Contracts. A Government Contract is defined in section 2 as "a written or oral agreement for the procurement or sale by Government of goods and services, or a combination thereof…" Part IV sets out regulatory requirements and controls in respect of such contracts. Again, it is acknowledged that such a contract is not the subject matter before the Court.

74. Finally with respect to the relevant legislative provisions to be considered by the Court, the Crown Proceedings Act, Cap. 167 section 25 provides the procedure for payment upon judgment for payment of money against the Crown. Specifically, section 25(3) states

> *"If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the appropriate Government department shall, subject as hereinafter provided, pay to the person entitled or to his attorney-at-law the amount appearing by the certificate to be due to him together with the interest, if any, lawfully due thereon:*
> *Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued, may order any such directions to be inserted therein."*

The Court notes at this juncture that the judgments are not stipulated as being charges upon the Consolidated Fund.

The Authorities Cited

75. Firstly, ***The Attorney-General v Martinus Francois***, concerned the constitutional challenge to the issue of a guarantee by the Government of St. Lucia, first executed and subsequently ratified by resolution of the House of Assembly in respect of funding of a private entity for purposes of tourism development. Under consideration were sections 38 – 42 of the Finance (Administration) Act No. 3 of 1997 of St. Lucia. Section 41 of the Act required a guarantee by Government to be given in accordance with an enactment or resolution of Parliament. At the time of execution of the guarantee no such resolution was in effect or enactment in force. A resolution was subsequently approved by Parliament some two years after the guarantee was executed. The question under consideration by the OECS Court of Appeal was whether section 41 required the Minister to obtain parliamentary approval prior to execution of the guarantee – per Rawlins JA @ paragraph 112. At paragraph 123 Rawlins JA having reviewed a series of authorities involving constitutional or statutory provisions to be considered in the case before that Court, stated with respect to those cases that:-

> *"The principles indicate, for example, that generally, Ministers of Government and officers of the Crown or State, who have the necessary authority, may enter into contracts, including contracts of guarantee, which validly bind the government, without prior parliamentary approval. The authority to do these springs from common law."*

Further, at paragraph 124:-

> *The principles also indicate that prior parliamentary approval is not generally required to make a guarantee a valid contract upon which a party may sue. Parliament, however, retains control over the expenditure of funds to meet the financial obligations that arise under them. Parliament's refusal to provide funds to make payment for the financial obligations incurred does not invalidate them, but may render them unenforceable. Parliamentary approval of such contracts is not a condition precedent to their validity unless this is expressly stated in the guarantee. Constitutional provisions or statute may also stipulate conditions for validity.*

76. Earlier in this judgment at **paragraph 109**, Rawlins JA acknowledged that the power of Government to enter into contracts is the exercise of executive power, but that some aspects relating to the power to borrow and to execute a guarantee are provided by statute. Further, that any action of a Minister or other person or body not in accordance with the provisions of such a statute may be declared illegal and void. Particularly, it was said

> *"The essential legal imperative for this purview of the court is that any power that is granted by the Constitution or any statute must be observed. This is central to the rule of law, the sovereignty of Parliament and the supremacy of our Constitutions.*

And at **paragraph 112** that section 41 of the Finance (Administration) Act of St. Lucia had modified the common law in relation to the Crown and execution of guarantees. With further reference to English authorities, the bar against withdrawal of monies from the Consolidated Fund in the absence of authorization from Parliament was recognized at **paragraph 125**. The challenge to the guarantee and resolution affirming it was dismissed in this case by virtue of the subsequent resolution and again it is recognized that the instant case is not concerned with enforcement of a guarantee. However the Court's discussion on the questions of common law authority of the Crown to enter into contracts, the limitations on that authority by statute and the enforceability of such contracts are relevant to the Court's deliberation in this case.

77. The second case relevant to this issue is the **Belize Bank Limited v The Association of Concerned Belizeans and others [2011] UKPC 35**. The judgment of Lord Clarke set out the Privy Council's decision that the Loan Note under consideration in the instant case (which discharged the 2004 guarantee) was not a loan; did not effect a borrowing and as such did not offend against section 7(2) of the Finance Act as set out at paragraph 75(iii) above (paragraphs 46 – 47 of that judgment). The judgment concluded that "on its true construction, the Loan Note is a Promissory Note…"

At paragraph 45 of the judgment, Lord Clarke appeared at pains to state that the singular basis of the decision of the Board was the question whether or not the Loan Note was invalid by reason of section 7 of the Finance Act and that there was no consideration with respect to the autonomy of a promissory note outside of its underlying transaction.

78. More particularly, whilst acknowledging that the illegality of consideration given for a promissory note precludes its enforcement, the Board's decision did not address any question of whether had there been an invalid loan, the promissory note would have been enforceable. This decision is in any event considered as establishing that the instrument under consideration in respect of the Final Award sought to be enforced is not a loan, but a promissory note.

The Court's consideration of the public policy argument

79. In relation to the issue before the Court – that enforcement of the Award would give rise to an illegality in light of section 114(2) of the Constitution, the Court revisits its approach in paragraph 48 herein, which was based on ***BCB Holdings (paragraphs 29-32)***. Applying that approach to this issue, the Court acknowledges that it is bound by the Privy Council decision in ***Attorney-General v Association of Concerned Belizeans*** as pertains to the findings that the 2007 Loan Note was not a loan and as such was not invalid by virtue of section 7(2) of the Finance Act – and that what was created was a promissory note as such governed by section 85 of the Bills of Exchange Act, Cap. 245 of the Laws of Belize. Notwithstanding being bound by this issue, the Court is at liberty to consider the transaction that gave rise to the promissory note against the applicable law, as part of its deliberation on whether the enforcement of the Final Award would be contrary to public policy.

80. In so considering, as per ***Attorney-General v Francois*** (*paragraph 75 above*), the right of the Government further to its executive powers at common law to enter into the agreement by which the Loan Note is given is acknowledged. It is also acknowledged that being neither a loan (or borrowing) nor guarantee to a loan as provided under section 7(2) of the Finance Act, and given the absence of any express provision requiring a

resolution of the National Assembly to authorise the Government to give a promissory note, the Executive's power so to do has not been restricted by statute in the manner that a loan or guarantee both have been restricted, by virtue of section 7(2) of the Finance Act. It is in fact acknowledged, that it was not the case advanced by the Defendants that the promissory note (created by the 2007 Loan Note) was invalid. The Defendant's case is that it is not enforceable – but what exactly does this mean within the circumstances of this case?

81. At this juncture the Court considers the argument on behalf of the Claimants, with respect to section 25, particularly 25(2) of the Crown Proceedings Act, satisfying the requirement in section 114(2) of the Constitution for authority for payment out of the Consolidated Fund by 'any other law'. The Court is not of the view that section 25 satisfies this requirement for authorisation. The Court's interpretation of section 114(2) as reduced in paragraph 74(i) above is the basis of this view. The interpretation captured by paragraphs 1(a) and 1(b) finds that the prohibition against moneys being paid out from the Consolidated Fund applies to *expenditure charged upon the Fund* in either of two ways – (i) either by the Constitution itself; or (ii) by any other law. The key words in the Court's view however, are '*expenditure charged upon the Fund*'.

82. When one looks at the Constitution, there are several instances, where certain expenditure is expressed to be 'a charge upon the Consolidated Fund'. As extracted earlier, the remuneration of certain offices set out under section 118 of the Constitution is expressed as being 'a charge upon the Consolidated Fund'. Section 119(1) expresses public debt (as defined in section 119(2)) as being 'charged to the Consolidated Fund'. Section 112(4) provides that all pensions benefits payable under certain stated laws are to be charged on the general revenues of Belize (the Consolidated Fund). With respect to laws other than the Constitution, section 7(4) of the Finance and Audit (Reform) Act provides that the principal and debt charges of all loans authorized under that section (7) shall constitute a charge on the Consolidated Revenue Fund.

Merely by way of illustration and not relevance to the subject matter, sums payable pursuant to the Bank Agreement under the Caribbean Development Bank Act, Cap. 264 are expressed as 'charged upon the Consolidated Fund'.

83. The point of all these references is that 'charged upon the Consolidated Fund', is a terminology not used in relation to all expenditure. The Court had above referred to Halsbury's Vol 20 on Constitutional and Administrative Law, where at paragraph 480 a 'charge upon public revenues' is noted as 'an obligation to pay' out of the Consolidated Fund thus once charged, it is no longer a question of approval in order for these moneys to be withdrawn. The satisfaction of a money judgment against the Crown under section 25 (or elsewhere under Cap. 167) is not expenditure expressed to be 'charged' to be met out of the Consolidated Fund.

84. The second category of payments out of the Consolidated Fund created by section 114(2) is as expressed in numbers 2(a) and 2(b) in paragraph 74(i) above. That is – (a) payments out of the Consolidated Fund pursuant to an appropriation law (which is provided for under section 115 of the Constitution; or (b) payments authorized under an Act pursuant to section 116 of the Constitution – appropriation in advance. The Appropriation Act of course is the Act passed by Parliament after completion of the process of laying the estimates (the detailed lists of capital and recurrent expenditure of Government prepared by the Executive for its Financial Year) before the National Assembly for debate, approved and thereafter passed into law. Outside of expenditure charged upon the Consolidated Fund whether under the Constitution or any other law, all other expenditure of the Government must be directed through the process of appropriation – that is either under an Appropriation (or Supplementary Appropriation) Act pursuant to section 115 or appropriated in advance pursuant to section 116.

85. A money judgment against the Crown not being charged upon the Fund, must therefore be provided for through the process of appropriation and it is according to this interpretation of section 114(2), that the Court does not accept the argument on behalf of the Claimant that the Crown Proceedings Act is that 'other law' which satisfies the requirement for authorization for payment out of the Consolidated Fund, but this point

will be revisited below. This view aside, the question still remains as to exactly what this argument of 'unenforceability' means and how is it to be regarded in the circumstances of this case.

The issue of 'unenforceability'.

86. ***Martinus Francois*** (discussed at paragraphs 75-76 above) spoke to a contract executed without necessary Parliamentary approval as being valid but not enforceable where required resolutions or authorization are regardless not obtained before or after execution of such a contract. The references to and illustrations of the British public finance system (paragraphs 69 – 71 above), from times past up to present day, was to establish and reinforce the accepted position in law, that without authority as stipulated under law, no moneys can be paid out from the Consolidated Fund. The question now to be considered is whether this accepted position automatically gives rise to a finding by the Court that short of that authority in respect of payment of the Loan Note, enforcement of the arbitral award in this case would give rise to an illegality and consequently be contrary to public policy. The Court is not of the view that this is the automatic result.

87. In considering this issue, the Court views the question of enforceability as it pertains to payments out of the Consolidated Fund as distinguishable in two respects - one of unenforceability arising from a lack of capacity or jurisdiction of the source to commit and bind Government to the expenditure in question. The other view of enforceability is considered more operational with respect to formal but required compliance with the process of appropriation but where the committal and binding of Government to the expenditure, is within the purview and authority of the source. In the former case, one can consider the circumstances in ***Martinus Francois*** (section 41 of the Finance (Administration) Act), which deemed a guarantee executed sans Parliamentary approval as not binding. Had it not been subsequently authorized by resolution, the contract would have remained valid, but unenforceable in the first sense stated above.

It can be noted at this point that an agreement for a loan or guarantee effected without authorization in accordance with section 7(2) of the Finance and Audit (Reform) Act, would not fall into this category as the legislation itself deems such an agreement invalid. Similarly, the situation found in BCB Holdings was not a matter of enforceability of an otherwise valid agreement, the Settlement Deed therein was found illegal.

88. On the other hand, there is the situation of an agreement, valid insofar as it does not infringe any express provision requiring legislative sanction or Parliamentary approval for execution. The agreement, validly entered into, gives rise to expenditure which is neither a charge on the Consolidated Fund nor has it been approved in the yearly estimates and thus not catered for in an Appropriation Act. Such an agreement, cannot be enforced, not because of invalidity, but because the ultimate sanction for payment does not rest in the hands of the Court. It rests in the hands of the legislature, by virtue of the statutorily prescribed process of appropriation being the only means (aside from moneys charged to the public revenue) of withdrawal of moneys from the Consolidated Fund, in order to satisfy the agreement (*Sections 114(2) and 115 of the Constitution as reinforced by sections 3(2) and 3(3) of the Finance and Audit (Reform) Act)*. In similar vein, the Court considers the position of a money judgment against the Crown. Section 25(2) directs to whom initiation of payment should be sought, but the amount in order to be paid still has to be appropriated according to law. The expenditure cannot be impugned as the source of it is the Court's order by determination according to law. (This is not the case with a foreign or Convention award).

89. In respect of the above, the Court tends to the view, that a qualitative difference exists between the situation first regarded where expenditure sought to be met was made without authority of Parliament, in whatever form required, and the latter of expenditure otherwise valid but not properly appropriated and so incapable of being satisfied from public funds. It is this qualitative difference that the Court views as determinative in its consideration of the question of the enforcement of the arbitral award and public policy.

The question of 'unenforceability' and public policy.

90. The task for the Court is to determine into which category (as expressed by the Court above) the Loan Note which forms the basis of the Arbitral Award under consideration for enforcement falls. It has already been found that there was no express requirement for a resolution of the National Assembly for a promissory note to be executed – certainly, not in the manner expressly prescribed in respect of a loan or a guarantee. A promissory note however creates or rather acknowledges the existence of a debt and in this case, the 2007 Loan Note – whilst it discharged the debt created by the Government's 2004 guarantee of the UHS loan – transformed that debt into a different vehicle in the form of the promissory note. Nonetheless a debt, an obligation to pay, remained in effect against the Government.

91. Section 119(2) of the Constitution defines public debt as including

> *"interest, sinking fund charges, the repayment or amortization of debt, and all expenditure in connection with the raising of loans on the security of the Consolidated Revenue Fund and the service and redemption of debt created thereby"*

Public debt as per this definition is by virtue of section 119(1) a charge upon the Consolidated Fund. The 2007 Loan Note was determined not to be a loan and this Court is bound by that finding. The 2007 Loan Note is a promissory note – which acknowledged the existence of an obligation to pay – a debt therefore, in excess of thirty-three million dollars by the Government to the Claimant along with interest. Public debt, being a charge upon the revenues of the Government is so charged only by an Act of Parliament or the Constitution itself - section 114(2); or section 77(2)(a)(ii) (which restricts the manner in which any bill or motion seeking to impose or increase a charge upon public revenue is introduced into the National Assembly). No one ever asserted that the promissory note so created by the 2007 Loan Note, is a debt within the definition of 'public debt' and thereby a charge upon the public revenue but it must be regarded with some question as to its origins, in light of the fact that it has to be paid from the public revenue. In this respect, the existence of this promissory note created by the 2007 Loan Note is regarded with some uncertainty.

92. The Court again recalls the approach of the CCJ in BCB Holdings at paragraphs 29 – 32 therein, where the question was posed and answered as to whether the legality of the Deed therein should be re-examined despite the Tribunal's finding that it was valid. The question was answered from the perspective (@ paragraph 30) that the relevant facts were uncontested, which this Court takes to mean that there would be no foray by the Court into the realm of fact finding which at that stage of enforcement of the arbitral award, was not part of the enforcement court's function. As a result, the Court's consideration of the issue of public policy and enforcement was to be accomplished on '*uncontested matters of public record accepted by both sides*'. Further, as the issue before the Court required the balancing of competing public policies of finality of arbitral awards on the one hand and illegality of the subject matter of the arbitral award, the Court needed to examine the extent to which the illegality was addressed by the arbitral tribunal and the extent to which the illegality would impact on the society at large and is offensive to its primary principles of justice (paragraph 31).
93. In the instant case, there is similarly no dispute as to the facts upon which the application for the enforcement of the award is based, but even further, there is no jurisdiction to go behind the finding of the Privy Council that the 2007 Settlement Deed did not create a loan, but rather a promissory note. However, the Privy Council can be regarded as having either left open a question of the validity of the promissory note or, declined to consider any other issue besides what the Loan Note was not and the fact that it did not violate section 7(2) of the Finance and Audit (Reform) Act. This Court therefore considers itself at liberty, to address the promissory note within the context of the illegality that it is advocated, would occur as a result of its enforcement. Also in this regard, the Tribunal in coming to its conclusion, considered the 2007 Settlement Deed from a purely contractual standing and not with any reference to the Constitution's section 114(2) that has been put before this Court.
94. In considering this challenge, the Court will be carrying out a similar exercise of balancing competing public policies, but in this case, the question unenforceability of the agreement against the public policies associated with the pro enforcement bias of the Convention.

With respect to the unenforceability asserted in relation to the Loan Note, the Court is of the view that the circumstance of its creation and effect, must be considered against the wider ambit of the regulation and control of public expenditure as is provided for under the Constitution and laws enacted thereunder.

95. In this respect, one first considers the existence of the debt that Government must pay from the public revenues. Having not been charged upon the public revenue by the Constitution or any other law, this debt is not and cannot be a charge upon public revenues and so stand on its own in relation to the authority of its creation. In the circumstances, the debt falls to be satisfied as expenditure to be appropriated from the public revenue. In considering the debt from this standpoint, the Court must look at what is and apply context.

96. The Executive cannot borrow in excess of ten million dollars without the National Assembly's approval by resolution - ***section 7(2)*** of the Finance and Audit (Reform) Act; the Executive cannot guarantee any loan made to any private sector entity or statutory body by any public or private bank, financial institution or capital market in or outside Belize without a resolution of the National Assembly to be given in certain prescribed terms and subject to specifically prescribed qualifications - ***section 7(6***) of the Finance and Audit (Reform) Act; even where the Executive obtains a loan less than 10 million dollars, certain prescribed details of that loan are to be published in the National Gazette and a Report containing such details laid before the National Assembly – ***section 7(8)&(9)*** of the Finance and Audit (Reform) Act.

97. In addition to the above, the Executive cannot enter into a contract to procure goods or services in excess of five million dollars without laying such contract before both Houses of the National Assembly within one month of the execution of the contract - ***section 19(5)&(6)*** of the Finance and Audit (Reform) Act; the Executive cannot dispose of the Government's assets in excess of two million dollars without the approval of the National Assembly by resolution nor can the Executive dispose of national lands in excess of 500 acres or any Caye, without the approval of the National Assembly by resolution – ***section 22(1)&(2) of the Finance and Audit (Reform) Act***.

The Executive can further not 'charge' any expenditure to the Consolidated Fund except pursuant to the Constitution or other Act of Parliament – ***section 77(2)(a)(ii)*** of the Constitution; moneys held apart from the Consolidated Fund can only be so held pursuant to statute – ***section 9*** of the Finance and Audit (Reform) Act.

98. Through the process of Appropriation all expenditure of the Executive passes under the approval of the National Assembly – sections 115 and 116 of the Constitution and section 3(2) of the Finance and Audit (Reform) Act. Finally regarding the context of public expenditure as regulated by law, the Court harkens back to its historical example of the underpinnings of the British system which as a common law jurisdiction, Belize has inherited, which illustrate that not even the King could authorize withdrawal of monies from his own public purse for approved purposes without the authority of the Commons (the Legislature).

99. Within the context of all the oversight and controls of public expenditure as set out in paragraphs 94-96 above, the Court considers this promissory note in excess of thirty-six million dollars, which up to this time of enforcement has had neither the intervention nor the involvement of the National Assembly. The Court does not consider that the execution of the Loan Note which gave rise to the promissory note is to be attributed the base illegality found in relation to the Settlement Deed in ***BCB Holdings***. However, the Court considers that it cannot ignore, that the promissory note gives rise to a debt significantly in excess of obligations generally created by financial transactions which ordinarily require authorization by law and that these transactions are subject to substantial controls prescribed by the Constitution and other written law. Within this context the Court can also not ignore, that the promissory note sought to bypass these controls, insofar as it purported to warrant (clause 3(b) of the 2007 Loan Note), that all legal and constitutional action regarding the execution, deliver and performance of the Agreement had been complied with. Regarding enforcement of the agreement, this was not the case.

The final issue – the exercise of the public policy exception

100. The Court finds that the promissory note whilst validly executed pursuant to executive authority, that when considered against the extent of legislative financial controls of public expenditure listed in paragraphs 94-96 above, it is inconceivable that the Executive possessed the authority to bind the Government to this expenditure without Parliamentary approval. As a result, the Court finds that the promissory note cannot be enforced without the sanction of the Legislature. And in this regard, as learned Senior Counsel for the Defendant submitted, the absence of that sanction cannot be cured by the Court. As already stated at paragraph 86 above, in the case of the domestic Court's judgment, expenditure arising out of a judgment against the Crown is incurred as a result of the Court's determination of issues before it according to law. That the judgment must still be satisfied by funds appropriated is not a matter of any further approval of the legitimacy of the required expenditure. It is a matter of formal compliance with the legal mechanism to effect payment out of the Consolidated Fund.

101. The Arbitral Award does not arise out of the Court's own adjudicative process, and the consequence of this fact is underscored by the bases for challenge against enforcement. To be clear, this Court is not finding that the prerogative of the Executive to enter into the 2007 Agreement was restricted. This Court finds, that absent the approval of the National Assembly (the requirement for which a forceful case is made out by virtue of the existence of all the legislative restrictions and regulation surrounding the incurrence of debt), the expenditure created out of the Loan Note is not enforceable.

102. In considering the effect of this finding, the Court returns to BCB Holdings, (paragraphs 24 – 28) where after recognizing that the ambit of the exercise of public policy was very wide (paragraph 21) and that it was the public policy of Belize that fell to be considered, the Court nonetheless sounded a caution, (at paragraph 23, citing ***Loucks v Standard Oil Co. of New York***)[30] that "*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*". More particularly the following at paragraphs 24 – 25 ***BCB Holdings***, are also considered:

[30] 224 N.Y. 99

> *"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 globalized 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.*
>
> *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. 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."*

It was also stated at paragraph 26, that enforcement must not be refused unless it infringes a 'fundamental principle'. Reference was made to Indian Supreme Court decision which declared that the Court would decline to enforce a foreign arbitral award "*if enforcement would be contrary to (i) the fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."*[31]

103. The final reference in this vein to BCB Holdings is at paragraph 28 of the Judgment as follows:

> *"…to claim the public policy exception successfully the matters cited must lie at the heart of the 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."*

[31] Renusagar Power Company Ltd v General Electric Company (1994) AIR 860 @ [66], cited at paragraph 26 of *BCB Holdings, supra*.

The extent of the illegality of the Settlement Deed in ***BCB Holdings*** exceeded this high threshold and did so even against the circumstances of the State refusing to participate in the arbitral process. Additional factors the Court took into account were the circumstances of secrecy surrounding the creation and implementation of the Settlement Deed and the fact that it was clear that there was never an intention to seek Parliamentary approval; also that the Agreement was to have been performed in Belize (paragraphs 57-59).

104. As a final consideration the Court takes a brief look at the decision of the Indian Supreme Court, referred to at paragraph 26 of ***BCB Holdings***. The basis of refusal articulated by the Indian Supreme Court was also stated in **Penn Racquet Sports Ltd. v Mayor International Ltd**. a decision of the Delhi High Court[32]. This decision left much discussion in its wake, reason being that it represented a departure from a series of cases[33] in which enforcement of foreign arbitral awards in India was refused on a distinctly nationalistic basis. Commentary on the ***Penn Racquet Sports*** case highlighted the Court's statement that the mere passing of a monetary award against an Indian entity on account of its commercial dealings did not make enforcement of the award against the interests of India or contrary to morality or justice.[34]

105. In the final analysis this Court is balancing the public interest of the Executive's adherence to financial controls and regulation in expending public funds so as to secure transparency, accountability and to uphold the rule of law by maintaining the separation of powers between the Executive and the Legislature as it pertains to authorizing expenditure from the Consolidated Fund. The position is that Court has found, that the incurrence of debt above certain prescribed amounts, is by the Constitution and other written law, restricted without the involvement of the Legislature.

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[32] [2011] (1) ARBLR 244 (Delhi)

[33] *ONGC v Saw Pipes Limited* [2003] 5 SCC 705 *Venture Global Engineering v Satyam Computer Services Limited & anor* [2008] AIR SC 1061

[34] Desai & Kanuga, 2007 Indian Law Journal

It is therefore inconceivable that the Executive can without involvement of the Legislature, indebt the Government in a sum far in excess of that which is permissible under law without the Legislature's approval, by reason of only, of a classification of the vehicle by which the debt was incurred.

106. With respect to the question of enforcement, the balance now needs to be reckoned between the competing public interests which pit the pro enforcement bias of the Award against the public interest of accountability and control of expenditure of public revenue in Belize. As a developing state, the Executive of Belize's adherence to the controls of public expenditure is of especially grave importance and of public interest to the security and well-being of the people of Belize. The award is to be enforced in Belize against its public purse, as opposed to between private entities. Further, the other party involved is domestic and not foreign, the relevance being that recommendations from the International Law Association on the public policy bar against enforcement of international arbitral awards, specifies that the pro enforcement bias is primarily concerned with awards which involve a 'material foreign element'.[35] The competing public policy of guaranteeing public confidence in the arbitral process and respecting the institutional fabric of the country where the award is to be enforced, as articulated in ***BCB Holdings*** is considered but found to be just outweighed when considering the interests of Belize as a developing state, in maintaining transparency and accountability in the Executive's handling of the country's public revenue.

107. The Court has understood all of the cautions in relation to declining to enforce a Convention Award and acknowledges the Government's failure to take part in the arbitration process (in this respect guidance is taken from ***BCB Holdings***' finding that non participation is not a bar to challenging enforcement). With respect to the high threshold to be satisfied in declining to enforce a Convention Award, whilst not to the same extent of offensiveness found in relation to the Settlement Deed in ***BCB Holdings***, the absence of any legislative oversight or intervention in the issue of the promissory note herein,

[35] International Law Association Conference, 2002 – Final Report on Public Policy as Bar to Enforcement of International Arbitral Awards, pg. 2 Recommendation 1(a).

relative to the degree of oversight prescribed by law in relation to incurrence of debt by means generally effected, compels the enforcement of this Arbitral Award as against public policy as it is harmful to the interests of Belize. In the circumstances the Court declines to order enforcement.

Costs

108. Costs are awarded to the Defendant as the successful party herein. However given that all of the issues were not resolved in their favour and that the Court regards the failure of the Government to participate in the arbitration proceedings as a factor relevant to costs, a percentage of fifty percent (50%) only of costs is considered an appropriate award in favour of the Defendants. Costs are also awarded to be assessed if not agreed.

Final Disposition

109. (i) The Claimant's application to enforce the Arbitral Award is refused on the grounds that enforcement would be contrary to public policy.

(ii)The Defendant is awarded costs at 50%, to be assessed if not agreed.

Dated the 17th day of February, 2015

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Shona O. Griffith
Supreme Court Judge.