IN THE COURT OF APPEAL OF BELIZE AD 2017

CIVIL APPEAL NO 4 OF 2015

THE BELIZE BANK LIMITED Appellant

v

THE ATTORNEY GENERAL OF BELIZE Respondent

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BEFORE

The Hon Mr Justice Samuel Awich	Justice of Appeal
The Hon Mr Justice Christopher Blackman	Justice of Appeal
The Hon Mr Justice Murrio Ducille	Justice of Appeal

E Courtenay SC for the appellant.
D A Barrow CBE, SC with J Ysaguirre for the respondent.

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16 June 2016 and 24 March 2017.

AWICH JA

[1] I concur in the majority judgment of the Court prepared by Ducille JA.

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AWICH JA

DUCILLE JA

[2] This appeal arose from a decision of Griffith J declining to order enforcement of an arbitral award (the Award) made in London, the United Kingdom by the London Court of

International Arbitration (LCIA). The award was thirty-six million, eight hundred and ninety-five thousand, five hundred and nine Belize dollars (BZ$36,895,509.46), plus interest and 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). The award wasmade against the Government of Belize and in favour of Belize Bank Limited, the Appellant herein. Specifically, the learned Trial Judge refused the Appellant's application for enforcement on the ground that enforcement would be contrary to public policy, and awarded costs to the Respondent at 50% to be taxed if not agreed. The learned Trial Judge's decision was lengthy and scholarly, it traced the chronology of this matter, as well as the historical basis for some of the constitutional and other statutory provisions applicable and relevant in this case.

[3] The material document in this matter was a Loan Note. The Privy Council has in the past held that a loan note was to be in reality a promissory note (the Note). As such, only the pertinent facts associated with the Note will be related herein.

[4] The Appellant's Grounds of Appeal are several. However, as counsel for the Appellant, Mr. Courtenay SC, has stated so succinctly before us, "the sole issue that is left for this court is [whether] it is contrary to public policy for the award to be enforced." Counsel contended that what the Arbitral Tribunal determined is not open for review, and what the Privy Council determined is not for review. We agree, with the qualification that in certain circumstances, the policy in favour of the finality of those decisions must be balanced against the apprehension that absent some form of review, there would occur a violation of "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[1]The law on which we rely for determination of this issue is constitutional, statutory and precedential and is set out below for ease of reference.

[1]Loucks v Standard Oil Co. of New York 224 N.Y. 99 at 111

[5] The Belize Constitution[2] - PART IX Finance

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.

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.

[2] Laws of Belize, Cap.4

(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 forth 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.

116. Any law enacted by the National Assembly may make provision under which, if the appropriation law in respect of any financial year has not come into operation by the beginning of that financial year, the Minister responsible for finance may authorise the withdrawal of moneys from the Consolidated Revenue Fund for the purpose of meeting expenditure necessary to carry on the services of the Government until the expiration of four months from the beginning of that financial year or the coming into operation of the appropriation law, whichever is the earlier.

[6] Belize Finance and Audit (Reform) Act 2005[3] Part II Finance.

7. -(1) The National Assembly may, subject to subsection (2), from time to time by resolution authorize the Government to borrow monies or to 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 current or capital requirements.

[3]No. 12 of 2005

(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 authorising the Government to raise the loan or to borrow the money: …"

[7] Belize Arbitration Act[4]:

13. An award on a submission may, by leave of the court, be enforced in the same manner as a judgment or order to the same effect.

25.-(1)…"Convention award" means an award made in pursuance of an arbitration agreement in the territory of a country, other than Belize, which is a party to the New York Convention; and "the New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958, and set out in the Fourth Schedule hereto …

28.-(1) A Convention award shall be enforceable either by action or in the same manner as an award by an arbitrator is enforceable by virtue of section 13.

(2) Any Convention award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it is made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Belize and any reference in this Act to enforcing a Convention award shall be construed as including references to relying on such an award.

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

[4]Laws of Belize, Cap 125

(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves-

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(d) (subject to subsection (4) of this section) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or

(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

(f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(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.

[8] Belize Crown Proceedings Act[5]

> 25.-(1) Where in any civil proceedings by or against the Crown or in connection with any arbitration to which the Crown is a party, any order (including an order for costs) is made by any court in favour of any person against the Crown or against a Government department or against an officer of the Crown as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person, at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order: Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs, if any, ordered to be paid to the applicant.
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> (2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the head of the authorised Government department or the officer concerned, or the Attorney General, as the case may be.

BCB Holdings Limited et al v. The Attorney General of Belize[6]

[9] The facts of this case are almost identical to the current case. Not only was it a case from the same jurisdiction, it also involved a Settlement Deed purporting to settle pre-existing disputes. The pertinent facts transpired after elections and after a new administration was sworn in. Both cases went to arbitration, where the State did not appear initially in the current case, or at all in BCB. In neither case did the Settlement Deed require the government to seek approval or appropriation from the National Assembly. The points of difference are that BCB concerned tax concessions granted to a private entity without legislative authority, and this case concerned a promissory note in favour of a private entity that purported to bind the Government without there having

[5]Laws of Belize, Cap.167
[6][2013] CCJ 5 (AJ)

been any parliamentary approval of the same. Justice Saunders who rendered the Court's decision in BCB, discussed the scope of the public policy exception at some length, and we will refer to this later.

The Belize Bank Limited v The Association of Concerned Belizeans et. al.[7]

[10] This case arose from facts which are the same as the facts of the instant case. The Respondents, as their name indicates, were citizens who had misgivings about the transactions at issue here. The Privy Council held that the Loan Note was not invalid by reason of section 7 of the Finance and Audit (Reform) Act.[8] Their Lordships reasoned that on its true construction, the Loan Note was a promissory note, since there were no documents evidencing a loan or any borrowing by the Bank. Further, that even if there was a loan which was invalid under section 7, the promissory note would yet be enforceable.

Cukurova Holdings A.S. v Sonera Holding B.V.[9]

[11] This case from the British Virgin Islands (BVI) underscores the pro-enforcement bent of the courts in relation to arbitral awards. Cukurova appealed unsuccessfully against an order of the High Court granting Sonera leave to enforce a final arbitral award. Cukurova had argued that leave to enforce the award should have been refused because it was not able to present its case in violation of the rules of natural justice, and this in turn violated public policy. The court pointed out that the enforcing court must apply its own principles of natural justice as understood in the BVI and further, that enforcement may be refused if it would be contrary to public policy of the BVI. The court stated that there must be 'good reasons" for refusing to enforce a Convention award.There were no such good reasons in this case, as the court found that Cukurova had had every opportunity to develop its case.

Attorney General (of St. Lucia) v Martinus Francois.[10]

[7][2011] UKPC 35
[8]No.12 of 2005
[9][2014] UKPC 15
[10]ECSCJ 37 of 2004.

[12] At issue here, was the precise wording of section 41 of the Finance (Administration) Act of St. Lucia which is not mirrored in the Finance and Audit (Reform) Act of Belize. That section specifically stated that a guarantee involving financial liability is not binding on the government without "an enactment or unless approved by resolution of Parliament." The court held that this provision did not mean that a guarantee made without such enactment or approval would be void; merely not binding. Redhead JA stated that "[c]ontracts which involve the expenditure of public moneys are not void, but merely unenforceable until funds to answer them are provided by Parliament." Saunders JA, as he then was, said that when the Prime Minister in that case gave a guarantee "he was not doing anything wrong or unlawful. He was perfectly entitled to do so. However, because that guarantee involved a financial liability, Parliamentary approval was required before it could be made binding on the Government."[11]

The facts

[13] A quick synopsis of the facts in the instant case, which are not in issue is as follows. This matter began in 2004 with a loan by the Appellant to United Healthcare Services, a company that was constructing a hospital in Belize. Repayment of this loan was guaranteed by the Government of Belize (the Government). In 2007, after United Healthcare Services defaulted on the loan and the Government also defaulted on the Guarantee, the Government executed a certain Settlement Deed with the Appellant which purported to release the Government from liability under the guarantee. Appended to the Settlement Deed as Schedule I was a Loan Note in favour of the Appellant. The Government never made any payments on the Loan Note and the Appellant demanded payment.

[14] The Settlement Deed provided for disputes to be settled by arbitration under the London Court of International Arbitration (LCIA).The matter proceeded to arbitration. Meanwhile, a few things were happening. The Government made a certain oral agreement with the Appellant whereby the Government would pay the Appellant twenty million dollars (BZ$20,000,000) and the Appellant would in turn provide thirty-nine million

[11] Francois at para. 55

dollars (BZ$39,000,000) to Belize Healthcare Partners Limited to buy the assets of United Healthcare Services. In consequence, the arbitration was terminated. Then, a group of citizens filed a matter in the Supreme Court challenging both the original Guarantee and the Loan Note. Elections took place and the Government changed. The new Government challenged the validity of the Loan Note in court but the Appellant obtained an injunction in England halting those proceedings. Eventually, the local proceedings were stayed and arbitration recommenced before the LCIA. The result was that the oral agreement was determined by the tribunal to be invalid because it was not in compliance with section 114 of the Belize Constitution and section 3 of the Finance and Audit (Reform) Act. The twenty million dollars were returned to the Government. The term "returned" is used cautiously here, since apparently, prior to that time, those funds had not been placed in the Consolidated Revenue Funds of Belize. It is also unclear whether the amount returned was in fact twenty or ten million.

[15] Thereafter, the Privy Council judgment was rendered in the case of **The Belize Bank Limited v The Association of Concerned Belizeans et al.** [2011] UKPC 35. That court held that while the Loan Note was not invalid by reason of section 7 of the Finance and Audit (Reform) Act, it was on its true construction a promissory note since none of the documents "evidence[d] a loan to or borrowing by the Bank." Thereafter, the arbitration proceeded and concluded with the finding that the Government was liable to pay the Appellant the amounts first mentioned above. The Appellant sought enforcement of the Tribunal's award in the court below, and the Government resisted on the ground, inter alia, that enforcement of the award would be contrary to public policy. The learned Trial Judge agreed with the Government's contention.

The Grounds of Appeal

[16] It is noted that while counsel for the Appellant stated that there was only one of the Government's grounds at issue in this appeal, and that was whether the Government was authorized to enter into the Agreement, here in court he contended that the sole issue

was whether it is contrary to public policy for the award to be enforced. Be that as it may, the appellant's arguments can be summarized as follows: The learned Trial Judge erred when she reconsidered the question of the illegality of the Loan Note which had already been determined by the Privy Council, and when she held that the absence of an Appropriation law precluded the court from ordering enforcement. Further, that she erred in distinguishing between a money award and a foreign judgment, and her reliance on the public policy exception was misconceived. The Respondent countered first that the Privy Council had decided only that the Loan Note was not invalid; that they had not decided that it *was* valid, and second, that an Award is not equivalent to a judgment and does not escape the power of the court to refuse enforcement on the ground of public policy.

The Appellant's arguments

Illegality of the Loan Note

[17] Counsel for the Appellant argued here that the learned Trial Judge erred in law or misdirected herself in holding that she was at liberty to consider the legality of the Settlement Deed. He submitted as follows:

> 5. The issue of the authority of the [Government] to enter into the 2007 Loan Note had been previously determined by the Judicial Committee of the Privy Council in Attorney General v Association of Concerned Belizeans et al ("the ACB Case").The Judicial Committee rejected the [Government's] argument that prior approval of the National Assembly was required under the Finance and Audit (Reform) Act before it entered into the 2007 Loan Note. No other argument was advanced before that Court that the 2007 Loan Note was invalid.
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> 6. The Judge did not call into question this Judgment, but did seek to limit its scope and held that she could revisit the issue of illegality that the GoB alleged would occur on enforcement. Ultimately, the Judge's consideration of the issues trespassed on the finding of the Judicial Committee as she re-considered precisely the issue which had been determined by the Judicial

Committee; namely whether the GoB required legislative approval to enter the 2007 Loan Note.

[18] Counsel for the Respondent countered that, the *enforceability* of the Loan Note as a promissory note obliging the Government to pay a debt in the absence of Parliamentary approval had not been raised before the Privy Council and did not form part of the ratio of that court's decision. The implication is that the learned Trial Judge was permitted to consider all factors that bore on the enforceability of the Loan Note, including its validity. As to the nicety of the distinction as to whether the Privy Council's decision that the Loan Note was "not invalid" (meaning that the possible positive formulation of the wording that their Lordships could have used) left open the issue of the validity of the Loan Note, we offer no opinion on the last argument. There is other precedent to consider which is more useful on the point.

[19] The learned Trial Judge referred to the case of BCB Holdings Limited et al v. The Attorney General of Belize[12], where Justice Saunders, posed the question "[s]hould 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?" He answered in the affirmative, but qualified that statement by noting that "all the relevant facts were uncontested", and stated that since "the factual background is agreed and since the court is performing, essentially, a balancing exercise between the competing public policies of finality and illegality, the nature and seriousness of the alleged illegality and the extent to which it can be seen that the same was addressed by the arbitral tribunal are factors we must take into account. If there is illegality, we must also consider the extent to which it impacts on the society at large and is offensive to primary principles of justice."

[20] The learned Trial Judge in this case found that there was "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

[12] [2013] CCJ 5 (AJ)

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." Although the prior tribunals were not the same: an arbitration tribunal in BCB and the Privy Council in ACB, the principle of finality is obviously the same. Arbitral awards are accorded a high degree of deference as are decisions of the Privy Council. The learned Trial Judge proceeded to outline the very narrow parameters of her enquiry, namely that she would "address the promissory note within the context of the illegality that it is advocated, would occur as a result of its enforcement." Thus, while not re-examining the "validity" of the Loan Note, she was considering the anticipated illegality that would transpire if she granted the application for enforcement. The Appellant's argument is based on the idea that the learned Trial Judge was revisiting the issue of the validity or legality of the Loan Note. She was not, and so the contention that she misdirected herself on this issue must fail.

The absence of an Appropriation law

[21] Counsel for the Appellant argued that the learned Trial Judge erred in holding that there is a distinction between authority of the Government to enter into a contract and the authority required to pay sums out of the Fund in order to satisfy the Government's obligations under the contract; that legislative approval is required to authorize payment of the sums in question from the Fund; that the Court has no power to order the Government to pay a money judgment, and that the Court is only empowered to " to direct to whom initiation of payment should be sought but thereafter (or prior to that) the amount still has to be appropriated according to law. However, the amount ordered cannot be impugned …"

[22] With all due respect to learned Counsel, it is a matter of basic constitutional principle that there are fundamental differences, bearing on the Separation of Powers doctrine, between the ability of the Executive to negotiate and execute a contract on behalf of the Government, and the authority to pay sums out of the Consolidated Revenue Fund. The first arises because "Government" being of an amorphous nature must act through one of its arms (Executive, Legislative or Judicial), and the second is that the "authority" is either the Constitution or any other law (such as an Appropriation or

Supplementary Appropriation law). In the first instance, the Executive acts; in the second, the Legislature acts. In this case, the learned Trial Judge carefully, and with examples, contrasted the areas in which payments may be made from the Consolidated Revenue Fund without more, and cases where payment could be made only after a condition precedent was satisfied. The former cases are those where the Constitution or other law states there to be a "charge" on the Consolidated Revenue Fund. The latter are those requiring legislative approval, in the form of Supplementary Appropriation Bills, before payments are made. See section 115(3)(b) of the Belize Constitution.

[23] In her examination of section 115 of the Constitution, including its marginal note which reads "Authorisation of expenditure from the Consolidated Revenue Fund", the learned Trial Judge particularly referred to section 115(2), emphasising the words "other than expenditure charged upon the Consolidated Revenue Fund by this Constitution or any other law …" She pointed out that "[s]ection 115(2) separates expenditure contained in the estimates from expenditure '*charged upon the Consolidated Revenue Fund'* by the Constitution or any other law [emphasis hers] and is the *authority* [emphasis ours] for the enactment of the 'appropriation law' referred to in section 114(2)." She continued by providing examples of items specifically charged upon the Consolidated Revenue Fund such as Remuneration of Certain Officers under section 118, where section 118(2) provides that "[t]he 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."

[24] The Appellant's position seems to be that section 25 of the Crown Proceedings Act is some of that "other law" contemplated by section 115(2) of the Constitution. The learned Trial Judge very properly rejected this proposition, indicating that the key words in section 114(2) authorising payments out of the Fund that are sanctioned by any other law, are "expenditure charged upon the Fund." It would appear then that any expenditure "charged upon the Fund" must be either proclaimed as such in the Constitution itself, or in the other law. The Crown Proceedings Act does not so proclaim. At this point, it may be useful to take a closer look at The Crown Proceedings Act. That Act in essence provides for the Crown to be sued and sets out various heads of liability. The rest of the

Act is procedural in effect and Part IV titled “Judgments and Executions” sets out the process whereby orders made against the Crown are satisfied.

[25] The Appellant referred to section 28 of the Arbitration Act in support of its proposition that the application for an order under this section to enforce the arbitral award, if granted, conferred on the Appellant the status of a successful claimant with a money judgment in a domestic case. The Appellant contends that this is the meaning to be gleaned from the words “in the same manner as a judgment or to a like effect” in section 28. We disagree. In fact, the successful party who prevails against the Crown in arbitration, and gets a monetary award, is in exactly the same position as the successful domestic litigant in an action against the Crown for damages. Both are in receipt of a final order or arbitral award, and both must now seek the leave of the court to enforce that order or that award.

Money awards and foreign judgments

[26] The Appellant also referred to the case of New South Wales v Bardolph[13] in refutation of the proposition that the learned Trial Judge should have refused the application for enforcement because there had been no appropriation of moneys by Parliament. In particular, the Appellant states: “… when dealing with the Judiciary Act, which is the equivalent of the CPA, Dixon J held that judgment could be entered regardless of whether funds had been appropriated by Parliament. There are good policy reasons as to why this is the case. If it were not so, then the [Government] would be able to avoid a court judgment being issued against it determining that there was a breach of contract and the liability in damages for that breach by not appropriating any sums.” While we wholly endorse the opinion of Dixon J, it appears that the Appellant is once again confusing the concepts of “judgment” and “leave.” The issue before us on appeal is a challenge to the learned Trial Judge’s *denial of leave* to order enforcement of the Award

[13](1934) 52 CLR 455

and not passing *a judgment* (which is synonymous with the Award in this case).

The public policy reason for refusing enforcement.

[27] The Appellant argues that "there is no credible basis for suggesting that enforcement of the Final Award would amount to [a breach] of a fundamental rule of justice." The Appellant adverts again to the proposition that the learned Trial Judge revisited the Privy Council's decision on the issue of the Loan Note. This was not the case, as we explained heretofore.

[28] The Appellant also contended that the relief sought in the lower court was actually a request for the Supreme Court to make an order in the same terms as the arbitral tribunal. However, there is nothing permitting the Appellant to do so in either the Arbitration Act or the Crown Proceedings Act, and the application was, as we have noted before, merely for *leave* to enforce an order or award that was already in existence. Counsel for the Respondent drew attention to the decision of the learned Trial Judge where she said [t]he Arbitration 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."

[29] Finally, the Appellant contended that the facts of this case are "strikingly different" from those in BCB Holdings. However, the sole point of difference mentioned by the Appellant appears to be that the transaction in that case purported to "create and guarantee … a unique tax regime" and this case concerned a valid Loan Note. However, the underlying theme is similar since both cases involved action taken by the Executive concerning governmental financial controls without the input of the Legislature.

[30] The entire essence of this appeal lies in the elusive concept of public policy, which has been found to refer to different things in different circumstances. The Oxford Dictionary defines "public policy" as (1) [t]he principles, often unwritten, on which social laws are based, and (2) [t]he the principle that injury to the public good is a basis for

denying the legality of a contract or other transaction.[14]It was stated in the case of **Deutsche Schachtbau-und TiefbohrgesellschaftmbH v R'As al Khaimah National Oil Co**[1990] 1 AC 295, 316 that considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution. This caution was sounded again by Justice Saunders in BCB Holdings Limited et al, already mentioned above. He said that "[e]ven if a judge determines that there are features of an award that may seem inconsistent with public policy, it does not at all follow that the court must decline to enforce the Award." Also, quoting Cardozo J in Loucks v Standard Oil Co. of New York.[15], 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."

[31] In BCB Holdings, the concept of public policy was examined thoroughly and may come to be regarded as the locus classicus in this part of the world. Justice Saunders stated at paragraph 23 that

> "the concept of public policy is fluid, open-textured, encompassing potentially a wide variety of acts. It is conditioned by time and place. Religion and morality, as well as the fundamental economic, social, political, legal or foreign affairs of the State in which enforcement is sought, may legitimately ground public policy concerns. Whether those concerns are of a substantive or procedural nature, if they are fundamental to the polity of the enforcing State, they may successfully be invoked."

He further stated that

> "public policy … must in the first instance be assessed with reference to the values, aspirations, mores, institutions and conception of cardinal principles of law of the people of Belize. It is in Belize that the [Appellants seek] to enforce the Award and it is the courts of Belize that must make the assessment as to what, if anything, is offensive to public policy. It is also in Belize that the underlying obligations and promises were to be performed. Article V. 2(b) of the Convention

[14]Public policy. Retrieved from https://oxforddictionaries.com/definition/public-policy
[15]224 N.Y.99

provides that enforcement of an award may be refused, if enforcement would be contrary to "the public policy of that country."

[32] Justice Saunders also stated at paragraph 24 that

> [w]here enforcement of a foreign or Convention award is being considered, courts should apply the public policy exception in a more restrictive manner than in instances where public policy is being considered in a purely domestic scenario. This is because, as a matter of international comity, the courts of one State should lean in favour of demonstrating faith in and respect for the judgments of foreign tribunals. In an increasingly globalised and mutually inter-dependent world, it is in the interest of the promotion of international trade and commerce that courts should eschew a uniquely nationalistic approach to the recognition of foreign awards." And, "even if a judge determines that there are features of an award that may seem inconsistent with public policy, it does not at all follow that the court must decline to enforce the Award."

[33] However, Justice Saunders also stated that only where enforcement would violate the forum state's most basic notions of morality and justice would a court be justified in declining to enforce a foreign Award based on public policy grounds. Enforcement would be refused, for example, if the Award is "at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it infringes a fundamental principle" (citing Krombach v. Bamberski [2001] 3 WLR 488 at [37]).

[34] The learned Trial Judge in this case analysed the issue of public policy extensively, utilizing much of the learning offered by Justice Saunders in BCB Holdings. First, she laid out the several factors upon which she would base her conclusion, starting with the Constitution and the Finance and Audit (Reform) Act. In particular, she took note of the admonitions to caution that were sounded in both Loucks v Standard Oil and BCB Holdings as to individual notion[s] of expediency or fairness (Loucks), the danger of re-opening the merits of the case, and the very high threshold that the State must meet in order to claim the public policy exception (BCB).After declaring that "this debt is not and cannot be a charge upon public revenues … [It] falls to be satisfied as expenditure to be appropriated from the public revenue … [and] the Court must look at it and apply context",

the learned Trial Judge then examined certain sections in the Finance and Audit (Reform) Act. These are sections that we did not set out above for the particular reason that they do not mention promissory notes. Sections 19(5) and (6) require that procurement or sales contracts of five million dollars and above must be published in the National Gazette and laid before both Houses of the National Assembly within one month of execution. Section 22(1) provides that the Government shall not dispose of public assets of or above two million dollars without National Assembly approval. Section 7(2) provides similarly in respect of the validity "any agreement, contract or other instrument effecting borrowing or loan to the Government" save that the sum mentioned there is ten million dollars or above.

[35] It may be argued that the "instrument" in this case, having been determined to be a promissory note, and thus a debt, is not of the character of or a loan or a borrowing. Neither is it a procurement or sales contract. However, there is clear logic and pattern to those provisions, the corollary of which must be that any expenditure, and in particular, large expenditure of funds or debt incurred on behalf of the Government must be subject to approval by the National Assembly before it can be satisfied. In the circumstances of this case, we agree with learned Trial Judge's view that, "this promissory note in excess of thirty-six million dollars, which up to the time of enforcement has had neither the intervention or involvement of the National Assembly … gives rise to a debt significantly in excess of obligations generally created by [in respect to] financial transactions which ordinarily require authorization by law …"

[36] The learned Trial Judge opined that "when considered against the extent of legislative financial controls of public expenditure … it was *inconceivable* that the Executive possessed the authority to bind the Government to this expenditure without Parliamentary approval." She concluded that the promissory note "cannot be enforced without the sanction of the Legislature [a]nd … the absence of that sanction cannot be cured by the Court." She very properly conducted a balancing exercise whereby she considered, on the one hand, 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." On the other hand, the learned Trial Judge considered the pro-enforcement bias of the Award, which she regarded as a "competing public interest." She then considered the desirability of Belize's "adherence to the controls of public expenditure" as being of "grave importance to the security and well-being of the people of Belize." She looked at the fact that the public purse was implicated and not that of private parties. She also considered that both parties were domestic, as opposed to foreign and that the pro-enforcement bias was concerned with awards which involve a "material foreign element." She then weighed this against "[t]he competing public policies of guaranteeing public confidence in the arbitral process and respecting the institutional fabric of the country where the award is to be enforced."

[37] The learned Trial Judge found the balance to be in favour of non-enforcement. It is interesting to note that the word "inconceivable" appears twice in her decision. It calls to mind the declarations of Saunders J in BCB Holdings where he said that the Deed in question was "obviously offensive." Further, that "the grounds for not enforcing the … award were *compelling* and the Court actually had a duty to invoke the public policy exception." In both cases, the conduct and circumstances involved were so egregious as to leave the Court with very little option other than to decline to grant leave to enforce.

[38] Our conclusion is that the learned trial judge decided the application for leave to enforce the arbitral award correctly by refusing to grant leave. For these reasons, we dismiss this appeal and affirm the order of the court below.

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DUCILLE, JA

BLACKMAN JA

[39] I have read in draft the majority decision dismissing the appeal prepared by **Ducille**

JA with which my learned brother **Awich JA** has agreed. For the reasons which follow, I would allow the appeal and set aside the decision of **Griffith J** which declined the application of the appellant for enforcement of an Arbitral Award.

[**40]** The observation by the majority at paragraph 16 of their decision that "*while counsel for the appellant stated there was only one of the Government's grounds at issue in this appeal, and that was whether the Government was authorized to enter into the agreement, here in court he claimed that the sole issue was whether it was contrary to public policy for the award to be enforced"* must be seen in the context that at the start of the appeal, Counsel for the Government, Mr. Denys Barrow SC handed up a document dated 14 June 2016 styled "**Respondent's Statement of Issues**" which stated at paragraph one that "*the question whether the promissory note created a debt has been overtaken by the agreement of the parties that the executive could properly have entered into the promissory note without prior legislative approval."*

[41] As a consequence of the foregoing concession the appeal thereafter was primarily concerned with the finding by the trial judge that it was contrary to public policy for the award to be enforced.

[42] Counsel for the Bank submitted that the trial judge erred in holding at paragraph 101 of the judgment 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."* Mr. Courtenay further submitted that failure to secure passage of an appropriation law did not prevent the Court from entering judgment pursuant to section 28 of the Arbitration Act, a procedural provision that enables the Bank to enforce the Final Award as a judgment of the Supreme Court, being the order which the Bank had sought in its application.

[43] In support of the foregoing, Mr. Courtenay placed reliance on a decision of the High Court of Australia in ***New South Wales v. Bardolph*** [1934] 52 CLR 455 where the

suggestion that the Court should refuse to enter judgment on a claim where no funds had been appropriated at the time of the determination, was rejected.

[44] At pages 508 and 509 of the judgment, Dixon J stated that:

> "*The general doctrine is that all obligations to pay money undertaken by the Crown are subject to the implied condition that the funds necessary to satisfy the obligation shall be appropriated by Parliament" (**New South Wales v. The Commonwealth [No. 1]** [1932] 46 C.L.R. at p. 176. But, in my opinion, that general doctrine does not mean that no contract exposes the Crown to a liability to suit under the provisions of secs. 58 to 66 of the Judiciary Act unless and until an appropriation of funds to answer the contract has been made by the Parliament concerned, or unless some statutory authorization or recognition of the contract can be found. The very object of such provisions is to enable the subject to establish against the Crown, which except by statute cannot be sued without its own consent, a contractual or delictual liability subject to the condition which is preserved by the nature of the judgment that money shall be legally available to satisfy the claim so established. The effect and operation of such enactments was early described by the Supreme Court of Victoria. "In many instances money has been so appropriated as to be applicable to the satisfaction of judgments against the Crown. In all cases the Act presents a simple and comparatively economical machinery for obtaining the decision of the Supreme Court of the country (which decision may be reviewed by the highest Court of appeal) on the questions whether a valid contract has been made between the suppliant and the Crown, and what damages should be awarded for the breach of such a contract. It is left to Parliament, if no money is applicable to the liquidation of those damages, to determine whether the Judgment obtained on that decision should be satisfied or not" (**Alcock v. Fergie** [1867] 4 W.W & B 285 at pp. 320, 321. In this manner the principle that Parliament shall control the expenditure of public moneys is preserved, but the subject is given a means of establishing the existence and validity of his claim against the Executive*

Government. (See ***Rayner v. The King*** *[1930] N.Z.L.R. at pp. 457- 459. The principles of responsible government impose upon the administration a responsibility to Parliament, or rather to the House which deals with finance, for what the Administration has done.* ***It is a function of the Executive, not of Parliament, to make contracts on behalf of the Crown.*** *The Crown's advisers are answerable politically to Parliament for their acts in making contracts. Parliament is considered to retain the power of enforcing the responsibility of the Administration by means of its control over the expenditure of public moneys. But the principles of responsible government do not disable the Executive from acting without the prior approval of Parliament, nor from contracting for the expenditure of moneys conditionally upon appropriation by Parliament and doing so before funds to answer the expenditure have actually been made legally available."*

'Notwithstanding expressions capable of a contrary interpretation which have occasional/y been used, the prior provision of funds by Parliament is not a condition preliminary to the obligation of the contract. If it were so, performance on the part of the subject could not be exacted nor could he, f he did perform, establish a disputed claim to an amount of money under his contract until actual disbursement of the money in dispute was authorized by Parliament."
'It would defeat the vey object of such provisions as those contained in the Judiciary Act, if, ***before*** *the Courts could pass upon the validity in other respects of the subject's claim against the Crown, it were necessary that Parliament should vote the moneys to satisfy it."* ***[Emphasis added].***

[45] Mr. Barrow for the Government submitted that the requirement for leave was not a mere formality but a substantial and a definitive requirement. He noted that section 30 (3) of the Arbitration Act provided that enforcement of this type of award may be refused on the ground of public policy. In that regard Counsel relied on the observation by the learned trial judge at paragraph 101 of the decision that as *"the Arbitration 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*" it was open to the court to

consider refusing leave to enforce the award on the ground of public policy. In support of the foregoing, reference was made to the statement by Their Lordships of the Caribbean Court of Justice in the matter of ***BCB Holdings Limited et al v. The Attorney General of Belize*** [2013] CCJ 5 (AJ) at paragraph 61 that a court should not give leave to enforce an award where by so doing "*we would effectively be rewarding corporate citizens for participating in the violation of the fundamental law of Belize and punishing the State for refusing to acquiesce in the violation. No court can properly do this."*

Discussion and Disposition.

[46] **David Joseph QC** in his text on **Jurisdiction and Arbitration Agreements and their Enforcement** (2005) noted at Chapter 15.88, under the heading **Contrary to public policy** that section 103(3) of the UK Arbitration Act 1996 made provision for resisting enforcement on the ground that it would be contrary to public policy. Section 103(3) of the UK Act is in similar terms as section 30(3) of the Belize Arbitration Act, Chapter 125 of the Laws of Belize. The section(s) read "*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."*

[47] In the abovementioned text, **Joseph** noted that while the reach of public policy in theory is extremely broad and not capable of exhaustive definition, resort to it should be approached with extreme caution. More recently (April 2015), **Lord Justice Tomlinson** in addressing the AGM of Chartered Institute of Arbitrators on the topic of **The Enforcement of Foreign Arbitral Awards** published in **(2015)81 Arbitration, Issue 4**, 398 noted that national courts have generally adopted a "pro-enforcement bias" approach by construing narrowly the grounds for resisting enforcement set out in Article V of the **New York Convention on the Recognition and the Enforcement of Foreign Arbitral Awards 1958 (The Convention)** which is part of the Laws of Belize by virtue of Section 25 and the Fourth Schedule to the Arbitration Act Cap 125. As a consequence, national courts are precluded from reviewing the merits of the tribunal's decision in the context of enforcement proceedings. As **Tomlinson LJ** wryly noted, arbitration is founded on

consent, a factor seemingly overlooked notwithstanding the provisions of the Settlement Deed of March 23 2007 and referred to by **Griffith J** in her decision.

[48] Elaborating further in his address on the issue that grounds of public policy must be construed narrowly, the learned justice cited the case of ***Honeywell International Middle East Ltd v. Meydan Group LLC*** [2014] EWHC 1344 (TCC); 2 Lloyd's Rep. 133 a case which notwithstanding several allegations of misfeasance, including bribery, ***Meydan*** was (inter alia) unable to resist enforcement of the arbitral award under s.103 (3) of the Act, contrary to public policy in the enforcing jurisdiction.

[49] I set out below, the brief details of ***Honeywell*** as mentioned at pages 400 and 401 of the Arbitration publication cited at paragraph 35 above.

> "*By way of brief context, the parties entered into a contract pursuant to which Honeywell would carry out certain works on a Dubai racecourse owned by Meydan. Arbitration proceedings arose out of Meydan's failure to honour its payment obligations in exchange for those works. Meydan refused to participate in the proceedings; however the tribunal went on to make an award in Honeywell's favour under the rules of the Dubai International Arbitration Centre (DIAC). Honeywell obtained leave to enforce the arbitral award in this jurisdiction. Meydan applied to have the enforcement award set aside.*
>
> *When the matter came before* ***Mr Justice Ramsey****, one of Meydan's key submissions was that Honeywell had obtained the underlying contract by paying bribes to public servants in Dubai. Therefore, Meydan argued, enforcement should have been refused because the contract and arbitration agreement were not valid under UAE law for the purposes of s. 103(2)(b), and because enforcement would be contrary to English public policy under s.103(3). On the evidence, Meydan was unable to substantiate its bribery allegation. However,* ***Ramsey J*** *went on to find that even if the bribery allegation had been made out, the DIAC Rules provided that this would not invalidate the separate arbitration*

agreement contained in the contract. Further, although bribery was plainly contrary to English public policy, contracts procured by bribes are not unenforceable—rather, they may be avoided by the innocent party, but Meydan had made no attempt so to do. Accordingly, Meydan was unable to resist enforcement based on s. 103(2)(b), invalidity under the proper law, or s.103(3) of the Act, contrary to public policy in the enforcing jurisdiction.

Meydan also raised various challenges to the integrity of the proceedings, submitting that it was under an incapacity for the purposes of s. 103(2)(a) because it had been unable to obtain public funds to defend the claim. ***Ramsey J*** *rejected that argument, noting that difficulties in appointing legal representatives did not amount to incapacity under s. 103(2)(a). Meydan's alternative submission was that enforcement should be refused under s. 103(2)(b), (c) and (e) because it had been deprived of the opportunity to nominate an arbitrator. It relied on the fact that the Request for Arbitration named its predecessor, Meydan LLC, as the Respondent. The judge also rejected that submission, noting that because Meydan Group LLC and Meydan LLC were the same legal entities, Meydan was plainly aware of the Request for Arbitration. Therefore, it had had every opportunity to nominate an arbitrator, but had deliberately chosen not to participate in the proceedings or object to the claims advanced by Honeywell. On that basis, Meydan's objection to Honeywell raising a new termination claim in its Statement of Claim also failed under s. 103(2)(d).*

Finally, Meydan submitted that because it was challenging the award before the Court of Appeal at the seat of arbitration, the award had been suspended for the purposes of s 103(2)(i). ***Ramsey J*** *rejected that argument, noting that the mere making of an application to the Dubai courts did not result in the award being set aside or suspended. Therefore, the arbitral award remained binding.*

The decision in Honeywell serves as a helpful illustration of how narrowly the English courts will construe the grounds under s.103 of the Act. Although

Meydan raised various superficially attractive arguments, the judge was mindful of the fact that, "English law recognises an important public policy in the enforcement of arbitral awards and the courts will only refuse to do so under s.103 in a clear case".

[50] In the instant case, **Griffith J** herself acknowledged the very high threshold for the application of the ground of public policy to resist enforcement of an arbitral award, as stated by the Caribbean Court of Justice in ***BCB Holdings*****,** (see paragraph 45 above) even as she determined the award was not enforceable at paragraph 107 of the decision. At paragraphs 102 and 103, the learned judge said:

"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)*** *224 N.Y. 99*

"*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 of* ***BCB Holdings****, are also considered:*

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

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."

[51] In my view, the concession by the Respondent Government noted at paragraph 40 above which clearly recognized that prior legislative approval was a not a pre-requisite to enter into a promissory note, undermined the fundamental rationale for the learned trial judge's finding at paragraph 101 of the judgment (see paragraph 42 above). As noted in ***New South Wales v. Bardolph*** (paragraph 44 above), Dixon J had observed that ***"It is***

a function of the Executive, not of Parliament, to make contracts on behalf of the Crown". Moreover, notwithstanding the myriad of issues mentioned in ***Honeywell*** (see paragraph 49 above) the only one which had a seeming similarity with the instant case, was the failure of the Government to participate in the arbitral process, an occurrence which was held not to be a bar to enforcement.

[52] I am of the opinion that the fundamental error made by the learned trial judge, now supported by the majority in this decision has been to conflate the issue of registration the subject of the application to the court, with that of enforcement which was not, and consequently should not have been considered. This error is demonstrated at paragraphs 105 to 106 of the decision of **Griffith J** where the learned judge held that:

> "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. 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 entitles. 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'. 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."*

[53] In the result, I am of the view that on a consideration of the authorities and the facts of the instant case, the decision by the trial judge not to enforce the Arbitral award cannot be sustained. I would have allowed the appeal and set aside the several orders including those related to costs made in the court below.

[54] I would have further ordered:

(a) That pursuant to section 28of the Arbitration Act Cap.125 of the Laws of Belize, the appellant Bank be at liberty to enforce the Final Award in LCIA Arbitration No. 81116 between The Belize Bank Limited and the Attorney General of Belize dated 15 January 2013 in the same manner as a judgment or order to the same effect.

(b) The appellant is to have its costs here and in the court below, certified fit for two Counsel, to be taxed in the absence of agreement.

(c) The appellant be at liberty to make such applications to the Supreme Court as may be necessary to effect enforcement of the Final Award.

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BLACKMAN JA