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The Enforcement of Foreign Judgments in Belize

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This is the second part of a two part series on the enforcement of foreign judgements in Belize. In the first part I concluded that a foreign judgement for a definite sum of money may be recognised and legally enforceable in Belize either by taking steps under the statute, or as a matter of common law, so long as certain conditions are met.

It would seem an ineluctable conclusion that a foreign arbitral award is also recognized and legally enforceable in Belize in the same manner as a judgement or order to the same effect, and this was consistently the opinion of most practitioners in Belize for decades.

Foreign arbitration awards are usually based on a contract to arbitrate, but they are not themselves contracts. They are decisions, but they are not judgements: they cannot be enforced without the assistance of a court. So they can be enforced at common law by an action or pursuant to the provisions of the Arbitrative Act, Chapter 125 of the Laws of Belize.

The Arbitrative Act (Chapter 125) of the Laws of Belize initially enacted in 1926 when Belize was still a colony of England without power over its foreign affairs.

The Act is in three principal parts. Part II deals with arbitration (local awards) and empowers the court to enforce such awards. Part III deals with arbitration (Protocol and Foreign Awards) which incorporated protocols of the Geneva Convention (a multilateral convention) and empowered the court to enforce such awards by action or in the same manner as a judgment or order to the same effect. Part IV deals with arbitration (New York Convention or Recognition and Enforcement of Foreign Arbitral Awards) and empowered the court to enforce such awards by action or in the same manner as a judgement or order to the same effect.

Civil Appeal No. 4 of 2011 between the A.G. and BCB Holdings Limited and The Belize Bank Ltd is an appeal from the judgement of Muria J.,whereby he ordered that pursuant to Section 28 of the Arbitration Act (Chapter 125) the respondents be at liberty to enforce a final award obtained by them against the Government of Belize from the London Court of International Arbitration ("LCIA").

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The final award was obtained in arbitration proceedings which the respondents commenced by a request for arbitration pursuant to an arbitration clause contained in an agreement referred to as "the Settlement Deed". The arbitration clause permitted the parties to refer any dispute arising out of or in connection with the Settlement Deed, which could not be resolved amicably, to be finally resolved by arbitration under the LCIA rules.

It was further agreed that the seat or legal place of the arbitral proceedings would be London, England. The panel was constituted and the matter proceeded in the absence of the Government of Belize which chose not to participate even though fully aware thereof. The LCIA found that the Settlement Deed had been terminated as a result of the Government of Belize's repudiatory breach and the respondents' acceptance thereof. The LCIA awarded damages in the sum of BZ$40,843,272.34, reimbursement of the respondents' costs, legal, professional and other costs plus interest at 3.38% compounded annually.

The respondents immediately commenced enforcement proceedings in Belize pursuant to Section 28 of the Arbitration Act which provides that *"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."* A *"Convention award"* is defined by Section 25(1) as *"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."*

It is not disputed that the award was made in the United Kingdom and that at all material times the United Kingdom was a party to the New York Convention.

The Government of Belize invoking Section 30(3) of the Act, oppose the application for enforcement on the grounds that the award was in respect of a matter which is not capable of a settlement by arbitration, that it would be contrary to public policy to enforce it and further; that part IV of the Act, in which Section 28 is contained, is inapplicable because the New York Convention was only extended to Belize by an act of the United Kingdom when Belize was still a colony, but as a sovereign nation after independence in 1981 Belize is yet to ratify the Convention. As such, the New York Convention no longer applies to Belize and since Part IV of the Act provides for the enforcement of convention awards, it was accordingly inapplicable.

Rejecting this submission, Muria J found *"True, as a sovereign nation, Belize might not have ratified the Convention yet, but there can be no doubt that it applies to Belize. At independence on 21st September, 1981, the New York Convention as extended to Belize by Notice dated 26th November, 1980, became "existing law" of Belize and preserved (sic) by Section 134 of the Constitution of Belize. There is even a further and more fundamental reason to hold that the New York Convention applies to Belize. The Arbitration Act (Chap. 125) under its 1980 Amendment incorporates the provisions of the New York Convention on the recognition and Enforcement of Foreign Arbitral Awards, as well as the Arbitration (New York Convention on Recognition and Enforcement of Foreign Awards 1973). Thus I find that part IV of the Act is applicable in this case."*

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The majority of the court of Appeal (Mendes, JA dissenting) found that, but for the brief period between 24th February, 1981, when the United Kingdom extended the treaty to colonial Belize, and 21 September 1981, when Belize became independent, the New York Convention did not and does not apply to Belize and Belize never become a party to it.

The majority found first, that it has traditionally been the prerogative of the Crown/State to enter into treaties on behalf of a state. That this power was expressly reposed in the Governor by the 1964 letters Patent and the 1963 Constitution by the vesting of responsibility for foreign affairs in him. Secondly, that a law passed by the Belize Legislature which makes the state of Belize a party to a treaty violates the treaty making prerogative and is accordingly invalid. Thirdly, that a law which gives effect to an international treaty violates the treaty making prerogative either because it constitutes the state a party to the treaty or it otherwise encroaches upon the executive's exclusive external affairs preserve.

The majority held *"...the premature legislative act of the Belize legislature constituted no less than an unwarranted and impermissible, not to mention unprecedented, unequivocal interference in the exercise of the royal prerogative, and was, ex facie, ultra vires, unconstitutional, null and void and of no legal effect."*

The majority concluded that the New York Convention does not apply to Belize by virtue of this state not being a contracting state that its unilateral provisional application on the part of the Prime Minister of Belize was judicially misconceived in terms of the objective sough to be served. So there is no legal obligation on the part of Belize to recognize and enforce domestically arbitral awards within the contemplation of the New York Convention.

Furthermore, they went on to say that part IV and the Fourth Schedule of the Arbitration Act replicated, but did not incorporate or enact provisions of a legally binding international treaty known as the New York Convention. That they were incapable of being saved by Article 134 of the Constitution since insofar as it represents colonial legislation without appropriate authority on matters peculiarly and exclusively within the royal prerogative of the Crown, it was invalid and not a law in existence at the material time of being saved by Article 134 of the Constitution.

The minority opinion, however, rejected the notion that giving effect to the New York Convention by the statute usurped the treaty making prerogative of the Crown. That as a matter of pure construction, the status of Belize as a party to the New York Convention is wholly irrelevant to the applicability of Part IV of the Arbitration Act, as there is no requirement that Belize be a party the New York convention in order that what would otherwise satisfy the criteria of a 'Convention award' be enforceable under part IV.

Whether or not a foreign convention award may be treated the same as a foreign judgement for money and be enforceable as a bear contract debt at common law in Belize was not argued and or exployed in this case. An award however, is not a judgment, and so we doubt whether it may be so sued upon despite the purport of Sections 13, 19 and 28 of the Arbitration Act.

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In conclusion, the appeal was allowed. It is to be noted that the respondents have appealed to the Caribbean Court of Justice, the final court of appeal of Belize, for a determination of this fundamental issue. As a result for the time being a foreign arbitral award is not recognized and legally enforceable in Belize

In the premises we will be obliged to promptly add a third instalment to what was originally billed as a two part series on enforcement of foreign judgements whenever the ruling of the Caribbean Court of Justice is delivered.

Dated the 31st day of March, 2013

By: Rodwell R. A. Williams S.C., C.B.E