IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Application No. BZCV2017/001
BZ Civil Appeal No. 4 of 2015

BETWEEN

THE BELIZE BANK LIMITED **APPLICANT**

AND

THE ATTORNEY GENERAL OF BELIZE **RESPONDENT**

Before The Right Honourable and The Honourables

Sir Dennis Byron, President
Mr. Justice Saunders
Mr. Justice Wit
Mr. Justice Hayton
Mr. Justice Anderson

Appearances

Mr. Eamon H. Courtenay, SC and Ms. Angeline Welsh for the Applicant

Mr. Anthony Astaphan, SC, Mr. Nigel Hawke and Ms. Agassi Finnegan for the Respondent

JUDGMENT
of
The Right Honourable Sir Dennis Byron, President, and the Honourable Justices Saunders, Wit, Hayton and Anderson

Delivered by
The Honourable Mr. Justice Winston Anderson
on the 22nd day of November 2017

[1] On 4 April 2017, the Applicant, The Belize Bank Limited ("the Bank"), filed an application in this Court for special leave to appeal the judgment of the Court of Appeal delivered on 24 March 2017. The Respondent, the Attorney General of Belize, did not oppose the application for special leave, but did oppose the appeal. The application was heard on 17 October 2017 and was treated as the hearing of the substantive appeal.

[2] The judgment of the Court of Appeal concerned the application by the Bank for recognition and enforcement of an arbitral award made on 15 January 2013 by a London-seated arbitral tribunal under the Rules of the London Court of International Arbitration (the "LCIA Award"). The LCIA Award required the Government of Belize ("the Government") to pay to the Bank damages amounting to BZ$36,895,509.46 together with interest at 17% and arbitration costs of £536,817.71. In making the LCIA Award, the arbitral tribunal expressly relied upon the prior judgment of the Judicial Committee of the Privy Council in *The Belize Bank Limited v The Association of Concerned Belizeans & Others*[1] (the "*ACB Proceedings*"), which had decided that a loan note dated 23 March 2007 made out to the Bank by the Government (the "Loan Note") gave rise to a valid obligation on the part of the Government to make payment to the Bank in accordance with its terms.

[3] The Bank contended that the LCIA Award was a 'Convention award' within the meaning of section 25 (1) of the Arbitration Act[2] and that, having itself complied with the relevant formalities outlined in section 29, it was entitled to have the award recognized and enforced in accordance with the Arbitration Act. However, the trial Judge, and the Court of Appeal by a majority decision, agreed with the Respondent that it would be contrary to public policy to recognize and enforce the LCIA Award because the transactions underlying the Loan Note were tainted with illegality having been concluded without the authorization of Parliament and contrary to section 114 of the Constitution.

[4] As a brief indication of the underlying transactions it may be said that the Loan Note was part of a formal arrangement between the Government and the Bank to settle the

[1] [2011] UKPC 35.
[2] CAP 125.

Government's liabilities and obligations in respect of its guarantee of certain liabilities of a private company, Universal Health Services Co. Ltd., ("UHS") to the Bank. Advances had been made by the Bank to UHS to fund its expansion, including the construction of a hospital. This borrowing was at first guaranteed by the Development Finance Corporation ("DFC"), a statutory body tasked with promoting and facilitating financial development. The DFC ran into financial difficulty and the borrowing was then guaranteed by the Government itself under a 9 December 2004 agreement ("the 2004 Guarantee"). The Government supported the UHS project because it was Government policy to reform the health care system in Belize by promoting the expansion of health care facilities, the costs of which would be met by a national health insurance programme.

[5] On 23 March 2007, the Government and the Bank entered into a Settlement Deed in respect of the UHS debt which then totaled BZ$33,545,820. This Deed sought to release the Government from the UHS liabilities and obligations in consideration of the payment of BZ$1 and execution of the Loan Note in favour of the Bank in the sum of BZ$33,545,820 at 13% compound interest per annum. The Government failed to pay interest in accordance with the terms of the Loan Note and the Bank demanded payment in full on 9 May 2007. Prior to this demand, however, the *ACB Proceedings* were instituted and the Government, who was involved in these proceedings, undertook to refrain from satisfying the Settlement Deed until that claim was determined. The Bank instituted arbitration proceedings pursuant to the Settlement Deed's arbitration clause which resulted in the LCIA Award being made in favour of the Bank.

[6] The courts below considered several grounds on which the LCIA Award ought not to be enforced. Before us the areas of dispute have narrowed considerably. The only issue that remains for decision is whether enforcement of the LCIA Award would be contrary to the public policy of Belize.

NON-ENFORCEMENT ON GROUNDS OF PUBLIC POLICY

[7] Part IV of the Arbitration Act ("the Act") provides for the enforcement of a 'Convention award' that is, a foreign arbitral award covered by the provisions of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention"), set out in the Fourth Schedule. The scheme of the New York Convention, which is reflected in the Act, favours enforcement of Convention awards. Section 30 (1) provides that enforcement of a Convention award shall not be refused except in the cases mentioned in that section and section 30 (3) provides that enforcement may be refused if it would be contrary to public policy to enforce the award.

[8] In deciding whether enforcement may be denied on grounds of public policy the court conducts a balancing exercise weighing the interest of guaranteeing the finality of the award against the competing interest of ensuring respect for fundamental principles of its legal system such as the rule of law. To tilt the balance in favor of non-enforcement there must be strong and compelling evidence that there has been an unacceptable violation of these principles. Given what is customarily referred to as the "pro-enforcement bias" of the conventional scheme embodied in the Act, the court will be astute to ensure that enforcement proceedings are not used as a colourable device to reopen and relitigate matters that were decided in the arbitration. Whether the language of "bias" is ever appropriate to describe a desired judicial attitude is a matter of conjecture. What is important and undeniable is that the judicial attitude towards enforcement of arbitral awards is properly informed by the international obligation incurred by acceptance of the New York Convention to act in good faith in the discharge of the pro-enforcement provisions of the Convention. Such treaty-compliant action has attendant advantages of predictability, certainty and reliability of the global network of arbitration arrangements, an important constituent for foreign investment and economic development.

[9] The requisite balance to be struck in the application of public policy was extensively expounded by this Court in *BCB Holdings Limited and The Belize Bank Limited v*

The Attorney General[3] (the "*BCB Holdings case"*). At paragraphs 24-26, we said the following:

> "[24] 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 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.
>
> [25] 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.
>
> [26] An expansive construction of the public policy defence would vitiate the Convention's attempt to remove pre-existing obstacles to enforcement and to accommodate considerations of reciprocity. For all these and other reasons the Convention has a definite pro-enforcement bias, and interpretation of what is contrary to public policy under the Belize statute should also reflect this bias. There is universal consensus that courts will decline to enforce foreign arbitral Awards only in exceptional circumstances..."[4]

[10] This Court considered that the facts in *BCB Holdings* qualified as exceptional circumstances warranting non-enforcement of the foreign arbitral award. The London Court of International Arbitration had determined that the State of Belize should pay damages for dishonouring certain promises made by its Minister of Finance to two commercial companies which were incorporated in Belize. These promises were contained in a Settlement Deed which provided that the companies should enjoy a tax regime specially crafted for them and at variance with the tax laws of Belize. This regime was never legislated but it was honoured by the State for two years until it was repudiated in 2008 after a change in administration following a

[3] [2013] CCJ 5 (AJ).
[4] References omitted.

general election. There was no controversy as to the conduct of the parties in the making of the Deed and all the relevant facts were uncontested matters of public record accepted by both sides. These facts revealed clear and credible evidence of illegality of the promises contained in the Settlement Deed. Under the Constitution, only Parliament, or a body specifically delegated by Parliament, could lawfully grant exceptions to the obligation to obey the country's revenue laws.

[11] In these circumstances, we considered it permissible to examine the underlying agreement reflected in the Settlement Deed and to re-examine the legality of that document even after the arbitral tribunal had itself specifically addressed the issue and found it to be valid. In exchange for settling prior arbitral proceedings, the Settlement Deed purported to create and guarantee to the Belizean companies a unique tax regime that was unalterable by Parliament and notwithstanding provisions contained in the existing legislation to the contrary. Not even Parliament could have bound itself to legislation that was "irrevocable". It was evident that the Minister had no authority to make such an agreement. We held that enforcement of the foreign award based on that agreement would violate existing legislation as well as the separation of powers and constitutional order of Belize. The balance was therefore clearly in favour of denying enforcement on grounds of public policy, which we did.

[12] The Respondent urged that the decision in the *BCB Holdings case* should be applied to deny the present application because the Executive had not received the approval of the National Assembly to conclude the Loan Note. The Bank contended that the present proceedings were distinguished from that of the *BCB Holdings case* in two vital respects, namely; the existence of the decision of the Privy Council in the *ACB Proceedings* which decided that the Loan Note was validly contracted, and the failure of the Respondent to produce any clear or credible evidence that enforcement of the LCIA Award would be illegal.

PRIVY COUNCIL DECISION IN THE ACB PROCEEDINGS

[13] At the time of its decision in the *ACB Proceedings*, the Judicial Committee of Her Majesty's Privy Council was the final Court of Appeal for Belize. That decision therefore finally settled the matters in dispute between the parties and precluded

those matters from being re-opened based on the doctrine of issue estoppel. Unlike the case of a foreign arbitral tribunal, there can be no question of re-examining the legality of an agreement that had been specifically addressed by Belize's final Court of Appeal (as the Judicial Committee then was) and found to be valid. The only viable issue remaining to the Respondent was to question the scope of the Judicial Committee's decision.

[14] The judgment of the Board of the Judicial Committee, delivered by Lord Clarke, framed the issue as whether the Loan Note "… is invalid as being contrary to section 7 (2) of the Finance and Audit (Reform) Act No. 12 of 2005 ... on the ground that the Bank… made a loan to the Government of Belize which could only lawfully be made pursuant to a resolution of the National Assembly authorizing the loan."

[15] Section 7 (2) of the Finance and Audit Reform Act ("FARA") provides that:

Loans to Government

> "(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 the Government shall not use any money borrowed under this section to meet its "recurrent expenditure" (as defined in the financial regulations made under section 23(4) of this Act, except,
>
> *(a)* to refinance existing public debt; and
>
> *(b)* to amortize and service principal payments to existing public debt,
>
> 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."

[16] The Board noted that both the Supreme Court and the Court of Appeal of Belize had held that the Bank did effect such a borrowing or loan, and that the Loan Note was accordingly invalid under section 7 (2). The Board examined in significant detail the terms of, and the background to, the Settlement Deed and Loan Note before turning its attention to the reasoning and conclusions of Hafiz J, the trial judge. She had focused on the reference at the beginning of the Loan Note to "FOR VALUE RECEIVED" which implied that a loan had been made. She was of the view that the fact that there was no evidence of a draw-down or a facility letter was not conclusive evidence to rebut the implication that a loan had been made. The Board considered this reasoning and conclusion to be defective, primarily because the judge had failed to analyze the language of the Settlement Deed and Loan Note.

[17] Morrison JA, who gave the judgment of the Court of Appeal, had conducted an analysis of the Settlement Deed and Loan Note and had concluded that the trial judge was entitled to take the view that there was no need for the court to, "speculate as to the method of advance or the accounting method used in this transaction, or whether there was any recording at all of this transaction."[5] The trial judge opted to have regard to the fact that the 2004 Guarantee was discharged under the Settlement Deed and that the Government had executed the Loan Note and to conclude in the light of both those facts that the sum of BD$33,545,820 was advanced to the Government by the Bank. Morrison JA also took into account statements made by the Bank's solicitors to the effect that the Bank "acting under a mistake as to law had paid out over BZ$33 million" as well as their claim that the Bank was entitled to rescind the Settlement Deed and the Loan Note on the ground of the Government's negligent or fraudulent misrepresentation as to its authority to enter into the transaction, the effect of which "would be to revest in the Bank the principal amount advanced to the Government and give rise to a claim in damages …"[6] The learned Justice of Appeal concluded that for these reasons, together with those given by the trial judge, he would hold that the Loan Note effected a borrowing by the Government from the Bank.

---

[5] *Belize Bank Ltd v Association of Concerned Belizeans et al* (Court of Appeal of Belize, 19 March 2010), BZ 2010 CA 2 (CARILAW) at [71g].
[6] Ibid at [74].

[18] The Board disagreed. In its judgment, the true construction of the Settlement Deed and the Loan Note in their historical context and surrounding circumstances made clear that the purpose of both was,

> "to settle the position as between the Bank and the Government under the 2004 Guarantee, not under any later arrangement between the parties. The amount due under the Guarantee was agreed to be BZ$33,545,820 and the purpose of the Settlement Deed was to discharge that liability and to release the Government from all future liabilities under it. In short the liability under the 2004 Guarantee was replaced by a new obligation, namely to pay that amount as the Principal Sum due under the Loan Note, together with interest calculated as stated in the Loan Note. There is no support for the suggestion that that amount, or any other sum, was lent to the Government. Indeed, such a loan would make no sense, since there was already a liability under the 2004 Guarantee."[7]

[19] At paragraphs 29 and 30 of its judgment, the Board continued as follows:

> "29. Moreover, quite apart from the fact that the Settlement Deed was effected by deed, there was ample consideration for the agreement, including that contained in the Loan Note. That consideration is expressed in clause 3.1…. It lay both in the mutual promises made by the parties and by the Government's promise to pay the Bank BZ$1.00 and to execute the Loan Note. The judge mentioned the reference to "FOR VALUE RECEIVED" but observed that neither the Loan Note nor the Settlement Deed said what was the value received. The Board is unable to accept that that is so for two reasons. The first is that…clause 3.1(a) expressly provided that the Government "shall execute and deliver to the Bank … the Loan Note under the terms of which the Government *for value received* shall pay to the Bank BZ$33,545,820 … in accordance with the terms and conditions contained in the Loan Note". The second reason is that, as just stated, the consideration, that is the value received by the Government, was the promise by the Bank to treat the Guarantee as discharged and to release it from all future liabilities under it.
>
> 30. Both the judge and, in particular, the Court of Appeal placed considerable reliance upon their conclusion that the effect of the Settlement Deed and the Loan Note was to replace the Government's secondary liability under the 2004 Guarantee with its primary liability under the Loan Note. The Board is unable to accept this reasoning, for two alternative reasons. The first is that … the obligation of the Government under the 2004 Agreement and the 2004 Guarantee was expressly stated to be as primary obligor and not merely as surety. The second is that, however that may be, the effect of the Settlement Agreement and Loan Note was to replace the Government's liability under the 2004 Guarantee by its liability under the Loan Note, which simply

[7] *The Belize Bank Ltd v The Association of Concerned Belizeans and Others* [2011] UKPC 35 at [28].

> contained an obligation to pay the Principal Sum and interest in accordance with its terms. Whether that was to replace a primary or secondary obligation is legally irrelevant. In either case the obligation was due and in either case there was no commercial or other reason to introduce a further loan as between the Bank and the Government. Unsurprisingly, there is nothing in the language of the Settlement Deed or the Loan Note which has that effect."[8]

[20] Having found no evidence from the surrounding circumstances which could have been said to evidence a collateral agreement between the Bank and the Government, the Board said at paragraph 39:

> "39. There was no commercial need for a loan to form part of the transaction documented in the Settlement Deed and the Loan Note. The government was unable to satisfy its guarantee of the UHS debt. The settlement which it reached with the Bank was that it would promise to pay the sum owing within six months, while also taking control of UHS from its former shareholders. There was no need for the Government to be loaned money by its creditor, the Bank, for this settlement to be put into effect."

[21] The Board rejected the suggestion that the purpose of the loan was to enable the Government to on-lend the money borrowed to UHS, so enabling UHS in turn to repay its indebtedness or, simply, to replace UHS's indebtedness and the Government's guarantee of that indebtedness by a new loan under which the Government would be the sole debtor. It found that there was "no evidence" of such an agreement and therefore concluded that on it its true construction, the Loan Note was a Promissory Note. As there was no evidence of any loan to or borrowing by the Government, "the Loan Note was not invalid by reason of section 7 of the Act."[9] The approval of the National Assembly was not required for the Government to enter into the Loan Note.

[22] In the present case, the majority in the Court of Appeal, at paragraph 8 of their judgment, indicated that they were offering no opinion as to whether the Privy Council's decision that the Loan Note was "not invalid" left open the question of the validity of the Loan Note. Nevertheless, the majority also agreed with and endorsed the approach of Griffith J in the Supreme Court who, at paragraph 79 of her judgment, stated that although bound by the decision that the Loan Note was not

[8] Ibid at [29] – [30] (original emphasis).
[9] Ibid at [47].

contrary to Section 7 (2) of FARA, the court was still "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." More expansive, at paragraph 93, the learned trial judge said that the Privy Council could 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 Audit (Reform) Act." The Judge continued: "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."

[23] We do not consider this to be a reasonable characterization of the scope of the decision by the Privy Council. In coming to its judgment, the Board considered in significant detail the background and history of the Loan Note. There was no mention of any illegality infecting the transactions which underlay the Loan Note. To the contrary, the Board accepted the 2004 Settlement Deed and Guarantee, which discharged and released the Government from the BZ$33,545,820 liability under it, as providing value and consideration for the Loan Note.

[24] The Board's decision was framed in terms of the validity of the Loan Note as measured against the requirements of section 7 (2) of the FARA because that was the way in which the case had been argued. The Respondent did not seek to argue any other ground on which the Loan Note may have been illegal. In making this point, it is necessary to mention that the proceedings were originally brought by the Association of Concerned Belizeans against the then Prime Minister and Attorney General of Belize. There was a change of Government in Belize in February 2008 and the new Prime Minister and Attorney General ceased to defend the claim. In the Court of Appeal, Ms. Magali Perdomo was announced as appearing for the Prime Minister and the Attorney General but did not otherwise participate in the

proceedings. The Respondent Attorney General therefore had the opportunity to raise the issue of the legality of the transactions underlying the Loan Note, if such a course was considered factual and viable, but chose not to do so. To now allow the Respondent Attorney General to raise that issue would expose the judicial process to the intolerable evil of litigation in increments and undermine a decision of the highest appellate court of Belize.

[25] Furthermore, the decision of the Board in the *ACB Proceedings* was the basis of and entirely consistent with the concession made in the Court of Appeal by Mr Denys Barrow SC for the Government. At the start of the appeal, learned senior counsel handed up a document dated 14 June 2016 styled **Respondent's Statement of Issues**. That document 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." In his minority decision, Blackman JA interpreted this concession as recognizing that prior legislative approval was not a pre-requisite to enter into the promissory note.

[26] In these proceedings, Mr Anthony Astaphan SC for the Government confirmed that the concession was rightly made in light of the decision in the *ACB proceedings* but then argued that the concession did not extend to or include the underlying agreements or whether the promissory note was enforceable or not.[10] Learned senior counsel argued that the issue before this Court was not whether Parliamentary approval was required to enter into the promissory note but rather whether leave to enforce the award ought to be refused because enforcement would be contrary to public policy. For the reasons given at [23] – [24], we consider that this is to read the judgment of the Board much too narrowly. The Board's examination of the transactions underlying the Loan Note and its determination that those transactions provided value and consideration for the Loan Note preclude re-examination of the legality of these transactions on which the Loan Note was based. That determination settled the dispute litigated between the parties as to the legality of the Loan Note

[10] Record of Appeal, Submissions on Behalf of the Respondent/Attorney General, pp 935 – 972, 941 at [5.1].

and the doctrine of issue estoppel precludes further litigation between them on that matter.

[27] It follows that we disagree with the decision of the Supreme Court and Court of Appeal that the judgment of this Court in *BCB Holdings* permitted them to examine the transaction underlying the Loan Note for illegality. The fundamental difference between the two cases is that in *BCB Holdings* the Minister acted in clear and direct contravention of legislation and the Constitution. He had no authority to make, far less implement, the Settlement Deed as he purported to do. In the present case, the court of final appeal held that the Minister did not act in breach of any laws in concluding the Loan Note and that he had the authority to make that agreement. The Government can hardly be heard to argue that it would be contrary to public policy to enforce an agreement against it which agreement it had itself validly contracted.

SECTION 114 OF THE CONSTITUTION

[28] It is now necessary to examine whether section 114 of the Constitution has any bearing on the application to recognize and enforce the LCIA Award. That section provides as follows:

> "(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."

[29] The Respondent relied heavily on the stipulation in section 114 (2) that no monies can be paid out of the Consolidated Revenue Fund ("CRF") except as charged by the

Constitution or any other law enacted by Parliament. As there was no law in the instant case which authorized the payment on the Loan Note, it would be illegal to make those payments and thus it would be contrary to public policy to recognize and enforce the Final Award. The Bank countered that it accepted that prior legislative approval was required for monies to be withdrawn from the CRF but offered that the grant of leave to enforce the arbitral award would enable recourse to section 25 of the Crown Proceedings Act,[11] relating to the mode of satisfaction of judgments against the Crown.

[30] Justice Griffith examined in fulsome detail the legislative and constitutional regimes of oversight and controls of public expenditure. The learned judge did not consider that the base illegality found in relation to the Settlement Deed in *BCB Holdings case* was to be attributed to the execution of the Loan Note. Nonetheless, she could not ignore the fact 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. She concluded at paragraph 107 that:

> "… 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, 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."

[31] The majority in the Court of Appeal considered that the trial judge correctly analyzed the issue of public policy and was right to refuse leave to enforce the award as this would breach the regimes governing payment from the public purse. Delivering his minority opinion, Blackman JA considered that the fundamental error made by the judge and supported by the majority, was to "conflate" the issue of registration, the subject of the application to recognize and enforce the award, with the enforcement

[11] Cap. 167.

of the award, which was not before the court and consequently should not have been considered.

[32] We disagree with the majority in the Court of Appeal for two separate but related reasons. First, the Loan Note did not expressly or by necessary implication bind or purport to bind the Government to expenditure from the CRF without Parliamentary approval. The making of a Government contract is quite distinct from its enforceability against the State as was held by the Eastern Caribbean Court of Appeal in the Saint Lucian case of *The Attorney General v Francois*.[12] That case concerned a guarantee entered into by the Saint Lucia Minister of Finance. No Parliamentary approval had been given for the grant of the guarantee. The State was subsequently obliged to make good on the instrument and a citizen challenged its legality. The court held that nothing prevented the Minister from giving the guarantee, but the State only became bound to pay out the relevant sums from the Consolidated Fund after Parliament had approved the monies necessary to discharge it. As Parliament had done so before the guarantee was honoured, there was no basis for complaint by the citizen. There are several other cases recognizing the distinction between the government's making of a legal agreement and the implementation of that agreement which may require Parliamentary approval: *Kidman v The Commonwealth;*[13] *State of New South Wales v Bardolph;*[14] *Australian Railways Union v Victorian Railways Commissioners.*[15]

[33] Second, there is an important distinction between an order to enforce an award and an order that requires the issuance of a certificate that compels payment. To make an order allowing enforcement is not equivalent to making an order compelling payment. This distinction is similar to the difference between the "registration" and the "enforcement" of arbitral awards as explained in *Micula, S.C. European Food SA and others v Romania and European Commission*[16] when the court said:

> "… just as there is a distinction between the giving of a judgment and the enforcement of it, so there is a distinction between registering an award, and

[12] (Court of Appeal, 29 March 2004), LC 2004 CA 4 (CARILAW).
[13] [1925] HCA 55, 37 CLR 233.
[14] [1934] HCA 74, 52 CLR 455.
[15] [1930] HCA 52, 44 CLR 319.
[16] [2017] EWHC 31 (Comm).

> enforcing it. Registration is not necessarily a precursor to execution, though it may lead to it. In commercial terms, there may be good reason to register an award aside from imminent enforcement, for example for reasons of priority as against other creditors, or as a precaution. So, in this case, the claimants who have a binding award in their favour could be prejudiced by setting aside the registration whilst the State aid issue is resolved in the European courts. In the court's view, care should be taken not to derogate from the entitlement to have an award registered as a judgment outside the confines of the 1966 Act…"[17]

[34] The Arbitration Act of Belize does not refer to "registration" but rather "enforcement" of awards. Nevertheless, an order to enforce a foreign award has essentially similar effects to its registration within the domestic sphere in that such an order permits the foreign award to be treated in the same manner as a judgment or order of the domestic court. Where such an award clothed with the status of a judgment is not satisfied, the award holder must take further steps for the execution of the judgment. In this way, the order to enforce the award is a necessary precursor to execution. But it is not an inevitable precursor, since an enforcement order could have other effects in commercial terms and therefore has value apart from the issue of execution. According to section 28 (2) of the Arbitration Act:

> "(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."

[35] In this application, the Bank seeks, pursuant to section 28 read together with section 13 of the Arbitration Act, an order granting leave to enforce the award in the same manner as a judgment or order to the same effect. The majority in the Court of Appeal considered that there would be an "anticipated illegality" in granting such an order, presumably because it would breach the rule that the Executive can incur no enforceable obligation or debt unless and until the National Assembly approved payment from the Consolidated Revenue Fund.[18] We disagree.

---

[17] Ibid at [125].
[18] Record of Appeal, Submissions on behalf of the Respondent / Attorney General, pp 935 – 972, 952 at [36].

[36] It is presumed that judicial orders will always be obeyed by those affected, including the Government, but the order for enforcement of a foreign arbitral award does not itself compel payment from the CRF. It is common ground that s 114 of the Constitution requires legislative approval for expenditure which the Government promised to pay by validly entering into the Loan Note. If the Government procures the passage of the relevant legislation there is obviously no illegality in making payment. Furthermore, there is much force in the Bank's contention that current constitutional and legislative provisions provide a procedure for enforcement. The marginal note to s 25 of the Crown Proceedings Act is entitled "Satisfaction of orders against the Crown" and the section provides as follows:

> "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
>
> (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 authorized Government department or the officer concerned, or the Attorney General, as the case may be.
>
> (3) 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.

> (4) Except as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Crown of any such money or costs as aforesaid, and no person shall be individually liable under any order for the payment by the Crown, or any Government department, or any officer of the Crown as such, of any such money or costs."

[37] Section 115 (3) of the Constitution provides a means of appropriation whereby legislative approval may be obtained to pay the judgment. The subsection provides:

> "If in respect of any financial year it is found… that a need has arisen for expenditure for a purpose for which no amount has been appropriated … 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."

[38] For the foregoing reasons, we have concluded that an order allowing enforcement of the LCIA Award would not involve any illegality and would not be contrary to the public policy of Belize.

[39] The Bank has requested extraordinary relief "in light of the long history of the Government's delay in payment notwithstanding decisions from the Judicial Committee and the LCIA arbitral tribunal confirming the validity of the Loan Note." It requests that we make orders pursuant to section 25 of the Crown Proceedings Act directing the Minister of Finance to pay to the Bank the amount ordered by this Court.

[40] We consider that such a request is premature in that it anticipates that the Government will not honour its commitment without such an order. Such anticipation is unwarranted and it directly contradicts the presumption of regularity to which this court adheres: [36]. The request is also inconsistent with the procedure outlined in section 25 which requires the party, in whose favour the order to enforce the award is given, to make the appropriate application to the proper officer of the court after the expiration of twenty-one days from the date of the order made below. There are other specific steps that are prescribed by section 25 as prerequisites to securing satisfaction of the order against the Crown. Accordingly, we do not accede to this request.

ORDERS

1. The application for special leave to appeal is granted.
2. The appeal is allowed.
3. The Applicant is at liberty to enforce the London Court of International Arbitration Award dated the 15th day of January, 2013 in the amount of BZ$36,895,509.46 (as at the 7th day of September, 2012) plus interest at 17% compounded on a monthly basis from the 8th day of September, 2012 until the date of payment and costs of £536,817.71 in the same manner as a judgment or order of the Supreme Court of Belize to the same effect.
4. The Respondent to pay the Applicant/Appellant's costs, both in this Court and the Courts below, to be taxed if not earlier agreed.
5. In respect of the preceding Order, the Registrar of the Caribbean Court of Justice shall issue a separate Certificate of Costs to the Applicant/Appellant pursuant to section 25 (1) of the Crown Proceedings Act Cap. 167.

/s/ CMD Byron

The Rt Hon Sir Dennis Byron, President

/s/ A Saunders

The Hon Mr Justice A Saunders

/s/ J Wit

The Hon Mr Justice J Wit

/s/ D Hayton

The Hon Mr Justice D Hayton

/s/ W Anderson

The Hon Mr Justice W Anderson