IN THE COURT OF APPEAL OF BELIZE, A.D. 2012
CIVIL APPEAL NO. 4 OF 2011

THE ATTORNEY GENERAL OF BELIZE Appellant

v

BCB HOLDINGS LIMITED
THE BELIZE BANK LIMITED Respondents

BEFORE

The Hon Mr Justice Manuel Sosa	**- President**
The Hon Mr Justice Douglas Mendes	**- Justice of Appeal**
The Hon Mr Justice Duke Pollard	**- Justice of Appeal**

M Young SC and M Perdomo for the appellant
N Pleming QC, E Courtenay SC and A Arthurs-Martin for the respondents

18,19, 20 October 2011, 8 August 2012

SOSA P

1. I concur in the reasons for judgment given by Pollard JA in his judgment, which I have read in draft. The order of the judge below is accordingly set aside. Subject to what is set out in para 81, the appellant shall have his costs, here and below, to be agreed or taxed. I am authorised by Pollard JA to say that he concurs in these orders.

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SOSA P

MENDES JA

2. I have the great misfortune to dissent from the judgment of my brother Pollard JA, with which the President, Sosa P, has concurred.

Background

3. This is an appeal from the judgment of Muria J whereby he ordered that, pursuant to section 28 of the Arbitration Act Cap. 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"). They are at liberty to enforce the award in the same manner as a judgment or order to the same effect and to make any further application to the Court to effect its enforcement.

4. The final award was obtained in arbitration proceedings which the respondents commenced by a request for arbitration dated 16 October 2008. The request was made 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. A panel of three arbitrators was constituted as the Deed envisaged and the arbitration proceeded in the absence of the Government of Belize which chose not to participate even though fully aware of the various steps being taken. On 20 August 2009, after a hearing which lasted no more than two days, 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 Court awarded damages in the amount of BZ$40,843,272.34, reimbursement of the respondents' costs of the arbitration in the amount of £206,248.40 and legal, professional and other

arbitration costs in the amount of BZ$2,960,735.69. Interest at an annual rate of 3.38% compounded annually on all sums found to be due was also awarded.

5. On the very next day, the respondents commenced these proceedings 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. Invoking section 30(3) of the Act, the Government of Belize opposed 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 and that it would be contrary to public policy to enforce it. Muria J rejected both planks of the Government's defence. The appellant appeals against these findings.

6. In the court below, Mr. Young SC, who appeared for the appellant, argued in addition 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 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 is accordingly inapplicable. Rejecting this submission, Muria J found as follows:

> "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 26 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 (Cap. 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."

The Applicability of Part IV of the Act

7. Before us, Mr. Young pointed out, and it is not disputed, that the New York Convention was ratified by the United Kingdom on 24 September 1975. The Arbitration (Amendment) Ordinance No 12 of 1980 ("the 1980 Ordinance"), which introduced Part IV and annexed the text of the New York Convention as a schedule, was assented to on 10 October 1980 and gazetted on 18 October 1980. The application of the New York Convention was subsequently extended to Belize by notification received by the relevant authorities on 26 November 1980, but to take effect on 24 February 1981. Belize became independent on 21 September 1981 and since then has taken no step to ratify the Convention and has not deposited any instrument of succession or accession to the treaty. On the other hand, we were referred to a letter dated 29 September 1982 from the Prime Minister of Belize to the Secretary General of the United Nations informing him that

> "the Government of Belize has decided to continue to apply provisionally and on the basis of reciprocity, all treaties to which the Government of the United Kingdom of Great Britain and Northern Ireland was a party, the application of which was extended either expressly or by necessary implication to the then dependent territory of Belize.
>
> Such provisional application would subsist until Belize otherwise notifies Your Excellency, the depository (in the case of a multilateral treaty), or the state party (in the case of a bilateral treaty)."

Mr. Young submitted that, nevertheless, this did not constitute Belize a party to the treaty and he referred to an email dated 18 December 2008 from the Deputy Chief, Treaty Section, Office of Legal Affairs, United Nations, which stated, inter alia, that "since independence, Belize has not deposited with the Secretary General an instrument of succession or accession to the Convention. As such, Belize is not considered to be a party to the Convention at international law." Mr. Young accordingly argued that "since Part IV of the Arbitration Act was introduced and was extant on the basis that it was applying the New York Convention to Belize, the non-extension and non-application of the New York Convention must necessarily result in the non-application of Part IV of the Arbitration Act."

8. I understand my brothers in the majority to have found that, but for the brief period between 24 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 became a party to it. However, this finding does not avail the appellant because 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.

9. The only criterion established for the applicability of Part IV is that the award which a party seeks to enforce is a 'Convention award'. Section 27(1) provides that:

> "Sections 28 to 31 of this Act shall have effect with respect to the enforcement of Convention awards; and where a Convention award would, but for this section, be also a foreign award within the meaning of Part III of this Act, that Part shall not apply to it."

As noted section 28(1) makes 'Convention awards' enforceable either by action or in the manner provided for by section 13. To constitute a 'Convention award',

an award must satisfy three criteria in accordance with section 25(1): i) it must be an award made in pursuance of an arbitration agreement; ii) it must be made in the territory of a country, other than Belize; and iii) the country in whose territory the award is made must be a party to the New York Convention. There is no requirement that Belize be a party to the New York Convention in order that what would otherwise satisfy the criteria of a 'Convention award' be enforceable under Part IV. I would accordingly reject Mr. Young's submission as misconceived, but in doing so I must not be taken to have accepted the findings of the trial judge quoted above.

The Constitutionality of PART IV of the Act

10. In the course of examining Mr. Young's submissions on the applicability of the New York Convention to Belize, the Court thought it appropriate to seek the parties assistance on the following questions:

> "Did the enactment of Schedule IV of the Arbitration Ordinance (now the Arbitration Act) by the colonial legislature of Belize at the time when the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was not yet applied to the colony of Belize amount to an impermissible interference with the prerogative of the Crown in the area of international relations/foreign affairs such as to render the enactment ultra vires?
>
> If so, was the Arbitration Act capable of being saved at the time of Belize's attainment of independence?"

11. This produced thorough and interesting submissions by both parties, with the Attorney General taking the not so usual role of arguing for the invalidity of the 1980 Ordinance and the respondents seeking to uphold it.

12. In his very helpful submissions Mr. Young reminded us and emphasised that the British Honduras Legislature passed the 1980 Ordinance to give effect to the New York Convention at time when British Honduras was not and could not

then have been a party to the Convention because of its colonial status, and at a time when the Convention had not yet been extended to and was otherwise not applicable to British Honduras. He pointed out that by section 16 of the Letters Patent 1964 which, along with the British Honduras Constitution Ordinance 1963, vested self government status in British Honduras, the Governor, acting in his discretion, was to be responsible for, inter alia, external affairs, a responsibility which, acting in his discretion, he could delegate, with prior approval of the Secretary of State, to a Minister designated by him, upon such conditions as he might impose. Section 2(4) of the 1963 Constitution Ordinance itself, he pointed out, recognised 'external affairs' as falling within what is referred to in the constitution as the Governor's "special responsibilities". When the British Honduras colonial legislature purported to give effect to the New York Convention, he submitted, it was doing an act that it had no constitutional authority to do since "it is entirely and exclusively for the executive to accede to or ratify an international treaty." Mr. Young accordingly would equate "giving effect" to a treaty with "acceding to or ratifying a treaty."

13. In reply, Mr. Pleming QC, who appeared for the respondents, submitted first of all that the Court of Appeal lacked jurisdiction to declare the 1980 Ordinance *ultra vires* the 1963 Constitution since the 1963 Constitution has been revoked and replaced by the 1981 Independence Constitution. The Court of Appeal's power, he said, is limited to declaring legislation to be invalid by reason of inconsistency with the 1981 Constitution. In any event, he submitted, the 1980 Ordinance did not purport to cause British Honduras to accede to or ratify or otherwise become a party to the New York Convention. What it did was simply to give domestic effect to a treaty within the territory of British Honduras. That, he said, is not an incursion into the domain of external affairs and accordingly does not trespass on the Governor's special responsibilities in relation thereto.

The Jurisdiction of the Court of Appeal

14. I do not accept Mr. Pleming's contention that the Court of Appeal is not empowered to review a law passed under the 1963 Constitution on the ground that it is inconsistent therewith. The Court of Appeal is charged with the responsibility of upholding the rule of law. The British Honduras legislature was a creature of the 1963 Constitution and could only exercise such powers as were vested in it by that Constitution. As Lord Pearce said in ***Bribery Commissioner v Ranasinghe*** [1965] AC 172, at p 197, "a legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law." It is a fundamental principle of our legal system that when confronted with two laws, one inconsistent with the other, a court of law is duty bound to say which prevails. This is precisely what the appellants have asked us to do. They say that the 1980 Ordinance violates the provisions of the 1963 Constitution vesting special responsibilities in the Governor. We have no choice but to determine whether that is in fact so and, if it is so, then to declare what the law is. The fact that the 1963 Constitution has been replaced by the 1981 Constitution does not relieve us of that responsibility. If the 1980 Ordinance was passed unconstitutionally, we must say so. The repeal of the 1963 and 1969 Orders and Constitutions of the Bahamas and their replacement by the 1973 Independence Constitution did not preclude the Privy Council from determining in ***Bowe v R*** [2006] 1 WLR 1623 whether the mandatory death penalty was inconsistent with the repealed constitutions. In addition, section 28(1)(b) of the Interpretation Act provides that the repeal of an enactment "does not affect the previous operation of any enactment so repealed." Whether an Ordinance passed in violation of the 1963 Constitution but not invalidated before the commencement of the 1981 Constitution is saved by section 134 thereof is an entirely different question, but it is one I need not grapple with since I am satisfied that the 1980 Ordinance did not infringe the 1963 Constitution.

Discussion

15. The constituent elements of Mr Young's argument, which has found favour with the majority, are firstly that it has traditionally been the prerogative of the Crown to enter into treaties on behalf of a state. This power was expressly reposed in the Governor by the 1964 Letters Patent and the 1963 Constitution by the vesting of responsibility for external affairs in him. The second proposition is that a law passed by the British Honduras Legislature which makes the Sate of British Honduras a party to a treaty violates the treaty making prerogative and is accordingly invalid. The third proposition is that a law which gives effect to an international treaty violates the treaty making prerogative either because it thereby constitutes the state a party to the treaty or it otherwise encroaches upon the executive's exclusive external affairs preserve.

16. I have no hesitation accepting the first proposition. The power to make treaties is a quintessential executive function and has been well recognised as such by the highest authority. In ***Attorney General of Barbados v Joseph and Boyce*** (2006) 69 WIR 104, para 55, de la Bastide P and Saunders J said that "treaty-making .... is a power that lies in the hands of the executive." Or as Lord Hope said more expansively in ***Roberts v Minister of Foreign Affairs*** [2007] UKPC 56, para 12:

> "The right to enter into treaties is one of the prerogative powers of the Crown. No-one other than the Queen can conclude a treaty. In practice, in the case of The Bahamas, this prerogative power is exercisable on behalf of Her Majesty by the Governor-General or by a Minister acting under the Governor-General's authority. The Governor-General does not require the advice or consent of the legislature to authorise the signature to or ratification of a treaty. Nor does a Minister to whom authority has been delegated by the Governor-General. The signature and ratification by the Minister was all that was needed to give effect to the Treaty in international law."

I accept as well that the power to make treaties would have fallen within the Governor's responsibilities for external affairs under the 1963 Constitution.

17. I accept for the sake of argument, but do not decide, that it is an impermissible use of the legislative power of a colonial legislative to usurp to prerogative treaty making power. I note the statement in Sir Kenneth Roberts-Wray's text on ***Commonwealth and Colonial Law*** (Stevens & Sons, 1966) (at p. 380) that:

> "… subject to any special arrangements, external relations are excluded from the executive and legislative authority of every dependent territory. It follows that local laws purporting to limit these prerogatives of the Crown would be outside the limits of the legislative power granted."

I hesitate from making any definitive finding because of the elaborate provisions in the 1963 Constitution which permit the Governor to intervene in the legislative process to stay any further proceedings on a Bill which he considers affects his special responsibilities (section 27(1)), to require introduction and proposal of a Bill in pursuance of his special responsibilities (section 27(2)), and to deem the Bill to have been passed if the legislature fails to do so within a reasonable time (section 27(3)). The Constitution also requires all Bills passed by the legislature to be presented to the Governor for his assent (section 28(2)) and empowers him, in his discretion, to refuse to assent to a Bill which appears to him to affect his special responsibilities (section 28(4)) or to reserve for the signification of Her Majesty's pleasure any Bill which appears to him, acting in his discretion, "to be likely to prejudice the Royal Prerogative". No bill may become law unless it receives the assent of the Governor or of Her Majesty (section 28(1)) and all laws must bear words of enactment which record that they are "enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the House of Representatives" (section 29). The issue which would arise in each case therefore is whether a law which impinges upon the Governor's special responsibilities or Her Majesty's Royal Prerogative but nevertheless is assented to can be held to be inconsistent with those responsibilities or prerogatives. This issue is not an easy one to resolve and has not been explored by the parties in sufficient detail in their submissions.

18. What I do not accept, for reasons which in no small measure have been influenced by Mr Pleming's submissions, is that the 1980 Ordinance usurps the executive's treaty making power.

19. In the first place, there is nothing in the 1980 Ordinance which purports to make British Honduras a party to or bound by the New York Convention. No promise is made to any other state party and no obligation enforceable in international law is created. Moreover, as Mr. Pleming rightly points out, the process for accession to the Convention is spelt out in Article 8 of the Convention itself and it does not include accession by way of a domestic legislative act. The obvious purpose of the Ordinance was to provide for the enforcement of what are called 'Convention awards'. Sections 27 and 28 make this clear. As already noted, section 25(1) defines the term 'Convention award' as an award made in a country which is a party to the New York Convention. Section 25(1) proceeds to define the term 'New York Convention' as meaning "the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958, and set out in the Fourth Schedule hereto." The fourth schedule appears to contain the full terms of the treaty including the means by which a state may ratify or accede thereto or denounce it altogether. The Convention was annexed, it appears, by way of identification only. There is no provision incorporating the Convention wholesale as part of the domestic law of British Honduras. Far less is there any indication that the annexure of the treaty was intended to signify the assumption or imposition of any obligations on the part of British Honduras towards any state which might have been a party to the Convention.

20. To be sure, the 1980 Ordinance did declare in its long title that its purpose was to give effect to the New York Convention. And true to that promise, the enacting provisions do mirror the terms of the Convention in many respects. Thus, to the extent that the Ordinance permits the enforcement of Convention awards it mirrors articles 1, 2 and 3 of the Convention. Section 29, which requires

a party seeking to enforce a Convention award to produce the duly authenticated original award or a duly certified copy of it, the original arbitration agreement or a duly certified copy of it and a translation of an award in a foreign language, mirrors article 4. Similarly, the circumstances under which an award will not be enforced under the Ordinance have their counterparts in article 5. Section 30 thus provides that a court may refuse to enforce a Convention award on the grounds: of the incapacity of a party to the arbitration agreement; of the invalidity of the arbitration agreement under the law to which the parties subjected it; that a party had no notice of the appointment of the arbitrator or of the proceedings or was otherwise unable to present his case; that the award deals with a matter not contemplated by or falling within the terms of reference; that the award contains decisions on matters beyond the scope of the submission to the arbitrator; that the composition of the arbitration authority or procedures was not in accordance with the agreement of the parties; that the award has not yet become binding, or has been set aside or suspended; that the award is in respect of a matter which is not capable of settlement by arbitration; and that it would be contrary to public policy to enforce the award. All of these grounds of non-enforcement appear in the Convention as well. It is therefore accurate to say that the 1980 Ordinance gave effect to the New York Convention at a time when British Honduras was not a party thereto and at a time when the Convention had not yet been extended to it by the United Kingdom. The question is whether giving effect to the Convention in this way and at that time usurped the treaty making prerogative of the Crown.

21. The first thing to note is that by section 16 of the 1963 Constitution Order the British Honduras Legislature was empowered to "make laws for the peace, order and good government of the Territory." This power has been interpreted expansively. In ***Riel v The Queen*** (1885) 10 App Cas 675, 678 Lord Halsbury LC said that the conferral of such power was "apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to." In ***Ibralebbe v The Queen*** [1964] AC 900, 923, Viscount Radcliffe said that the words 'peace, order

and good government' "connote, in British institutional language, the widest law-making powers appropriate to a Sovereign."

22. Secondly, as Mr. Pleming points out, the authorities do make the distinction between the ratification of treaties on the international plane, which is an executive act, and the domestication of treaties, which is a legislative act. In ***Attorney General for Canada v Attorney General for Ontario*** [1937] AC 326, 347, Lord Atkins said:

> "Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alternation of existing domestic law, requires legislative action."

In his text on ***Commonwealth and Colonial Law***, Sir Kenneth Roberts-Wray, after referring to the limitations on the power of a colonial legislature to restrict the prerogatives of the Crown observed (at p. 381) that

> "This does not mean that such laws cannot make provision relating to external affairs. They frequently do, particularly for the purpose of giving effect to international conventions."

23. As much as it must be accepted that the wide plenary powers of the British Honduras Legislature included the power to give effect to international treaties, the authorities cited do not address the position, as here, where at the time the treaty is given effect to domestically, the state party has not yet become a party to the treaty which the legislature purports to incorporate into domestic law. Mr. Young makes the point, and Pollard JA places great emphasis on the usual legislative practice of awaiting the ratification of a treaty before steps are taken to incorporate the treaty provisions into domestic law. Against that is the example of the UK Arbitration Act 1975 which was enacted to "give effect to the New York Convention" at a point in time (25 February 1975) when the United Kingdom had not yet acceded to the Convention, although the Act itself was only brought into force on 23 December 1975 after ratification of the treaty on 2

September 1975. It may be said accurately nonetheless that the Act was enacted in anticipation of accession. McNair on the ***Law of Treaties*** (Oxford, 1961) also refers (at p. 86, footnote 3) to a number of instances where legislation incorporating treaties predated ratification by the United Kingdom of those treaties. Mr. Pleming has also referred us to the views of Sir Arthur Desmond Watts, who he describes as an international law specialist, and who is on record as recommending to the Belize Government that the right time to give effect to the obligations imposed by a treaty is before the ratification of the treaty, otherwise upon ratification the state party would be in breach of the treaty.

24. I must say that I have gained very little assistance from this excursion into the practice of states as to the timing of the incorporation of treaties. It is either that the British Honduras Legislature was competent under the 1963 Constitution to give effect to the New York Convention when it was not bound thereby, or it was not. That issue is to be determined by an examination and construction of the 1963 Constitution. The practice of states is irrelevant in this regard.

25. The establishment of obligations on the international plane is the domain of the executive. The enactment of laws for the peace order and good government of the people of British Honduras was the responsibility of the British Honduras Legislature. It seems clear to me that these plenary powers include the power to provide for the enforcement of arbitration awards, no matter where made and no matter who the parties to the award might be. It was also within the competence of the legislature to place such limitations on the enforcement of such awards as it might deem fit. In this particular instance, it chose to identify the awards which are enforceable by reference in part to whether the country in which the award was made was a party to the New York Convention. That too was clearly within its plenary powers. It does not seem to me to make one jot of difference that the terms in which the legislative will of the British Honduras Legislature was expressed was inspired by or was intended to replicate or indeed was intended to give effect to an existing treaty by which British Honduras was

not yet bound. Such a legislative act does not intrude into the domain of external affairs. It concerns entirely the development of the domestic law of British Honduras.

26. Indeed, I am unable to discern in the 1963 Constitution any limitation on the power of the colonial legislature to enact a law which reflects the provisions of a treaty to which it is not yet a party, whether in anticipation of accession to the treaty at some point in time in the future, or not. Take for example a colonial legislature which is satisfied that the prohibition contained in the Inter-American Convention on Human Rights against the imposition of the death penalty on minors is a policy which should be pursued. It enacts a law which prohibits such executions. Would the fact that the executive might have been simultaneously considering or was on the verge of accession to the Convention strip the law of its pure legislative character? Or suppose that quite independently and in ignorance of the terms of a treaty on the subject a colonial legislature enacts a law which promotes the equality of women. Surely such a law is not a usurpation of the treaty making prerogative because the law in substance, albeit not intentionally, incorporates the terms of a treaty. If that is right, such a law cannot be said either to impinge on the external affairs domain of the executive simply because the executive may have been contemplating accession to the treaty at the relevant time. In short, the broad plenary powers of the British Honduras Legislature cannot be held to be restricted by the existence of treaties to which it is not yet bound, dealing with subject matters on which it wishes to pursue a legislative agenda. But, with respect, this is the effect of Mr Young's submissions.

27. The powers dispersed by the 1963 Constitution are not to be viewed as contained in tight, hermetically sealed compartments. The separation of powers doctrine accommodates the sharing of power between the three arms of the state. The executive is empowered to bind the legislature in international law to pursue certain legislative policies. The legislature is empowered and indeed duty bound to implement legislative measures for the peace order and good

government of the territory. There is no requirement that the legislature must await action by the executive in the international arena before taking action domestically on matters already covered by a treaty. As much as there may be some semblance between the two, the executive act of binding the legislature by treaty to enact laws is not a legislative function. A treaty is not self executing. It does not create rights and obligations cognisable in domestic law. Likewise, a law which gives effect to the terms of a treaty even before the treaty is binding on the state in international law is not an exercise of the executive power of treaty making. It has no effect in the international arena, even though it might make the act of accession to the treaty a mere formality given that compliance domestically has already been achieved. Its sole impact is in the domestic plane. As much as there may be some overlap between the exercise of the two powers and the one may have a practical impact on the other, therefore, it is wrong to conflate them, as Mr Young has done. The British Honduras Legislature exercised its broad plenary powers to make 'Convention awards' enforceable in British Honduras. It did not purport to impose obligations enforceable in international law. It altered the domestic law of British Honduras to provide for the enforcement of certain arbitration awards. This is not an incursion into the executive treaty making domain. No question of usurpation of the prerogative power to make treaties arises at all.

28. I would end by pointing out that, as required by section 29 of the 1963 Constitution, the 1980 Ordinance is declared to have been enacted by "the Queen's Mark Excellent Majesty, by and with the advice and consent of the House of Representatives and the Senate of Belize." Such words of enactment came at the tail end of a procedure which, as noted above, requires that all Bills be submitted to the Governor who may refuse his assent thereto if he considers, in his discretion, that the Bill is "likely to prejudice the royal prerogative" or "to affect his special responsibilities". While obviously not conclusive, the Governor's assent to the Ordinance is some indication that it was not thought that providing for the enforcement of 'Convention awards' as defined usurped the

treaty making prerogative of her Majesty, or any special responsibility in that regard which the Governor may have had. It is not that the question would not have been drawn to the Governor's attention. The long title of the Act specifically said that its purpose was to give effect to the New York Convention.

29. For these reasons, in disagreement with the majority, I find that the 1980 Ordinance was validly made and the respondents were entitled to apply to enforce their award under Part IV of the Act.

The merits

30. Ordinarily, I would have proceeded at this stage to consider the merits of the appellant's appeal, that is to say, whether the award was in respect of matters which were not capable of settlement by arbitration or would result in a breach of public policy if enforced. As it stands, however, if there is no further appeal, or if there is an appeal to the Caribbean Court of Justice and the decision of the majority is upheld, any view which I might express on the merits would be academic. On the other hand, if there is an appeal and the decision of the majority is overturned, their Honours of the Caribbean Court of Justice are very likely to require the views of this court particularly on the question whether the enforcement of the award would be contrary to public policy. In such matters, the views of a local court of appeal are usually of not inconsiderable weight. For my part, I would very much prefer to know the views of my brothers before finalising my own. As it is, the President and Pollard JA have determined the appeal entirely on the basis of their conclusion that the 1980 Ordinance is invalid. Accordingly, with reluctance, I will not now give my views on the merits of the appeal.

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MENDES JA

POLLARD JA

Introduction

31. This is an appeal from the judgment of Mr. Justice Muria enforcing an award made by the London Court of International Arbitration (LCIA) in respect of a Settlement Deed concluded between BCB Holdings (then known as 'Carlisle Holdings Limited'), the Government of Belize, the Minister of Finance of Belize (who signed for himself as well as on behalf of the Government of Belize) and the Attorney General of Belize (acting on behalf of the state of Belize) on 22 March 2005, that had as its purpose to settle a dispute among them, which had been submitted to the LCIA arbitration, concerning a share purchase deed and an option deed. Clause 8 of the Settlement Deed gave to Belize Bank Limited, the second respondent, the power to enforce the Settlement Deed. Clause 11 of the Settlement Deed internationalized the agreement set out therein by providing for the settlement by arbitration of any dispute arising from the Settlement Deed as follows:

> *"11.2 Any dispute arising out of or in connection with this deed including any question regarding its existence, validity or termination, which cannot be resolved amicably between the Parties shall be referred to and finally resolved by arbitration under the London Court of International Arbitration (LCIA) Rules which Rules are deemed to be incorporated by reference under this clause. The number of arbitrators shall be 3 (one appointed by each Party and the third appointed jointly by the two Parties' arbitrators)."*- See Texaco Overseas Petroleum Co. Ltd. and California Asiatic Oil Co. v Libya (1977) 53 1LR *for the internationalization of agreements.*

32. The gravamen of the appellant's appeal is that the learned trial judge erred in finding that: a) the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards applied to Belize; b) the issues raised in the Settlement Deed were arbitrable, and c) the final award of the arbitrators was

not contrary to public policy and was enforceable by the Courts of Belize. The various grounds of appeal adduced by the appellant were adumbrated in the aforementioned grounds either expressly or by ineluctable inference and would not be addressed in this Judgment separately. In any event, if the appellant were to succeed on any of the grounds articulated above, the appeal would have to be allowed. In this context, any one of the foregoing grounds of appeal must be seen to be conclusively determinative of the issue, if allowed.

Implications of the Status of Belize as a Dualist Jurisdiction

33. In addressing the first ground of appeal, it is important to bear in mind the status of Belize as a dualist jurisdiction in constitutional international law and the implications of such a status for the resolution of the present dispute. Although dualism, when dispassionately analysed in historical perspective, betrays attributes of a prophylactic constitutional principle designed, inter alia, to protect the ordinary citizen in municipal systems from the arbitrary excesses of executive lawlessness, it has also important juridical implications for state responsibility in international law. - See generally Duke E.E. Pollard, 'Unincorporated Treaties and Small States", Commonwealth Law Bulletin, Vol. 33 No. 3, Sept. 2001, pp. 389-421. In respect of some constitutional implications of dualism in international law, mention may be made of "(t)he British practice as to treaties, as distinct from customary international law, (which) is conditioned primarily by the constitutional principles governing the relations between the executive (that is to say, the Crown,) and Parliament. The negotiation, signature and ratification of treaties are matters belonging to the prerogative powers of the Crown. If, however, the provisions of a treaty made by the Crown were to become operative within Great Britain automatically and without any specific act of incorporation, this might lead to the result that the Crown could alter the British municipal law or otherwise take some important step without consulting Parliament or obtaining Parliamentary approval." – See I.A. Shearer, Starke's International Law, 11th ed. 1994 at p. 71.

34. Similar juridical implications of dualism were eloquently adumbrated by Lord Hoffman in *John Junior Higgs v Minister of National Security and others [2000] 2 AC 228.* In his judgment Lord Hoffman reminded us: "*In the law of England and The Bahamas,* (whose constitution is representative of those in the Caribbean Community), the right to enter into treaties is one of the surviving prerogative powers of the Crown … the Crown may impose obligations in international law upon the state without any participation on the part of the democratically elected organs of government. But the corollary of the unrestricted treaty-making power is that treaties form no part of the domestic law unless they are enacted by the legislature. This has two consequences. The first is that the domestic courts have no jurisdiction to construe or apply a treaty: *J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry (1990) 2 AC 44…* The second consequence is that unincorporated treaties cannot change the law of the land.

> *"They have no effect on the rights and duties of citizens in the common law; see the classic judgment of Sir Robert Phillimore in The Parlement Belize (1879) 4 PD 129. They may, however, have indirect effect upon the construction of statutes as a result of the presumption that Parliament does not intend to pass legislation which would put the Crown in breach of its international obligations. Or the existence of a treaty may give rise to a legitimate expectation on the part of citizens that the Government in its acts affecting them will observe the terms of a treaty: see Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273… The rule that treaties cannot alter the law of the land is but one facet of the more general principle that the Crown cannot change the law by the exercise of its powers under the prerogative. This was the great principle settled by the Civil war and the glorious revolution in the 17th Century."*

35. What Lord Hoffman was ardently articulating here was the classical dualist principle whereby international law and municipal law are regarded in common law jurisdictions as discrete normative regimes, unlike monism which regarded those regimes as one normative continuum, and accorded to international law

deemed to occupying the apogee of this normative order direct effect at the domestic level. However, for legally binding international obligations to have legal incidence or direct effect at the domestic level in dualist jurisdictions, the relevant treaty has to be incorporated or enacted by the legislature. In this way the democratic principle, which was established at the cost of much British blood and treasure, is sustained and safeguarded. In the characterization of Lord Hope: "*An international treaty does not, of course, by itself form part of domestic law. This is a necessary consequence of the unqualified treaty making power which resides entirely with the executive. Treaties do not form part of the law of the Bahamas unless and until they have been enacted by the legislature. The assent of Parliament must be obtained before a domestic court can give effect to them." – Roberts v Minister of Foreign Affairs [2007] UKPC 56.*

36. Where a domestic tribunal is required to make a determination based on an alleged rule of international law, such a tribunal has to be satisfied that the alleged rule is, in fact, a generally agreed rule of international law accepted as such by the principal actors of the international community. It is not for the Courts to create the required rule of international law. In the characterization of Lord Oliver, *"A rule of international law becomes a rule – whether accepted into domestic law or not – only when it is certain and is accepted generally by the body of civilized nations and it is for those who assent the rule to demonstrate it if necessary before the International Court of Justice. It is certainly not for a domestic tribunal to legislate a rule into existence for the purpose of domestic law and on the basis of material that is wholly indeterminate."* - See R.Y. Jennings, An International Lawyer Takes Stock, 1CLQ Vol. 39, July 1990 at p. 524.

37. In similar vein, an authoritative publicist enunciated, *"it has always been held that general customary international law is part of the law of England and, therefore, will be applied 'as such'. Thus, international law is a matter of judicial notice, and there is no question of having to prove it by evidence. It is argued and applied in the same way as any other part of the common law. On the other*

hand, for constitutional reasons, a treaty which requires for its carrying into effect an alteration of English Law, or a charge on public funds, requires an act or other instrument making the needful changes in English Law if the Courts are to give effect to it." – See Idem at p. 523.

38. The dualist paradigm has been adopted throughout the Commonwealth as exemplified in the weight of judicial authority as follows: *Rustomjee v The Queen 2 QB 69 which was* affirmed by the English Court of Appeal in *JH Rayner (Mining Lane) v The Board of Trade*; and *Blackburn v Attorney General (1971) WLR 1037*; endorsed by The Supreme Court of Australia in *Simsek v Macphee (1982) 56 ALJR 277*; and *Minister of Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273*; as well as The Supreme Court of Canada in *Ahani v Attorney General of Canada 58 O.R (3d) 107*; approved by the Judicial Committee of the Privy Council in *Fisher v Minister of Public Safety and Immigration*; and nearer home, endorsed by The Supreme Court of Trinidad and Tobago in *Ismay Holder et al v Council of Legal Education HCA No. 732 of 1997,* and The Judicial Committee of the Privy Council in *Roberts v Minister of Foreign Affairs [2007] UKPC 56.*

39. Despite the foregoing, however, dualism as a constitutional international law principle was inadvertently, but not irretrievably, compromised by the decision of the Judicial Committee of the Privy Council in *Thomas v Baptist (1999) 2 LKC* where it was boldly asseverated by Lord Millet: "(t)he appellants are not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution. By ratifying a treaty which provides for individual access to an international body, the government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the Constitution." In effect, contrary to historical learning on the constitutional principle of dualism, Lord Millet was asserting that a prerogative act by the executive at the international plane could amend the supreme law of the dualist state of Trinidad and Tobago, temporarily, thereby compromising, by

ineluctable inference, the hallowed constitutional principle of separation of powers enunciated by Lord Diplock in *Hinds v The Queen* (1977) AC 195. and which constitutes the Grundnorm of the Commonwealth Caribbean constitutional order.

40. Fortunately, the Caribbean Court of Justice in the celebrated case of *Boyce & Joseph v the Attorney General of Barbados (2006) CV3 (AJ)* - See in particular the judgment of Justice Pollard which enunciated the principle of treaty-compliant executive conduct at the municipal plane distinguished *Thomas v Baptiste* and restored a measure of constitutional legitimacy to this hallowed principle. As the situation now stands, there can be no doubt that ratification of a treaty by the executive in the exercise of its prerogative powers cannot, *ipso facto*, alter the ordinary municipal law of a dualist state much less its supreme law – the Constitution. And this principle is of seminal relevance in the present case where the colony of Belize, allegedly, enacted the New York Convention into municipal law at a time when that Convention was not duly applied to Belize by the Crown in the exclusive exercise of the royal prerogative.

41. What may be deduced from the foregoing dicta and other relevant statements is the following: dualism as a constitutional law principle deems international law and municipal law to be two discrete normative regimes; in the international law arena, the executive in the exercise of its exclusive prerogative powers in the area of foreign policy is entitled to establish legally binding commitments for the state by concluding treaties without the intervention of Parliament; the legislature was normally required to enact such obligations into domestic law, especially where performance of those obligations required expenditure of public funds, new legislation, or amendments to existing legislation or the disposition of land or other national assets; or where the discharge of such obligations may not be achieved by executive action; as a matter of state practice, the assumption by the executive of obligations at the international plane normally preceded enactment of the instrument. And Belize

as a Commonwealth Caribbean State subscribing to the dualist doctrine is constrained in its conduct by these realities.

Constitutional validity of Part IV and Schedule Four of The Belize Arbitration Act

42. There is no room for doubt that Part IV of the Belize Arbitration Act and the Fourth Schedule accompanying it were duly passed as laws of Belize prior to the independence of the colony in 1981. Notwithstanding the foregoing, however, in my respectful opinion, the legality of this "enactment" cannot be the subject of an axiomatic, uncritical determination by a Court of competent jurisdiction, as a matter of Cartesian logic. Indeed, the Courts of common law jurisdictions have, from time to time, struck down many aspiring constitutional enactments which were duly approved by the legislature on the ground of unconstitutionality or some other legitimate ground.

43. An excellent case in point in this context is *Attorney General for Canada v Attorney General for Ontario [1937] AC 326* where the Dominion Parliament of Canada legislated to implement certain international labour conventions. On appeal from the Supreme Court of Canada, the Judicial Committee advised the Crown that the legislation was *ultra vires* the Dominion Parliament; that legislative competence on the subject concerned vested in the legislatures of the provinces. In the characterization of Lord Atkin, *"it will be essential to keep in mind the distinction between (1) the formation; and (2) the performance of the obligations constituted by a treaty, using that word as comprising any agreement between two or more sovereign states. Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail the alteration of the existing domestic law requires legislative action … Parliament no doubt, as the Chief Justice points out, has a constitutional control over the executive; but it cannot be disputed that the creation of the obligations undertaken in treaties and the assent to their <u>form</u>*

and quality are the function of the executive alone." By parity of reasoning Part IV of the Belize Arbitration Act and Schedule IV thereto, given their legislative history, does necessarily imply repugnancy to the generally accepted principles of constitutional legitimacy.

44. In this context, counsel for the appellant reminded this Court in his supplementary written submissions (for which I am grateful), that the Letters Patent 1964 and the Constitutional Ordinance 1963 established the allocation of the powers of governance and the basis of constitutional legitimacy in Belize as a dualist state in which matters relating to international treaties were always exclusively within the domain of the royal prerogative. For example, Section II(I) of the Letters Patent 1964 empowered the Governor of Belize to exercise the executive authority of the Crown on its behalf. And section 16(I) reposed external affairs in the Governor to be discharged at his discretion. Further, Section 2(4) of the Constitutional Ordinance 1963 provided for matters exclusively in the prerogative of the Crown, including foreign affairs, to be exercised by the Governor of Belize on the Crown's behalf.

45. Section 16 of the Constitutional Ordinance 1963 empowered the colonial legislature of Belize to make laws for the peace, order and good government of Belize. However, when the colonial legislature purported to pass an ordinance *"to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards",* the colonial legislature was clearly encroaching on the royal prerogative in respect of a matter relating to foreign affairs. The "enactment" of the Convention by the colonial legislature necessarily involved interference in foreign affairs which was exclusively in the domain of the Crown.

46. In the premises the purported enactment was ultra vires and void ab initio: – see *Murphy v R [1982] lr 241*. The constitutional repugnancy of this "enactment" could not have been cured by the subsequent extension by the Crown of the New York Convention to Belize. In my respectful opinion,

consequently, the Arbitration Ordinance as amended did not constitute "existing law" within the meaning of Section 134 (I) of the Belize Constitution and amenable to being saved at the time of independence of Belize. Consider in this context the relevant determinations of Belize cases which were brought to the Court's attention by learned counsel for the appellant, to wit *Jeffrey Prosser et al v Attorney General and Minister of Public Utilities [2005]* and *Dean Boyce et al v Attorney General [2010]* involving enactments of the Belize legislature declared to be unconstitutional for repugnancy to the Constitution.

47. On the evidence before this Court, the colonial legislative assembly of Belize presumed to apply in its domestic law, and I would venture to say without proper executive authority, express or implied, an international treaty, the New York Convention, which had not yet been extended by the Crown in the exercise of its exclusive prerogative powers to Belize by way of declaration pursuant to Article 10 thereof. In so doing, the colonial legislature, in my respectful opinion, disingenuously purported to exercise without authority a power of the royal prerogative in the area of foreign policy exclusively reserved for the Crown. As Lord Hoffman reminded us above, domestic courts have no jurisdiction to construe or apply a treaty- see paragraph 4 of this judgment above. And the same restriction, by compelling inference from the exclusivity of prerogative powers, applies to a colonial legislature in the absence of appropriate executive authority. And this is precisely what the colonial legislature of Belize purported to do thereby tainting the ordinance with constitutional repugnancy. In my respectful opinion, such an exercise of the prerogative power was far beyond the legislative competence of the lowly colonial legislature of Belize.

48. When, for example, the dependent colonial territory of Montserrat desired to join the Caribbean Community and Common Market by enacting into law the Treaty Establishing the Caribbean Community and Common Market (Chaguaramas, 4 July 1973), Her Majesty's Government was required, constitutionally, to issue an appropriate Instrument of Entrustment authorizing it

to do so. In effect, the Crown by issuing the Instrument of Entrustment delegated to Montserrat the required treaty-making powers of the prerogative for the purpose thereby permitting the legislature of Montserrat to enact an appropriate ordinance.

49. And although the Belize enactment was not declared to be unconstitutional by an appropriate challenge in a court of competent jurisdiction at the material time, this omission does not in my respectful opinion preclude this Court from pronouncing on its constitutionality or illegality, as the case may require, even though somewhat belatedly. And, in my respectful judgment, Part IV and Schedule IV of the Arbitration Act are hereby declared to be and to have been at the material time *ultra vires* the constitution of the colony of Belize, null and void. Granting the constitutional propriety and legitimacy of the foregoing determination, it does appear to be the subject of a compelling inference that Part IV of the Arbitration Act and its handmaiden, Schedule IV, were not "existing laws" within the meaning of Article 134 of the Belize Constitution at the material time and, as such, were not amenable to being saved by the said Article on the attainment of independence by Belize.

50. Consequently, it is my respectful opinion, that the Courts of Belize have no jurisdiction to recognize and enforce Part IV of the Arbitration Act and Schedule IV thereof. And even assuming, but not conceding, that Part IV and Schedule Iv of the Act were not repugnant to the constitutional and legal order of Belize, there is yet another legitimate constitutional imperative constraining the Courts of Belize from recognizing and enforcing it. Dualist jurisdictions like Belize normally do not recognize and apply the legal principle of direct effect which is common currency in monist jurisdictions. Two known exceptions in the common law constitutional legal order are, on the one hand, the United States of America where treaties duly approved by the Senate and signed by the President have immediate legal incidence in the domestic jurisdiction – see Article VI of the US Constitution. The other partial exception is the United Kingdom which was

required to modify the British constitutional legal order in appropriate measure to accommodate various determinations of competent institutions of the European Union, absent the intervention of Parliament. And this explains the language of commitment employed in Section 2(1) of the European Communities Act 1972 which provides as follows:

> "*All such rights, powers, liabilities and restrictions from time to time created or arising by or under the Treaties and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties* are without further enactment to be given legal effect or used in the United Kingdom shall be recognized and available in law and be enforced, allowed and followed accordingly and the expression 'enforceable Community right' and similar expressions shall be read in treaties as referring to one to which this subsection applies."

51. However, in all other common law Commonwealth jurisdictions, legally binding obligations assumed at the international plane must be enacted into domestic law by the legislature in order to have legal incidence for private entities at the domestic plane, subject to the evolving qualifying principle of legitimate expectations – see Boyce & Joseph v Attorney General of Barbados (2006) CV3 (AJ). As a matter of practice by dualist jurisdictions, however, obligations assumed by the state at the international plane are given effect at domestic level only when it has been established that they are legally binding internationally. It follows *aequo vigore,* not to mention axiomatically, that incorporated treaties are instruments which normally are legally binding at international level by virtue of an appropriate international act, be it signature, ratification, accession, approval or acceptance as the case may require according to the Vienna Convention on the Law of Treaties 1969 - See Article 2 (1)(a) of the Vienna Convention on the Law of Treaties (1969). For ease of appreciation in this context, it is recalled that signature, ratification, accession, approval or acceptance, as the case may require, is the international act, so named, by which a state establishes at the international plane its consent to be bound by a treaty.

52. It also follows *a fortiori* that, more often than not, the legislature of a dualist jurisdiction is normally required to enact an international instrument which has already created legally binding obligations for the state at the international plane. It is, to say the least, contrary to the normal practice for a state's legislature to enact into domestic law the provisions of an international convention which is not legally binding on the state. And if my memory serves me correctly, the Warsaw Convention for the Unification of Certain Rules Relating to International Carriage by Air 1929 provides a rare example of the United Kingdom's Parliament enacting a treaty before it was duly ratified by the executive.

53. Bearing the foregoing in mind, it does appear to have been an exercise in futility for the colonial legislature of Belize to have purported to enact into law for Belizean citizens The New York Convention which had not been extended to Belize by the United Kingdom through the exercise of the royal prerogative in accordance with Article 10 of that Instrument. And, in the unlikely event that that was indeed the intention of the legislature, such an intention would have been effectively frustrated by the operation of law since, given the circumstances under which Part IV of the Act and Schedule IV were enacted, the legislature was attempting to tread on constitutionally prohibited ground as intimated above. In effect, the action of the Belize legislature was egregiously misconceived and constitutionally misinformed.

54. It is currently standard international practice for states to establish their consent to be bound by treaties one or two years before the instrument is actually enacted into law. This is so because parties to a treaty, concerned about discharging, in good faith, the obligations assumed thereunder in accordance with the principle *pacta sunt servanda*, normally need some time to determine whether implementation of the instrument required new laws, or the amendment of existing laws, or expenditure of public funds, or whether mere administrative measures would suffice. Where the disposition of national territory

was involved or expenditure from the national consolidated fund was required, legislation must be enacted to achieve treaty compliance.

55. However, it is normal to have a juridical nexus established between the state party and other members of a treaty regime before enactment of legislation may be contemplated to secure treaty compliance. Rarely, as intimated above does an enactment precede or anticipate the establishment of an intention at the international plane to comply with the treaty. In point of fact, the depressing treaty practice of the states of the Commonwealth Caribbean is to ratify treaties and leave them unimplemented rather than to enact them into law in anticipation of becoming parties thereto. Indeed, the treaty registers of CARICOM States are replete with unincorporated treaties - D.E.E. Pollard, 'Juridical and Constitutional Implications of CARICOM Treaty Practice', Commonwealth Law Bulletin, Vol. 35 No. 1, March 2005, pp. 7-29. And there was no evidence adduced before the Court below to establish that the replication by the Belize legislature of the provisions of the New York Convention set out in Schedule IV of the Belize Arbitration Ordinance must be construed as an intention to enact this instrument in anticipation of its legally binding effects for the colony of Belize at the international plane as part of the territory of the United Kingdom.

Is Belize estopped from denying the applicability of the New York Convention?

56. Relevant rules of statutory interpretation facilitate the reception of norms of international law in the municipal systems of Commonwealth Caribbean States. In this connexion, it would be apposite to address the relevant provisions of the Interpretation Act of Belize and their juridical implications for this state. Subsection 64(1)(b) of this enactment provides as follows:

> "64(1). In ascertaining the meaning of any provision of an Act, the matters which may be considered shall, in addition to those which

may be considered for that purpose apart from this section, include the following, that is to say-

a) …
b) Any relevant treaty or other international agreement which is referred to in the Act."

Subsections 65(a) and (b) provide as follows:

"The following shall be included among the principles to be applied in the interpretation of Acts where more than one construction of the provisions in question is reasonably possible, namely-

a) That a construction which would promote the general legislative purpose underlying the provision is to be preferred to a construction which would not; and
b) That a construction which is consistent with the international obligations of the Government of Belize is to be preferred to a construction which is not."

57. And, it is of considerable significance for resolving the intractable legal issues involved in this case that the respondents in their Speaking Note made the following admissions and submissions:

"16. Belize is not and has never been a Contracting State to the Convention. Nevertheless, Part IV of the Act has been given effect to the Convention in Belize. Although it is not a Contracting State, Belize has signaled in unequivocal terms that the Government of Belize has decided to continue to apply provisionally and on the basis of reciprocity, all treaties to which the Government of the United Kingdom was a party, the application of which was extended either expressly or by necessary implication to the then dependent territory of Belize. Until withdrawn, this declaration is effective to have the Convention apply provisionally between Belize and any Contracting State that accepts this declaration by Belize. Insofar as Belize is concerned, it has represented to all members of the United Nations and its agencies that the Convention applies provisionally."

58. Given the importance of this statement for a resolution of the issues before this Court, it is important to analyse it and to address its juridical implications. As concerns the extracts in paragraph 14, it is my respectful opinion

that the relevant provisions of the Interpretation Act of Belize cited in the respondents' Speaking Note have no relevance in terms of advancing their claim against the appellant. In the context of the Belize Interpretation Act, Section 64(1)(b), the Convention cannot be regarded as a *"relevant Treaty or other or other international agreement which is referred to in the Act"* (to wit, the Belize Arbitration Act) because the Convention in relation to Belize, was, at all material time, a *res inter alios acta* which was not within the contemplation of the draftsperson. Similarly, the provisions of Section 65(a) and (b) of the Interpretation Act are irrelevant for present purposes because there were no "*international obligations of the Government of Belize"* to speak of since by respondents' own admission, Belize was not a Contracting State to the Convention at all material times.

59. More importantly, the unilateral declaration of the Prime Minister of Belize to the Secretary General of the United Nations, following the independence of Belize cannot be construed as operating to establish legally binding relations with any Contracting State of the Convention as submitted by the respondents. This declaration set out in a *Note Verbale* dated 29 September 1982, stated the intention of Belize *"to apply provisionally and on the basis of reciprocity, all treaties to which the Government of the United Kingdom of Great Britain and Northern Ireland was a party, the application of which was extended either expressly or by necessary implication to the then dependent territory of Belize".* Article 25 of the Vienna Convention on the Law of Treaties which addresses provisional application of treaties makes it pellucidly clear that this rule of international law is applicable only to a negotiating state. And this Court was not presented with any evidence to establish that Belize, as a dependent territory of the United Kingdom, at the material time, was part of its negotiating team when the New York Convention was being negotiated and elaborated.

60. The respondents have not adduced any evidence in support of their position before this Court. In the premises, the Prime Minister of Belize in

making the unilateral declaration to the United Nations mentioned above appeared to have lacked the required *locus standi* for his declaration to have the desired effect. The relevant provisions of the Vienna Convention on the Law of Treaties 1969 read as follows:

> *"1. A treaty or a part of a treaty is applied provisionally if:*
>
> *(a) the treaty itself so provides; or*
>
> *(b) the negotiating states have in some other manner so agreed."*

In the submission of one preeminent authority on international law, *"it takes two or more parties to make a treaty, and that there must be a novation before the successor state is bound?"* - Ian Brownlie, 'Principles of Public International Law', 7th ed. OUP. 2008 at p. In the present case the New York Convention did not provide for provisional application and the dependent territory of Belize was not a negotiating state.

61. Indeed, Article 9(1) of the Vienna Convention on the Succession of States in Respect of Treaties 1978 reads:

> *"1. Obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory."*

Further, it is of no juridical significance whatever that the said declaration in the submission of the respondents had not been withdrawn at the material time since, as submitted below, it was incapable, juridically, of having the intended effect.

62. Similarly, it does not avail the respondents any advantage in this litigation that Article 10 of the Convention might be construed, in their submission, as applying to states which are not Contracting States and that "*the United Kingdom*

has not notified the Secretary General of the United Nations that the Convention has ceased to extend to Belize". This omission which is not peculiar to the treaty practice of the United Kingdom and rather appears to be in the nature of an undecipherable but accepted convenience of imperial amnesia of metropolitan states, may not be construed as irretrievably compromising the application of the non-transmissibility principle associated with the succession of states addressed by Ian Brownlie. - Ian Brownlie, 'Principles of Public International Law', 7th ed. OUP. 2008 at p.661. And the fact that the Vienna Convention on Succession of States in Respect of Treaties 1978 *"was not a part of international law when the Convention was concluded [1958] nor when Belize succeeded to independence"* as submitted by learned Counsel for the respondents, is of no juridical significance for present purposes, since the non-transmissibility principle is more likely than not a rule of customary international law whose validity is not necessarily a function of the codification in the Vienna Convention on Succession of States in Respect of Treaties, 1978 - Ian Brownlie, 'Principles of Public International Law', 7th ed. OUP. 2008 at p.661. The compelling inference and legal effect of the foregoing is that the New York Convention created no legally binding obligations for Belize, a non-Contracting State. In the premises, the Courts of the State of Belize are not required but, indeed, are constrained not, to recognize and enforce Convention arbitral awards.

63. Dualism has peculiar relevance in the present context as the focus of attention is not only on what commitments are assumed at the international plane but also on their enactment into law at the municipal plane. Postulated in other terms, incorporated treaties are, in the international practice of states, instruments having legally binding effect at the international plane and which have been enacted into law at the municipal plane to ensure the discharge of treaty obligations assumed therein. For, it is trite law that having committed to a treaty at the international plane a state is precluded from invoking its municipal law or the absence thereof as a ground for not discharging its international obligations. - Article 27 of the Vienna Convention on the Law of Treaties (1969).

Indeed, it is not without considerable significance that the Draft Articles of the International Law Commission on the Rights and Duties of States go so far as to preclude a state from invoking its Constitution as a ground for not discharging an international obligation. - Article 13 of the ILC's Draft Declaration on the Right and Duties of States 1949.

Applicability of the New York Convention to the State of Belize

64. The appellants contend that the New York Convention is not applicable to Belize. The respondents, however, have submitted that the Fourth Schedule of the Arbitration Act of Belize set out the New York Convention as the law of Belize and which was allegedly saved by Article 134 of the Belize Constitution at the date of independence. It appears to be common ground from both the oral and written submissions of Counsel that the provisions of the New York Convention were replicated in the Fourth Schedule of the Belize Arbitration Act. However, this is, in my respectful opinion, fundamentally different from establishing to the satisfaction of a court of competent jurisdiction that the provisions of the New York Convention replicated in the Fourth Schedule to the Belizean Arbitration Act did incorporate the provisions of an international instrument applicable to Belize and legally binding on Belize. Incorporation in the traditional practice of common law dualist states involves enactment of an instrument creating legally binding obligations at the international plane in order to give them effect at the municipal plane.

65. At the time of the enactment of the Fourth Schedule, to wit, 10 October 1980, it was some time before notification by Britain of the application of the New York Convention to Belize in compliance with Article 10(2) thereof. In effect, when the New York Convention was purported to have been enacted in Belize as Schedule IV of the Arbitration Act there was no existing convention in terms of an instrument creating legally binding obligations, to apply at the material time. Moreover, no evidence was adduced before the Court below that the Fourth

Schedule was enacted in anticipation of the application by the Crown to Belize of The New York Convention. The Fourth Schedule of the Belize Arbitration Act, as mentioned above, did not *stricto juris* apply the New York Convention. In this connexion attention is drawn to the memorandum of A D Watts, Legal Counsellor dated 31 December 1980 recalling the practice of Belize regarding the incorporation of treaties and which is to be found at TAB 26 of the skeleton arguments of the applicants dated 8 March 2012. In this memorandum the Solicitor General of Belize was represented as affirming that the Assembly of Belize enacts ordinances to give effect to treaties only after their ratification or exchange with the other party as the case may require. It merely replicated the provisions of the Convention and purported to give them the force of law in Belize. But the New York Convention as an instrument creating legally binding obligations for Belize at the international plane required, as a condition precedent, the exercise of prerogative powers extending it to Belize. Consequently, 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.

66. In my respectful opinion it does not appear that the New York Convention applies to Belize at present nor at any material time. The language of commitment employed in the New York Convention clearly establishes that the Convention applies to contracting states. Thus, Article 3 provides that each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the awards are relied upon. But the obligation to recognize awards only devolves on contracting states, a status to which Belize never attained judging from the evidence adduced in this Court. And the respondents have admitted this, without equivocation, in their Speaking Note. Belize enacted Parts I, II and III of the Arbitration Act by Ordinances in 1926 and 1932 while still a dependency of Britain. Part IV was also enacted by Ordinance No. 21 of 1980 and purported to

take effect on 10 October 1980 before notification of the application of the New York Convention on 24 February 1981 pursuant to Article 10(2) of the instrument.

67. In effect, when the New York Convention was extended to Belize, the country was still a colony of Britain. And it is trite law that restrictions on the sovereignty of states are not to be presumed: *the Lotus Case PCIJ, Ser. A, No. 10.* In the premises, the action of Britain was enough to entitle Belize to enjoy all rights under the Convention even though Belize was not a contracting state. Belize attained independence on 21 September 1981. By *Note Verbale* dated 29 September 1982, the Prime Minister of Belize informed the Secretary General of the United Nations and, through him, the members of the international community that "*the Government of Belize has decided to continue to apply provisionally and on the basis of reciprocity all treaties to which the Government of the United Kingdom was a party, the application of which was extended either expressly or by necessary implication to their dependent territory of Belize*".

68. It now falls to be determined what was the status of Belize in relation to the New York Convention at the material time, that is, on 21 June 2006 when the Settlement Deed as amended was signed by the Minister of Finance and the Attorney General on behalf of the Government of Belize and BB Holdings. In my respectful opinion, Belize was not a contracting state within the meaning of the New York Convention at the material time. In the authoritative submission of Ian Brownlie "*when a new state emerges, it is not bound by the treaties of the predecessor sovereign by virtue of a principle of state succession. In many instances the termination of a treaty affecting a state involved in territorial changes will be achieved by the normal operation of provisions for denunciation or the doctrine of fundamental change in circumstances. However, as a matter of general principle a new state, ex hypothesi, a non-party, cannot be bound by a treaty, and in addition other parties to a treaty are not bound to accept a new party, as it were, by operation of law".* - Principles of Public International Law 7th. Edition, Oxford University Press 2008 at p. 661.

69. It does appear to follow from the foregoing that Belize did not automatically succeed to the New York Convention on independence by operation of law and the mere fact of a unilateral declaration of the nature described above was incapable of having this effect. In order for Belize to have become a contracting state to the New York Convention, for example, by way of accession, it would have had to submit to the depository an appropriate instrument of accession. But the Government of Belize chose not to exercise this option. The foregoing not withstanding the fact that Belize never was at all material times a contracting state does not operate to terminate discussion of the issue. There are avenues open to states to assume legally binding obligations in international law other than by being parties to a treaty. - See the Eastern Greenland Case (1933) PC1J Ser A/B No. 53. Instead, the Prime Minister of Belize, as mentioned below made a unilateral declaration to the United Nations Secretary General, and, through him, to the international community at large indicating Belize's provisional application of treaties, on a basis of reciprocity, concluded by the previous sovereign, The United Kingdom.

70. However, in my respectful opinion, the declaration did not suffice, according to the applicable rules of international law, to make Belize a contracting state of the New York Convention, a circumstance which was confirmed by the Deputy Chief, Treaty Section Office of Legal Affairs of The Secretariat of the United Nations. In his authoritative submission, "*Since independence, Belize has not deposited with Secretary General an instrument of succession or accession to the Convention. As such, Belize is not considered to be a party to the Convention at international law".* This statement was dated 18 December 2008, some considerable time after the conclusion of the Settlement Deed and the arbitration agreement incorporated therein in 2006. Even though the New York Convention did not expressly provide for a depository, Article 15 confers on the Secretary General of the United Nations regular depository functions. In the premises the statement issuing from the United Nations is

extremely authoritative and it is doubtful whether a court of competent jurisdiction will be disposed to go behind it.

71. Indeed, the statement from the Treaty Department of the Office of Legal Affairs appears to confirm the submissions of *Ian Brownlie* regarding the effect of unilateral declarations made by competent officials of emerging sovereignties at the time of independence. In his submission, "*such declarations combine a vague or general recognition that certain unspecified treaties do survive as a result of the application of rules of customary law with an offer of a grace period in which treaties remain in force on an interim basis without prejudice to the declarant's legal position and is a requirement of reciprocity…The practice based on such declarations supports the view that what eventually occurs is either termination or novation as the case may be in respect of the particular treaty."* - Ian Brownlie, 'Principles of Public International Law', 7th ed. OUP. 2008 at p.665.

72. Having established that Belize was not a contracting state of the New York Convention and that Schedule Four of the Belize Arbitration Act did not, as a matter of law, incorporate the New York Convention, what are the juridical implications of such a finding? In support of this determination it is submitted that if Schedule Four, as the respondents contend did apply to the New York Convention, it must be the subject of a compelling inference that the colonial legislative of dependent Belize had, *ipso facto,* purported to extend the Convention to its territory constituting thereby an unacceptable and impermissible interference with the exercise of the royal prerogative in the area of foreign affairs exclusively reserved for the Crown as intimated by Lord Hoffman above. – See paragraph 4 of this Judgment. In effect, Part IV and Schedule IV of the Belize Ordinance constituted no less than a brazen attempt at the usurpation of executive prerogative powers and were, *ultra vires*, the colonial constitution. And, in my respectful opinion, it would be inconceivable to conclude from any provision in The Colonial Laws Validity Act enacted by the British Parliament in 1865 authorization for such an intervention, express or implied.

Consider in this context the proviso in section 5 of this enactment. Furthermore, Belize as a non-contracting state would not be obliged to recognize and enforce an award in accordance with Article 3 of The New York Convention. Moreover, The New York Convention is an international instrument governed by international law and creating obligations at the international plane; and since Belize was not a contracting state, its domestic legislation is not required to be in compliance with the relevant provisions of the New York Convention.

73. The foregoing notwithstanding, it is still extremely important to determine the juridical significance of the *Note Verbale* despatched by the Prime Minister of Belize gratuitously and unilaterally declaring the intention of the Government of Belize to apply provisionally, and on a basis of reciprocity, all treaties of the United Kingdom which were extended to Belize. But even, assuming, and not admitting, the juridical significance of the Prime Minister's conduct, there are some juridical solecisms which need to be addressed in the present context. Provisional application of the provisions of a treaty is governed by the Vienna Convention on the Law of Treaties 1969 which, the International Court of Justice has determined largely codifies customary international law. Article 25 of this Convention provides that the negotiating states of a treaty may provisionally apply the articles thereof pending its entry into force.- See paragraph 29 of this Judgment.

74. However, it does not appear that Belize was at the time of the unilateral declaration by the Prime Minister a negotiating state within the meaning of Article 2 (1)(e) of the Vienna Convention, 1969 and which had engaged in the elaboration of The New York Convention. Consequently, it is a moot point whether the government of Belize was in a position to provisionally apply the New York Convention. More importantly, the declaration was expressed to be subject to reciprocity and in the absence of an indication by any other interested state to reciprocate, provisional application of an indeterminate treaty unilaterally

extended by any state would appear to be juridically infeasible in terms of achieving the desired objective.

75. For present purposes, it would also be extremely important to determine whether by virtue of the unilateral declaration of the Prime Minister of Belize mentioned above, Belize would be precluded or estopped from declaring it was not a contracting state of the New York Convention and that that instrument constituted a *res inter alios acta: The Eastern Greenland Case (1933), PCIJ, Ser. A/B No. 53; the Temple of Preah Vihear Case ICJ Reports (1961) 17.* In this connection it is my respectful opinion that the requirements for preclusion or estoppel in international law do not appear to have been satisfied by the Prime Minister's unilateral declaration. In the submission of *Brownlie*, as a principle of international law the doctrine of estoppel has no particular coherence and its incidence and effects are not uniform. In the characterization of *D.W. Bowett*, estoppel as a principle of international law requires three elements – *"(1) a statement of fact which is clear and unambiguous; (2) this statement must be voluntary, unconditional and authorized; and (3) there must be reliance in good faith upon the statement either to the detriment of the party relying on the statement or to the advantage of the party making the statement."*- Ian Brownlie, 'Principles of Public International Law', 7th ed. OUP. 2008 at pp. 843- 4. Given that the declaration of the Prime Minister was expressly made conditional on reciprocity, it cannot operate to create preclusion or estoppel in international law.

Conclusion

76. In view of the fact 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 Minster of Belize was juridically misconceived in terms of the objective sought to be secured, and that the principle of estoppel or preclusion is inapplicable in the present context, what is the status of the award handed down by the International Court of International Arbitration? It is

clear that since the New York Convention does not apply to Belize at the level of international law either by express consent or the operation of law, 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 in accordance with Article 3 of that instrument. Refusal of the Courts of Belize to recognize and enforce domestically convention awards cannot operate to engage the international responsibility of Belize.

77. The foregoing notwithstanding, however, Belize still has to justify, juridically, Schedule Four of the Arbitration Act on its Statute Books. In my respectful opinion, however, that Schedule is a dead letter since, purporting as it did to intervene without the required authority in the exercise of the royal prerogative in the area of foreign affairs exclusively reserved for the Crown, it would be declared by a court of competent jurisdiction to be *ultra vires,* null and void and without effect ab initio. As such, it could not have been regarded as an existing law within the meaning of Article 134 of the Belize Constitution and I have so determined.- See paragraph 19 above. And if Schedule IV of the Belize Arbitration Act could not have been regarded as existing law at the material time, Article 134 of the Constitution was incapable of saving it before the independence of Belize and at the elaboration of its Constitution.

78. The Respondents contend that neither the United Kingdom nor Belize is a party to the Vienna Convention of 1969 and that this Instrument has not been extended to, applied to, nor domesticated in Belize. The foregoing notwithstanding, the International Court of Justice has determined that the Vienna Convention on the Law of Treaties 1969 largely codified customary international law which does not require domestication nor incorporation to produce legal incidence at the municipal plane in dualist jurisdictions.- Gabcikovo v Nagymaros, ICJ Reports 1997; Fisheries Jurisdiction Case (UK v Iceland) ICJ Reports 1973. And the fact that the Vienna Convention has no provision which

may be construed as dis-applying or repealing Part IV and the Fourth Schedule to the (Belize) Act is immaterial.

79. Applicable rules of international law have been adduced to establish that Part IV and the Fourth Schedule of the Belize Arbitration Act replicated but did not incorporate or enact provisions of a legally binding international treaty known as the New York Convention. More importantly, it is my respectful opinion that Part IV and the Fourth Schedule of the Belize Arbitration Act 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 capable of being saved by Article 134 of the Belize Constitution.

80. For the foregoing reasons, the appeal is allowed.

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POLLARD JA

SOSA P

81. The order as to costs dealt with at para 1 above is made on the basis that such costs are certified fit for two counsel, viz Senior Counsel and a junior, and is provisional in nature. Application may be made for a contrary order within 7 days of the date of the delivery of this judgment (in which event the Court shall make a new order as to costs on written submissions to be filed in 15 days from that date). I am authorised by Pollard JA to say that he concurs in all I have said in this paragraph.

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SOSA P