2014

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BRILL
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THE JOURNAL OF WORLD INVESTMENT & TRADE 15 (2014)
324-332

The Journal of World Investment & Trade
Law • Economics • Politics
brill.com/jwit

Anti-Arbitration Injunctions in Cases Involving Investor-State Arbitration: *British Caribbean Bank Ltd. v. The Government of Belize*

Caribbean Court of Justice, Judgment, 25 June 2013, [2013] CCJ 4 (AJ)

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Keywords

Anti-arbitration injunctions – bilateral investment treaty – *Elektrim SA v. Vivendi Universal SA* – investment arbitration – investor-state arbitration

Over the last few years, the international legal community has become increasingly interested in anti-arbitration injunctions, which are analogous to anti-suit injunctions except that the former prohibits the initiation or continuation of an arbitration while the latter focuses on judicial actions.[1] At this point, very few courts have actually issued an injunction of this type.[2] Nevertheless, a number of commentators have expressed concern about these mechanisms, since they can wreak havoc with contractual or treaty-based expectations about how a particular dispute is to be resolved. Indeed, some scholars and practitioners would prefer that these sorts of injunctions be made universally

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1 See Emmanuel Gaillard, 'Reflections on the Use of Anti-Suit Injunctions in International Arbitration' in L.A. Mistelis and J.D.M. Lew (eds.), *Pervasive Problems in International Arbitration* (Kluwer 2008) 203 paras. 10–19 to 10–21; Julian D.M. Lew, 'Does National Court Involvement Undermine the International Arbitration Process?' (2009) 24 *Am. U. Int'l L. Rev.* 489, 500–509.

2 See S.I. Strong, *International Commercial Arbitration: A Guide for U.S. Judges* (Federal Judicial Center 2012) 44.

 | DOI 10.1163/22129000-01502013

unavailable. However, other people believe that there are times when a court may enjoin arbitral procedures without damaging any of the core principles of arbitration law and practice.[3]

Theoretical debates about the relative merits of anti-arbitration injunctions will likely continue for years. However, the more practical question is whether and to what extent courts are currently willing and able to grant orders prohibiting international arbitrations from proceeding. Interestingly, the Caribbean Court of Justice (CCJ) has recently addressed precisely this issue in *British Caribbean Bank Ltd. v. The Government of Belize.*

* * *

British Caribbean Bank involved an appeal to the CCJ from an interlocutory order of the Court of Appeal of Belize restraining British Caribbean Bank Ltd. (BCB) from pursuing an arbitration based on a bilateral investment treaty (BIT) between Belize and the United Kingdom (para. 2). In addition to original jurisdiction over a limited number of matters, the CCJ has taken over the appellate function formerly exercised by the Privy Council with respect to certain member states of the Caribbean Community and Common Market (CARICOM).[4] The CCJ's appellate jurisdiction includes "all the jurisdiction and powers possessed in relation to that case by the Court of Appeal of the Contracting Party from which the appeal was brought."[5]

The substantive dispute between the parties arose in 2009, when the Government of Belize nationalized the country's telecommunications industry (para. 4). As part of that process, the government compulsorily acquired certain loan and mortgage debenture facilities held by BCB (para. 2). Although

3 For example, an anti-arbitration injunction may be appropriate if a party initiates arbitral proceedings in the wrong place or with the wrong institution. Injunctive relief may also be considered either useful or necessary if an arbitration is begun in the absence of a valid arbitration agreement. Purists, however, would argue that parties who believe an arbitration has been improperly initiated should raise the appropriate defences in the arbitration itself.

4 *See* <www.caribbeancourtofjustice.org> (10 December 2013); *see also* Agreement Establishing the Caribbean Court of Justice, para. XXV, 14 February 2001 [hereinafter CCJ Agreement] <www.caribbeancourtofjustice.org/wp-content/uploads/2011/09/ccj_agreement.pdf> (10 December 2013). At this point, the CCJ has appellate jurisdiction over Barbados, Belize and Guyana, with Dominica shortly to join the group. See *Dominica Informs Privy Council of Intention to Join Caribbean Court of Justice*, CARIBBEAN 360, 27 November 2013 <www.caribbean360.com/index.php/news/dominica_news/1086831.html#axzz2mGQeUCjn> (10 December 2013).

5 CCJ Agreement, *supra* note 4, para. XXV(6).

the instruments had a face value of US$24 million, payment of both principal and interest ceased at the time of the compulsory acquisition, and BCB received no other form of compensation (para. 4).

The legislation authorizing the initial acquisition was held unconstitutional in 2011, but the Government of Belize subsequently took a number of steps, including the enactment of a constitutional amendment, to reacquire the telecommunications properties in question (para. 5). The constitutionality of these actions has also been challenged (para. 5), and a variety of other domestic proceedings have also been initiated by either the Government of Belize or BCB (paras. 6, 8, 42–44, 48, 50).

The BIT arbitration that is at the centre of the current dispute was initiated on 5 May 2010 (para. 3).[6] That same day, the Government of Belize sought an interim injunction from the national courts prohibiting BCB "from taking any or any further steps in the continuation or prosecution of the arbitration proceedings" (para. 10). After considering the matter, the trial court issued the injunction, based on the judge's belief that "resolution of the disputes through the domestic courts was preferable" to investment arbitration (para. 11). That injunction was to remain in place until the related domestic cases had run their course (para. 11).

BCB subsequently appealed, and a majority of the Court of Appeal upheld the injunction, though on slightly different grounds than the trial court (para. 12).[7] The Court of Appeal also altered the timeframe of the injunction, holding that the order should only remain in place until "the date of trial of the merits of the substantive application for a (permanent) injunction" (para. 12).

BCB again appealed, this time to the CCJ. By this point, the dispute had been narrowed to three main issues. First, the CCJ was asked to determine "[w]hether the BIT provided BCB with an unqualified or indefeasible right to proceed to international arbitration" (para. 13). Although proponents of a strong view of investment arbitration might answer this question in the positive, courts seldom find an absolute restraint on their own power. Thus, it is unsurprising that the CCJ answered this question in the negative, holding that "[t]he exercise by one individual of his or her rights often infringes on the

6 A tribunal has been named, although Belize did not participate in the process. *See British Caribbean Bank*, para. 7.

7 At the time the Court of Appeal heard the current matter, the statute authorizing anti-arbitration injunctions had been held unconstitutional by a lower court. *See British Caribbean Bank*, para. 31. However, by the time the CCJ heard the current dispute, the Court of Appeal had held that the anti-arbitration statute was constitutional. *See ibid.*, paras. 31–32 (discussing *Zuniga v. Attorney General of Belize*).

rights of other individuals or the society as a whole and the courts are and must remain the final arbiter of the relative distribution of those rights" (para. 14).

The second issue was largely procedural in nature. Here, the CCJ was asked to determine "[w]hether, if there was a power to restrain the arbitral process, the Court should make a determination of the merits of the claim for a permanent injunction or should limit its enquiry and determine only whether there was a serious issue to be tried" (para. 13). Because "all the relevant materials were before [the court] without any complex issues of facts to be resolved," the CCJ decided that "the court below ought to have decided whether it was just and convenient to uphold the injunction" permanently, not just on an interim basis (para. 28). Although this analysis may yield a different outcome on different facts, observers should appreciate the CCJ's willingness to allow an early and conclusive determination of the propriety of an anti-arbitration injunction in appropriate circumstances, since the uncertain nature of interlocutory orders often creates a hardship on the parties.

Third, the CCJ was asked to consider "[w]hether ... there was any or any sufficient basis, for the grant of the injunction to restrain the arbitration" (para. 13). This question involved a *de novo* inquiry into whether a permanent injunction was justified on the facts presented to the court. After rigorous consideration of a variety of relevant factors, the CCJ ultimately decided that such an injunction was not proper, particularly in light of BCB's willingness to give an undertaking to suspend certain domestic proceedings so as to ensure that there would be no double recovery (para. 50). As a result, the CCJ discharged the injunction, thereby allowing the BIT arbitration to go forward (para. 56).

* * *

The CCJ's judgment is largely well-reasoned, and the Court of Appeal in Belize has subsequently relied on the decision to discharge two anti-arbitration injunctions that were pending in an unrelated matter.[8] However, there are some aspects of the CCJ's analysis that may be potentially problematic going forward. The key features of the decision to be discussed in more detail are the limited, yet existent, ability of domestic courts to issue anti-suit injunctions, contract analogies drawn by the Court and the Court's understanding of investment arbitration.[9]

8 *See Dunked Int'l Investment Ltd v. Attorney General of Belize*, paras. 7, 130–46, Civ App No. 24/2011, Court of Appeal (1 November 2013).

9 The CCJ discusses a number of additional matters that may prove useful to courts, commentators and counsel, even though those concerns fall outside the scope of this brief comment.

The Limited But Undeniable Ability to Issue Anti-Arbitration Injunctions

Although some people would like to see anti-arbitration injunctions prohibited in their entirety, the CCJ was clearly of the view that it had the power to enjoin an arbitral proceeding, even if an injunction was not appropriate on the facts presented in the instant case (para. 14).[10] When considering the source of its authority, the CCJ focused primarily on section 106A(8) of the Supreme Court of Judicature Act, which states that

> [w]ithout prejudice to the generality of the foregoing provisions, the Court shall have jurisdiction
> (i) to issue an injunction against a party or arbitrators (or both) restraining them from commencing or continuing any arbitral proceedings (whether sited in Belize or abroad), or an injunction against a part [sic] restraining it form [sic] commencing or continuing any proceedings for enforcement of an arbitral award (whether in Belize or abroad), where it is shown (in either case) that such proceedings are or would be oppressive, vexatious, inequitable or would constitute an abuse of the legal or arbitral process;
> (ii) to void and vacate an award made by an arbitral tribunal (whether in Belize or abroad) in disregard of or contrary to any such injunction.[11]

The CCJ then undertook a detailed analysis of the facts of the dispute before finding that the investment arbitration in question was not "oppressive, vexatious, inequitable or ... an abuse of the legal or arbitral process" within the meaning of the statute.[12]

Although the CCJ's discussion of the statutory standard is in many ways useful, an action challenging the constitutionality of section 106A(8) is currently pending in the CCJ, so it is possible that certain aspects of the analysis could

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For example, the decision addresses issues relating to the possible need for exhaustion of local remedies, *British Caribbean Bank*, paras. 21–23; the distinction between claims arising under the treaty and under domestic law, *ibid.*, paras. 46–47; questions of double recovery and inconsistent judgments, *ibid.*, paras. 47, 52, 54; and the undertaking of BCB, *ibid.*, paras. 50–54.

10 *See also* Lew, *supra* note 1, pp. 509–514.

11 Supreme Court of Judicature Act §106A(8), as quoted in *British Caribbean Bank*, para. 30.

12 *Ibid.*

become moot at some point.[13] The dubious constitutionality of section 106A(8) might also lead those who oppose anti-arbitration injunctions to wonder whether it is possible that this particular device might be eliminated from the array of available remedies in Belize.

While it is unclear whether this particular piece of legislation will pass constitutional muster, it is highly unlikely that the CCJ or Belizean judiciary will ever find themselves without the ability to enjoin arbitral proceedings, given the CCJ's statement that courts must retain the power to balance the rights of individuals and society at large (para. 14). Indeed, when the Court of Appeal temporarily found itself without statutory authority for an anti-arbitration injunction in the instant case, the court simply based its actions on the common law and equity (para. 31).

Although the Belizean courts have the power to enjoin arbitral proceedings, this is not to say that such injunctions will become commonplace. Indeed, the courts of Belize have "a long history of judicial self-denial" in arbitral matters,[14] and "it is 'only with extreme hesitation' that the court will interfere with the process of arbitration" (para. 38).

When discussing when an injunction might be proper, the CCJ invoked the test enunciated by the High Court of England and Wales in *Elektrim SA v. Vivendi Universal S.A.* (para. 39).[15] Thus,

> [a] party is ... at liberty to challenge the validity of the arbitration contract or the agreement of which the arbitration contract is an integral and non-severable part. But once the validity of the arbitration bargain has been established the court will only grant an injunction to restrain the arbitration if it is positively shown that the arbitration proceedings would be oppressive, vexatious, inequitable, or an abuse of process. The burden is on the party seeking the injunction and he must discharge that burden to a higher level than that required to restrain foreign proceedings which do not involve a contract to litigate in the foreign court (para. 41).

Regardless of whether the court is applying section 106A(8) or the common law, the standard is quite high, since "the jurisdiction to grant an anti-arbitration injunction must be exercised with caution" (para. 40; see also *ibid.*, para. 32). Indeed,

13 *See British Caribbean Bank*, para. 31 (discussing *Zuniga v. Attorney General of Belize*).

14 *Attorney General of Belize v. Carlisle Holdings Ltd (Belize)*, Action No. 15 of 2005, 18 February 2005, Supreme Court of Belize, (2008) XXXIII *Y. B. Com. Arb.* 360, 363 para. 3.

15 *See also Elektrim SA v. Vivendi Universal SA* [2007] EWHC 571 (Comm.).

> the court must re-double the caution it normally exercises in restraining foreign proceedings because of the importance of recognizing and enforcing the agreement of parties to the mechanism for dispute resolution and the accepted principle of international law that the arbitral tribunal should not be subject to the control of the domestic courts before it makes an award (para. 41).

The CCJ also identified a number of other salient features. For example, "there is no presumption that the pursuit of multiple proceedings is vexatious or oppressive or an abuse of process in itself, nor is there vexation or oppression if there is an advantage to the party seeking the arbitral proceeding" (para. 40). Furthermore, "[t]he equitable basis of the jurisdiction makes it a remedy based on the wrongful conduct of the person to be restrained" (para. 41).

The extraordinary nature of an anti-arbitration injunction will likely make the mechanism slightly more palatable to those persons who find such measures troubling as a matter of law or practice. However, the methodology employed by the CCJ does create some potential problems, as described in the next subsection.

Contract Analogies

When describing the standards to be used in cases involving anti-arbitration injunctions, the CCJ refers to "arbitration contracts" on several occasions (paras. 39–41, 47). Given that the arbitral proceedings in the current dispute arise out of a treaty, these statements might be assumed to refer exclusively to the test enunciated in *Elektrim S.A. v. Vivendi Universal S.A.*, which involved private, contract-based arbitral proceedings.[16] However, other parts of the decision suggest that the CCJ considers international investment arbitration to be akin to contract-based arbitration. For example, the CCJ states that

> [t]he constitution of the agreement to arbitrate from the terms of the investment treaty is not unlike making a contract from an advertisement containing certain terms to get a reward. Such an advertisement constitutes a binding unilateral offer that can be accepted by anyone who performs its terms: *Carlill v Carbolic Smoke Ball Co* (para. 20).[17]

16 *See Elektrim S.A. v. Vivendi Universal S.A.* [2007] EWHC 571 (Comm.); *see also British Caribbean Bank*, paras. 39–40.

17 Citing *Carlill v. Carbolic Smoke Ball Co* [1891-94] All ER Rep 127.

In this case, "BCB, the investor, ... makes a free standing offer which is accepted on submission of the dispute to arbitration and becomes a binding contract between the investor and the State party" (para. 21). As a result, "[t]he entire scheme of the BIT is contractual" (para. 47).

This approach is troubling for two reasons. First, it characterizes the investor as the offeror and puts the state in the place of the offeree, thereby reversing the conventional view of investment arbitration as involving a standing offer of arbitration from the state to the investor. Although the CCJ's view of the relationship between the parties does not create any difficulties in the current dispute, problems could arise in other contexts, including with respect to the timing of the perfection of the arbitration agreement and the form of the acceptance of the offer to arbitrate.[18]

Second, the CCJ formulation ignores key analytical distinctions between treaty-based and contract-based arbitration and brings investment arbitration out of the realm of public international law and into the realm of private law. While this move does not lead to any difficulties in the current dispute, it could be problematic in other settings.[19]

There is, of course, little or nothing that can be done about the language reflected in the current decision. However, parties and practitioners may want to be aware of this issue if and when they rely on this case in the future.

Understanding of Investment Arbitration

Although the CCJ's use of contractual language may create some difficulties going forward, the decision nevertheless demonstrates a relatively nuanced understanding of investment arbitration. For example, the CCJ recognizes that "[t]he bilateral investment treaty was developed to remedy the vulnerability of the foreign investor" and that "the success of the treaty regime depends upon the acceptance and fulfilment by the host state of the legal obligations imposed by the treaty" (para. 15). Furthermore, the CCJ notes that these obligations

18 Under standard analyses, the investor is the one to choose the time and manner of perfecting the arbitration agreement between the parties. Under the CCJ approach, the state would be in control of both those elements.

19 See S.I. Strong, 'Discovery Under 28 U.S.C. §1782: Distinguishing International Commercial Arbitration and International Investment Arbitration' (2013) 1 *Stan. J. Complex Litigation* 295, 322–372 (noting that the propriety of U.S. discovery requests in support of a "foreign or international tribunal" might depend on the type of arbitration at issue).

inure even if the host state has not enacted any statutes incorporating the treaty into domestic law.[20]

The CCJ also recognizes the broad powers of the arbitral tribunal. For example, the decision notes that arbitrators have the ability to determine their own jurisdiction under the doctrine of *Kompetenz-Kompetenz* and to decide whether to stay arbitral proceedings pending the outcome of any related domestic actions (para. 23). The respect shown by the CCJ to investment arbitration is very encouraging, since it suggests that the court will adopt a pro-arbitration stance in any future matters.

* * *

Like most judicial decisions, *British Caribbean Bank Ltd. v. The Government of Belize* is something of a mixed bag, with some elements that are good, some that are bad, and some that fall somewhere in between. Given that Belize is not currently a key arbitral jurisdiction and the CCJ does not yet have the same appellate scope as the Privy Council, any unfortunate features of the decision are likely to fade with time.

However, if there is one broad lesson to be learned from *British Caribbean Bank*, it is that common law courts are unlikely to deny themselves the ability to enjoin international arbitration. A court may impose a number of restrictions on itself so as to limit the availability of anti-arbitration injunctions to truly extreme situations, but it is highly unlikely that any court will ever rule that it does not have jurisdiction to order this type of relief in appropriate circumstances. While this approach is somewhat unpredictable and potentially open to abuse, the decision in *British Caribbean Bank* reinforces the extraordinary nature of anti-arbitration injunctions. Given that such mechanisms are likely to be a permanent feature on the contemporary litigation landscape, this outcome is perhaps the best that opponents to anti-arbitration injunctions can hope for.

20 See *British Caribbean Bank*, para. 19 (stating that "the notion that an unincorporated treaty is incapable of conferring any rights on private entities in the municipal system has been rejected. At a minimum they could yield legitimate expectations cognizable under domestic law").