IN THE SUPREME COURT OF BELIZE, A.D. 2008

CLAIM NO. 228 OF 2008

	THE ATTORNEY GENERAL	**Respondent/Claimant**
BETWEEN	**AND**	
	THE BELIZE BANK LIMITED	**Applicant/Defendant**
	SAID MUSA	**Interested Party**
	AMALIA MAI	**Interested Party**

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. Nigel Plemming QC with Mr. E. Andrew Marshalleck for the applicant/defendant.
Mrs. Tanya Longsworth Herwanger with Mr. Michael Young SC for the respondent/claimant.

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DECISION

This is perhaps one of the most troubling cases it has fallen my lot to decide. I say so because, one cannot be unmindful or unaware of the public controversy that has for the past several months been swirling around the payment of monies to the defendant, the Belize Bank Ltd., which is the applicant before me in the present proceedings. The instant application before me to which this decision relates has to do with an **ex parte** injunction I had ordered at the behest of the claimant, the Government of Belize, which is the respondent to these proceedings, on 2nd May 2008. By that Order I had injuncted the applicant, the Belize Bank

Ltd., from taking, commencing or continuing with any proceedings outside of Belize against the respondent, Government of Belize, relating to the issues in the substantive case. By the present application, the Belize Bank seeks to have me discharge my order of 2nd May 2008, and to stay the proceedings on the substantive claim in this case.

2. A part of the troubling aspect I alluded to stems from the fact that consequent on my Order of 2 May 2008 in favour of the Government of Belize, the Belize Bank subsequently obtained on 6th May 2008, an injunctive Order from the English Commercial Court in London, against the Government of Belize from continuing the present action before me or commencing any action relating to the substance of the Government of Belize's claim in this main case: so in effect there are two injunctions in respect of the case, one from this court restraining the applicant and another from the English Commercial Court restraining the respondent, the Government of Belize. There are other troublesome aspects as well, to which I shall refer later.

3. For the purposes of this decision a brief background would, I believe, be in order.

4. The origins of the transactions that have culminated in a battle royal between the Belize Bank and the Government of Belize (GOB) can be traced to the Universal Health Services Ltd. (UHS), a private company incorporated in 1997 for the purpose of developing and providing health care services. UHS later secured loans from the Belize Bank for its operations. Over a period of some four years, between 2001 and 2004, Belize Bank advanced to UHS, sums in total of some $29,000,000.00 (Twenty-Nine Million Belize Dollars) under a series of loans. The Government of Belize (then under the PUP administration of the Hon. Said Musa as Prime Minister) entered the scene as guarantor of Belize Bank's

loans to UHS in December 2004. UHS was however unable to repay its loans to Belize Bank. Eventually, the Government of Belize entered into a Settlement Deed and Loan Note on 23rd March 2007.

5. The terms of the March 2007 Settlement Deed and Loan Note were, briefly, that in return for the Government of Belize executing a loan note in Belize Bank's favour for the sum of $33,545,820.00 (Thirty-Three Million, Five Hundred and Forty-Five Thousand, Eight Hundred and Twenty Belize dollars), Belize Bank agreed to settle all claims owing to it under the 2004 Guarantee, to discharge the 2004 Guarantee and to release the Government of Belize from all future debts and liabilities under the 2004 Guarantee. Belize Bank also agreed to waive two months' interest that had accrued under the UHS debts.

6. However, clause 9 of the 2007 Settlement Deed contained the following provisions:

> *"9. GOVERNING LAW AND ARBITRATION*
>
> *9.1 This deed is governed by and shall be construed in accordance with Belize law.*
>
> *9.2 Any dispute arising out of or in connection with this agreement 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).*
>
> *9.3 The arbitral proceedings shall be conducted in the English language.*

9.4 The seat or legal place of the arbitral proceedings shall be London, England.

9.5 The Government irrevocably and unconditionally:

(a) agrees that if the Bank brings proceedings against it or its assets in relation to this agreement no immunity from such legal proceedings (which will be deemed to include without limitation, suit, attachment prior to judgment, other attachment, the obtaining of judgment, execution or other enforcement) will be claimed by or on behalf of itself or with respect to its assets;

(b) waives any such right of immunity which it or its assets now has or may in the future acquire; and

(c) consents generally in respect of any such proceedings to the giving of any relief or the issue of any process in connection with such proceedings including, without limitation, the making, enforcement or execution against any property whatsoever (irrespective of its use or intended use) of any award, order or judgment which may be made or given in arbitration proceedings or related enforcement proceedings."

7. It is the application and effect of this clause that is at the heart of this instant application by the Belize Bank before me. By this application, the Belize Bank is asking this court to discharge the Order I made on 2nd May 2008 by which I issued an interim restraint on the Belize Bank from instituting and or continuing proceedings in the United Kingdom courts or elsewhere that relate to the substantive claim in this case and that it was not to serve any proceedings from such courts without an order of this court.

8. However, the Government of Belize defaulted on payment under the 2007 Settlement Deed and Loan Note after its conclusion, as a result of which

the Belize Bank and Government of Belize proceeded to arbitration later that year. This resulted in a Partial Award in October 2007.

9. In so far as the original guarantee by the Government of Belize of UHS' debt to Belize Bank is concerned, a group of Belizean citizens under the banner of the Association of Concerned Belizeans (ACB), launched proceedings in the Supreme Court in Claim No. 218 of 2007, seeking several declarations from the Court that the Government of Belize's guarantee of that debt was unlawful and invalid because it was for debts owed by a **private** entity. This, no doubt, was the spur that urged the applicant to commence arbitration proceedings against the Government of Belize in June 2007. This resulted in the Partial Award I referred to in para. 8. However, in the course of the proceedings by ACB before the Supreme Court against the Government of Belize, the then Solicitor General of Belize, gave an undertaking that no payment would be made under the 2007 Settlement Agreement with the applicant (in effect the guarantee of UHS' debt) until the trial and determination of the proceedings brought by the Association of Concerned Belizeans against the Government of Belize. This case is still pending a determination.

10. In the meantime, the Government of Belize was able to secure financial assistance from the Government of the Bolivarian Republic of Venezuela in December 2007. The assistance was provided under formal agreements signed between the Venezuelan Bank of Economic and Social Development (BANDES) as the Administrator of the Venezuelan Autonomous Fund and the Government of Belize dated 28 December 2007.

11. Under the agreements, the sum of Twenty Million United States Dollars (US $20,000,000.00) was made available to the Government of Belize as follows:

a) the sum of US $1,000,000.00 for the reconstruction of an athletics track in Belize City;

b) the sum of US $19,000,000.00 for the following purposes:

(i) the sum of US $10,000,000.00 for a programme for the construction of houses for low income persons;

(ii) the sum of US $9,000,000.00 for a programme for the repair of houses of low income persons.

12. The Government of Belize assumed several obligations under these financial assistance Agreements, including in particular, in Clause 6.6 to ensure that the funds (provided under the Agreements) are utilized for the fulfillment of the objective of the Agreement itself. That is, for the construction and repair of houses for low income persons.

13. However, as a sequel to the Partial Award in the arbitration proceedings between the applicant and the respondent in October 2007, a fresh settlement was arrived at between them in January 2008. This has been variously described in these proceedings as the 2008 Settlement Agreement. This Agreement, it is claimed by the applicant, was intended to settle the arbitration proceedings between it and the Government of Belize in 2007. It is said to have been largely concluded orally. The Agreement itself was not put in evidence. But it has not been denied.

14. However, between the 23rd – 28th December 2007 events happened that were to subsequently culminate in the substantive claim in this action. By letter dated 23rd December 2007, the then Prime Minister of Belize

requested BANDES to transfer US $10,000,000.00 of the US $20,000,000.00 payable under the formal Financial Assistance Agreements with Venezuela to be transferred to the applicant's bank account with the Bank of America in London. And by letter dated 28th December 2007, Ms. Amalia Mai, who was described as the Vice Minister of Foreign Affairs, repeated the instructions to BANDES and requested the latter to wire transfer the sum of US $10,000,000.00 out of the US $20,000,000.00, to the applicant's London account with the Bank of America. The said US $10,000,000.00 was transferred on 28th December 2007, to the applicant's said account.

15. On 7th February 2008, General Election was held in the country. It resulted in a change of administration. It is reasonable to infer that this change facilitated the discovery of the transfer of US $10,000,000.00 to the applicant.

16. On 3rd April 2008, the new administration wrote a formal demand to the applicant for the return of the US $10,000,000.00 by the 8th April.

17. On 10th April 2008, the Government of Belize under its new administration, filed the present claim against the applicant as defendant by which it seeks to have the applicant, as defendant, return the said US $10,000,000.00, plus interest. It is to be observed that both Mr. Musa and Ms. Mai have been joined as interested parties to the action by the claimant, the Government of Belize.

18. On the 2nd May 2008, prompted perhaps by intimation from solicitors for the applicant, Belize Bank in London of possible legal action in the United Kingdom, the Government of Belize made an urgent ex parte application to me in Chambers for an anti-suit injunction against the Belize Bank. I have already mentioned this at the beginning of this decision.

19. The applicant for its part, through various letters from its lawyers both here and in London, maintains the position that the money was paid to it in settlement of the Government of Belize's debt guarantee and that the demand for its return was a breach of the Agreement to arbitrate as contained in the Settlement Agreement with the Government of Belize dated 23 March 2007. I have set out at para. 6 of this decision the provisions of this Agreement relating to arbitration.

20. As a counter move as it were, the Belize Bank, the applicant in this matter now before me, obtained on 6th May 2008 an anti-suit against the Government of Belize from the English Commercial Court in London. I have now had the benefit of reading the Approval Judgment of Andrew Smith J. of the United Kingdom Commercial Court given on 6th May 2008 exhibited to the second affidavit of Ms. Angeline Marie Welsh of 13th May 2008 filed in these proceedings. It would appear that the Belize Bank first approached the United Kingdom Commercial Court for an anti-suit injunction on 30th April 2008. That is, two days before the Government of Belize's application to me on 2nd May. Smith J. explained in his judgment that he only granted his order against the Government of Belize on 6th May 2008 after waiting to hear from the Government of Belize.

21. Nothing however, in my view, turns on this. I mention it only to explain how two cross injunctions came to be issued: one in favour of the Government of Belize, issued by this Court against the Belize Bank, and the other against the Government of Belize, issued by the English High Court in favour of the Belize Bank against the Government of Belize.

22. This only serves to underscore my unease I mentioned earlier. This unease is further accentuated by an appreciation of the circumstances surrounding the funds which the Government of Belize, the respondent in the present application, but the claimant in the substantive action,

received from the State of Venezuela. I have mentioned this in paras. 9, 10 and 11 above in this decision. Half of these funds in the sum of US $10 million, by some convoluted process, to put it no higher than that, was transferred to the Belize Bank's London account, on the instructions of high officials of the then Government of Belize.

23. I have at para. 13 above, set out how this transfer was effected. This is the pit and substance of the Government's claim against the Belize Bank in the substantive action in this case.

24. It was therefore apparent throughout the hearing of this application before me that in truth and in fact, it was all about the money. This much is common ground between the parties.

Rival contentions of the Parties

25. For the Government of Belize, it is claimed that the US $10 million was paid unlawfully to the Belize Bank and therefore it should return it plus interest.

26. For the Belize Bank, it is claimed that the payment was in fulfillment of the 2007 Agreement between it and the Government of Belize, which I referred to in paras. 4 and 5 above. Therefore, it is contended on behalf of the Bank, by Mr. Nigel Plemming QC that for the Government of Belize to demand the return of this money by the Belize Bank had given rise to a dispute. This dispute, Mr. Plemming QC argued, falls therefore to be adjudicated by arbitration in London, as both the Government of Belize and the Bank had agreed in Clause 9 of their 2007 Settlement Deed and Loan Note of 23 March that year. He further argued and submitted that there is a dispute as to whether the payment of US $10 million should have been made the subject matter of the substantive claim in this action,

and that to sue the Bank in the Courts of Belize was a breach of the contractual obligation to arbitrate as provided for in the Settlement Deed.

27. Mrs. Tanya Herwanger the Solicitor General, however, on behalf of the Government of Belize, argued that the claim is not arbitrable as it is about how the Venezuelan grant should have been applied pursuant to the Constitution of Belize. She further argued that the case is not a dispute in respect of any matter between the parties that had been agreed to be referred to arbitration.

28. Mr. Michael Young SC, also on behalf of the Government of Belize, argued and submitted that the issues raised in the substantive claim are not arbitrable because the funds in the hands of the Belize Bank were meant for the people of Belize but were never received, but were rather diverted. He urged that having regard to what occurred, and the capacity of government to deal with public funds, and what he termed the "egregious violations" of the Belize Constitution, the case would not be a subject for arbitration.

29. From the facts of this case and given the parties involved, it cannot be doubted that the Courts of Belize should be the forum convenience for the **litigation** of the claim the Government of Belize has brought against the Belize Bank. That this should be so, stems in my view, from the undeniable fact that all the parties are closely and intimately connected to the jurisdiction of Belize: the Attorney General as claimant is the nominally designated party by section 42(5) of the Belize Constitution in civil legal proceedings for or against the State; the defendant, Belize Bank (now the applicant in the instant proceedings to which this decision relates), is a Belizean corporation with its headquarters here in Belize and doing all its banking business in this country; and the interested parties named in the action are Belizeans domiciled here in Belize; and the substantive claim

itself arises out of monies given to the Government of Belize for the execution of projects in Belize by a friendly foreign government. These are compelling considerations to warrant the conclusion that the Courts of Belize should, **ordinarily**, have jurisdiction to hear and determine the substantive claim in this action. A clearer case of forum convenience of the Court of Belize could hardly be imagined. I say ordinarily, because in its application the Belize Bank is asking this court to stay the substantive action and discharge the interim injunction granted against it on 2nd May 2008, because it claims, the action by the Government of Belize is a breach of the 2007 Settlement Deed under which it was agreed that any dispute arising under it should be settled by arbitration by the London Court of International Arbitration..

30. This Settlement Deed was put in evidence and its existence has not been denied, although there was said to be another Settlement Deed of 2008 which the respondent claims exhausted or superceded the 2007 Deed. This was not however put in evidence as it was said to be made orally and evidenced in part by a letter from the Attorney General (more on this later).

Principal Issue for determination

31. The principal issue for determination in this application therefore is whether this Court should stay the action brought by the Attorney General against the Belize Bank for the return of monies it received. The subsidiary issue of discharging the interim injunction against the Belize Bank would therefore depend on the answer to the principal question.

The basis of the application

32. The applicant, Belize Bank, has based it case on section 26 of the Arbitration Act, Chapter 125 of the Laws of Belize, Rev. Ed. 2003. This provides as follows:

> *"26.-(1) If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.*
>
> *(2) Subsection (1) of this section does not apply in relation to a domestic arbitration agreement.*
>
> *(3) In this section "domestic arbitration agreement" means an arbitration agreement which does not provide, expressly or by implication, for arbitration in a state other than Belize and to which neither -*
>
> *(a) an individual who is a national of or habitually resident in, any State other than Belize; nor*
>
> *(b) a body corporate which is incorporated in, or whose central management and control is exercised in, any State other than Belize,*
>
> *is a party at the time the proceedings are commenced."* (Emphasis added).

33. It is manifest therefore, that the arbitration provision in Clause 9 of the parties' agreement is not for a domestic arbitration but a foreign arbitration. Section 5 of the Arbitration Act provides for the stay of proceedings by the Court in the case of a domestic arbitration. Clause 9.4 of the 2007 Arbitration Agreement expressly provides that the seat or legal place of the arbitral proceedings shall be London, England. That is to say for Belize, a foreign arbitration.

34. It is therefore in my view clear that section 26 of the Act grants jurisdiction to entertain the instant application. The terms of this section are mandatory. But for it to operate, the Court must be satisfied that the arbitration agreement in favour of which the stay must be granted is not **null and void**, **inoperative** or **incapable of being performed** or **that there is in fact a dispute between the parties with regard to the matter agreed to be referred**.

35. Section 26 of the Arbitration Act has its provenance in Article 2.3 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958. This Article provides as follows:

> *"The Courts of a Contracting State shall, when seized of an action in respect of which the parties have made an agreement within the meaning of this Article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."*

This Article is annexed as part of the Fourth Schedule of the Arbitration Act.

Lord Mustill in **Channel Tunnel Group Ltd and Another v Balfour Beatty Construction and Others (1993) A.C. 354** at pp. 353 to 355, gave a helpful sketch of the history of the Article and section 1 of the English Arbitration Act 1975. This section is the same as section 26 of Belize's Arbitration Act.

36. I should however, point out that the difference, whether material or not, is not in issue here, is that whereas Article 2.3 of the New York Convention requires the Court to refer the parties to arbitration, section 26(1) of the Arbitration Act only empowers the Court to make an Order staying the proceedings.

37. Of course, the court has an inherent power to stay any action which it considers should not be allowed to continue on the grounds that the action is frivolous, vexatious, oppressive or an abuse of the process of the Court. Order 26.1(e) of the Supreme Court (Civil Procedure Rules) 2005 makes provisions for the Court to stay the whole or part of any proceedings generally or until a special date or event. I do not understand the application as being pressed on the Court on this ground. It is however, readily recognized that recourse to this procedure for purposes of arbitration is very rare – see **Commercial Arbitration** by Sir (as he then was) Michael Mustill and Steward Boyd, (Butterworths 1989) 2nd Ed. at pp. 461 – 462. In any event, it is hardly conceivable that the Government of Belize's case can be described as frivolous, vexatious, oppressive or an abuse of the process of the Court. It is fair to say the claim stems from an indignation of what the Government of Belize perceives as an unlawful diversion of public funds from a friendly country into the hands of the applicant Bank.

38. It is therefore to the mast of the statutory provision regarding a stay of proceedings brought in breach of an arbitration agreement that the

applicant has nailed its colours. In this regard the applicant has therefore invoked the aid of section 26 of the Arbitration Act. I have set out at para. 32 of this decision the provisions of this section.

39. It is to be noted that **if** the conditions or circumstances mentioned in sub-section (1) of section 26 are met, that is, the Court is satisfied that the arbitration agreement is **not null and void**, **inoperative** or incapable **of being performed** and **that there is a dispute between the parties with regards to the matter agreed to be referred**, **then the Court shall mandatorily or compulsorily order a stay of the proceedings brought by one or the other of the parties** – see **Associated Bulk Carriers Ltd v Koch Shipping Inc (The "Fuohsan Maru") (1978) 1 Lloyd's Rep. 24**. (This case was decided by the English Court of Appeal under section 1 of the 1975 English Arbitration Act which is **ipsissima verba** with section 26 of the Belize Arbitration Act.

Determination

40. In determining the application in this case, I must perforce have regard to the elements or circumstances stated in sub-section (1) of section 26. These may briefly be stated as follows:

i) Is there an arbitration agreement between the parties within the meaning and contemplation of section 26?

ii) If there is, is the arbitration agreement null and void or not?

iii) If not, is the arbitration agreement in any event inoperative or incapable of being performed? and

iv) Is there a dispute between the parties with regards to the matter agreed to be referred?

i) I*s there an Arbitration Agreement between the parties*?

41. It is the case of the applicant that there is in fact and in law an arbitration agreement between it and the respondent, the Government of Belize. In support of this it relies on Clause 9 of the Settlement Deed and Loan Note of March 2007, executed between it and the Government of Belize. I have reproduced the terms of this clause at para. 6 of this decision.

42. The Solicitor General on behalf of the respondent graciously conceded that it was common ground that in the 2007 agreement between the parties there was an arbitration agreement. But, she contended, that Clause 9 of that agreement did not extend to the funds from Venezuela, which are the subject of the substantive claim by the Government of Belize. She also argued that as there was in her own words "no paper trail" of the 2008 Agreement between the parties, it could not therefore be said to contain an arbitration agreement, and that in any event, she submitted, the 2007 arbitration agreement is not referable to the 2008 agreement and there was no connection between the two. She finally argued that if the parties had intended to have an arbitration agreement in the 2008 agreement, the care with which the arbitration agreement was structured in the 2007 agreement would have been repeated and provided for.

43. I have given careful consideration to these arguments and submissions of the Solicitor General on this issue. But I am unable to accept them for the reason that in law an arbitration agreement is distinct and **separable** from the substantive contract of which it may form a part. The arbitration agreement is not ordinarily impeached or rendered void if the substantive

contract is rendered discharged, frustrated, repudiated, rescinded or voided or rendered void (see **Jurisdiction and Arbitration Agreements and their Enforcement** by David Joseph QC - London Sweet and Maxwell, 2005 at para. 4.34 at p. 104).

44. It should be noted that the January 2008 Agreement between the parties was intended to bring the arbitration proceedings between the Belize Bank and the Government of Belize concerning the latter's guarantee of the UHS debt (see paras. 4 and 5 of this decision) to an end without an Award. This January 2008 Agreement which is said to be largely oral is evidenced by a letter from the then Attorney General of Belize dated 25th January 2008 to the London firm of solicitors of the Belize Bank. This letter stated:

> "*I write on behalf of the respondent in the [arbitration] proceedings the Government of Belize, to confirm that the respondent consents to termination of the above proceedings without an award being made by the Arbitral Tribunal and on the basis that there be no order as to costs.*"

It is my considered view that this 2008 agreement, such as it is, could not have discharged or made unavailing the 2007 arbitration agreement contained in Clause 9 of the parties' 2007 Settlement Deed and Loan Note of 23rd March of that year.

45. It is widely and increasingly accepted today that arbitration agreements have almost a life of their own, capable of subsisting apart from the substantive contract of which they may be a part, and that this is so even if that contract is void on the grounds of initial illegality: **Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co**

Ltd (1993) 1 Lloyd's Rep. 455. This principle of separability of arbitration agreements is, for example, referred to as the principle of "severability" in the U.S.A. where in **Prima Paint Corporation v Flood and Conklin (1967) 388 US 393**, the United States Supreme Court adopted it. It is called the principle of "autonomy" in France and Germany. It is now a principle widely adopted in international commercial arbitration. It was reaffirmed as recently as 17th October 2007 by the United Kingdom House of Lords in **Fiona Trust and Holding Corporation and Others v Privalov and Others (2007) UKHL 40 (2008) Lloyd's Law Rep. vol. 1 p. 254**, where both Lord Hoffman at paras. 7, 8, 9 and 10 and Lord Hope of Craighead at para. 32 endorsed and reiterated this principle of separability of an arbitration agreement, as Lord Hope stated: *"The validity, existence or effectiveness of (an) arbitration agreement is not dependent on the effectiveness, existence or validity of the underlying substantive contract unless the parties have agreed to this."*

In this case, I find that there is no evidence that the parties, that is, the Government of Belize and the Belize Bank, had agreed to terminate the 2007 arbitration agreement, this despite the challenge so valiantly mounted against it by the learned Solicitor General.

46. I therefore find and conclude that there is subsisting between the parties a valid arbitration agreement contained in Clause 9 of the March 23rd 2007 Settlement Deed and Loan Note.

ii. Is the Arbitration Agreement null and void?

47. This is one of the considerations or conditions section 26(1) of the Arbitration Act requires the Court to be satisfied about in considering an application for a stay of proceedings claimed to be brought in breach of an

arbitration agreement. The court is here concerned only with the arbitration agreement and not with whether the substantive contract itself is illegal, null or void. In my view, the irrefutable logic of this is that even if the latter were the case, the parties would have provided in their arbitration agreement **qua** arbitration agreement, the means and method of resolving the issue, unless they had expressly stated otherwise. It is conceivable however, that illegality in the substantive contract may be such as to impeach and render unenforceable, null and void, any arbitration agreement contained in the contract itself. For example, in an agreement between robbers as to how to share the spoils of their labour with a provision for the resolution of any differences between them to be settled by arbitration. The whole agreement would palpably be infected with illegality, including the arbitration agreement. None of the desperados could expect the court to even entertain an action on their agreement much less consider the enforceability of the arbitration agreement they might have agreed to – see **Soleimany v Soleimany (1999) Q.B. 785 (CA)** at p. 797.

48. I did not understand either the learned Solicitor General or Mr. Young SC for the respondent Government of Belize to be saying that the arbitration agreement in Clause 9 was illegal or null and void. Rather, they tried to impeach the existence or applicability of the agreement. I have concluded above that the arbitration agreement does exist.

In any event, reading through Clause 9, on the arbitration agreement in issue here, I find there is nothing illegal, null or void in it. I therefore conclude that the arbitration agreement in this case is not null and void.

iii. Is the Arbitration Agreement inoperative or incapable of being performed?

49. This is one of the circumstances that would preclude the Court from granting a compulsory stay of proceedings brought in an alleged breach of an arbitration agreement.

In so far as the issue of the arbitration agreement being rendered inoperative is concerned this has to do with its discharge: it can come to an end by repudiation or frustration: see **John Downing v Al Tameer Establishment (2002) EWCA Civ. 721**.

50. On the evidence in this case, there were attempts in the exchange of letters between Young's Law Firm, acting for the Government of Belize and the local attorneys and London solicitors for the Belize Bank, Barrow and Co. and Allen Overy, as to question the applicability or inapplicability of the arbitration agreement to the respondent's claim from the Bank of US $10 million. But none of this in my view amounted to a repudiation of the arbitration agreement such as to render it discharged or inoperative. Indeed, I find the participation of the then Government of Belize in the arbitration proceedings in London in 2007 in which a Partial Award was rendered, to be a positive disprove of any claim of the discharge by repudiation of the arbitration agreement. Indeed, I find the letter of the then Attorney General of Belize of 25th January 2008, to the London solicitors of the Bank in respect of the arbitral proceedings between them in 2007 and the Partial Award, to be confirmatory that the arbitration agreement was not repudiated and therefore inoperative.

I therefore conclude that the arbitration agreement is still operative.

51. Nothing was submitted or urged on me during the hearing of this application and I find nothing in the affidavits filed on behalf of the

respondent Government of Belize to infer or warrant a conclusion by me that the arbitration agreement in issue here is incapable of being performed.

52. The only plank in the Government of Belize's platform in this respect is that the substantive claim in this action cannot or should not be the subject of arbitration and that the proper forum to litigate this claim on considerations of forum convenience should be the Courts of Belize. This is not, I must say, an unattractive argument, but I find that it is however no answer to an application for a stay of proceedings in the face of a subsisting and operative arbitration agreement, as is present in this case.

53. I therefore conclude that the arbitration agreement here is not inoperative or incapable of being performed.

iv) <u>Is there a dispute between the parties with regards to the matter agreed to be referred</u>?

54. This question raises in all its glory and complexity the issue of the construction and **<u>scope</u>** of the arbitration agreement involved in this case. The Government of Belize, as respondent, has pitched its tent on the principal ground that, in any event, its claim in the substantive action in this case is outside the scope of any arbitration agreement there might be. Simply put, if I may so do, the respondent, Government of Belize, is saying that its substantive claim is both proprietary and constitutional. That is to say, it has sued for the return of monies transferred unlawfully and in breach of certain provisions of the Belize Constitution to the applicant, Belize Bank. In eloquent and passionate terms, both the Solicitor General and Mr. Young SC argued and submitted that the Government of Belize's claim in the main action does not fall within Clause 9 and that the issues raised in the claim are not arbitrable.

55. Mr. Plemming QC for the applicant Belize Bank on the other hand, forcefully argued that the Government of Belize's claim is one for money and that this money was paid over to the Bank for an admitted debt, and that if the money should not have been paid then, he submitted, arbitration, as provided for in Clause 9 of the 2007 Agreement between the parties, should be the medium to ventilate and pursue that claim. He submitted that the arbitration agreement is the answer in any dispute about the money and that as the Government of Belize's claim is one for money, the issues are eminently arbitrable. He further submitted that the issues of constitutional and public law the Government of Belize may want to raise are not beyond the ken and expertise of arbitrations, and that they would do the best to interpret any constitutional provisions that might arise as they would with other statutes.

56. In order to arrive at a conclusion on these diametrically opposed positions of the parties, it is necessary to consider the scope of the arbitration agreement between them. I had set out the provisions on this at para. 6 of this decision. The question for determination I think, is: do the issues raised in this action fall within the ambit of the arbitration agreement between them?

57. Admittedly, the characterization or description of the disputes that might arise between them that shall be referred to arbitration in London under LICA Rules, is in very wide terms. Clause 9.2 especially provided in terms:

> *"9.2 Any dispute arising out of or in connection with this agreement 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)."

58. The applicant has however to satisfy this court that the legal proceedings instituted by the Government of Belize in this case, are in whole or in part in respect of a matter to be referred to arbitration and therefore a matter within the scope of the arbitration agreement. This is a matter of construction and ought to be resolved by arriving at the parties' presumed mutual intention using ordinary principles of construction: **Lobb Partnership Ltd v Aintree Racecourse Company Ltd (2000) 1 BLR 65**.

59. The arbitration agreement in this case is itself perplexing. It provides in Clause 9.1 that the Deed of Settlement and Loan Note shall be governed by and construed in accordance with Belize law; but it goes on to provide in Clause 9.4 that the seat or place of arbitration shall be in London, England. Therefore though Belize law is the proper law of the Deed, the curial law for the purposes of arbitral proceedings will be English law by reason of the fact of making London the seat or legal place of the arbitral proceedings.

60. I can say, I hope with some confidence, that in practice, because of history and legal evolution and development in Belize, there is much more in common between Belize law and English law. Such differences as do exist are largely statutory. But Belize shares most of the English legal philosophy and ethos and even practice. In the field of arbitration, for example, the statutory provisions in Belize have much in common with those in England, at least up until 1975. I have at para. 39 of this decision commented on the mirror-image of section 26 of the Belize Arbitration Act and section 1 of the English Arbitration Act 1975. This, of course, is not to say that the legislation of the two countries on arbitration are always the

same. However, in the area of an application for compulsory stay of court proceedings brought in alleged breach of an arbitration agreement, the statutory regime of Belize law and English law are virtually similar. Whilst the law in Belize is contained in section 26 of the Arbitration Act, the English regime is now governed by section 9 of the English Arbitration Act 1996. A close reading of the two provisions would readily disclose their near similarity.

61. Mr. Joseph QC in his work **Jurisdiction and Arbitration Agreement and their Enforcement** at paras. 11.21 to 11.226 at pp. 289 – 295 discusses the approach of the English Courts in determining the scope of arbitration clauses by reference to decided cases in the light of section 9 of the English Arbitration: cases such as **Ahmad Al Naimi v Islamic Press Agency Incorporated (2000) 1 Lloyd's Rep. 150 (CA)**; **El Nasharty v J. Sainsbury Plc (2004) 1 All E.R. (Comm.) 728** are all helpful.

62. However, in my view, given the wide frame of reference in the arbitration agreement, under consideration, I am satisfied that it comprehends the dispute such as now exists between the Government of Belize and the Belize Bank. In my view, it is reasonable and logical that given that the dispute is about the payment of the US $10 million to the Bank, the opening words of Clause 9.2 of the arbitration agreement *"Any dispute arising out of or in connection with this agreement …"* to construe them as sufficiently wide to bring this dispute within the scope of the arbitration agreement.

63. I am fortified in this conclusion by the statement of Lord Hoffman in **The Fiona Trust supra** ibid at para. 8:

> *"A proper approach to construction therefore requires the court to give effect so far as the language used by the parties will permit, to the*

commercial purpose of the arbitration clause. But the same policy of giving effect to the commercial purpose also drives the approach of the courts … to the second question … namely whether there is any conceptual reason why parties who have agreed to submit the question of the validity of the contract to arbitration should not be allowed to do so."

64. I am therefore of the considered view that the substantive claim raising as it does the validity or legality of the payment of the US $10 million to the Belize Bank and seeking the return of that money plus interest, raises a question that is within the reference in Clause 9.2 of the arbitration agreement in this case.

65. In the light of my findings and conclusions on this application therefore, even in the face of the unease I have expressed, I am ineluctably compelled to say that I cannot with the best will in the world conclude that there is no dispute in respect of the matter agreed to be referred to arbitration. There is, I find, therefore, a valid and existing arbitration agreement whose scope includes the dispute that is thrown up by the substantive claim of the Government of Belize in this matter.

Conclusion

66. Pursuant to section 26 of the Arbitration Act, I must therefore order a stay of the claim in this action. I note that there is no claim made against the two persons named as interested parties.

67. In the light of this, it should inevitably follow that I must as well discharge the injunction I had ordered on 2nd May 2008 restraining the Belize Bank from pursuing any proceedings outside of Belize in relation to the

Government of Belize's claim in this matter. Therefore, the matter of the cross injunctions should no longer exist. I must make it clear however, that the injunction issue by Smith J. on 6th May 2008 in the High Court (Commercial Division) of England has as its basis the fact that the Government of Belize had in addition to agreeing to arbitration in London under the Rules of LICA, had also expressly agreed to denominate London, England as the seat of arbitration thereby making English Courts the supervisory courts to ensure that the arbitration process agreed to by the parties would if necessary be carried through and not thwarted. I note that it was with some diffidence Smith J. made his Order. I am confident that with the outcome of this instant application in this matter, that order will now no longer be necessary.

A. O. CONTEH
Chief Justice

DATED: 4th July 2008.