

CLIENT UPDATE

CARIBBEAN COURT OF JUSTICE ALLOWS APPEAL WITH FAR-REACHING RAMIFICATIONS FOR ANTI-ARBITRATION INJUNCTIONS

LONDON

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On June 25, 2013, the Caribbean Court of Justice (“CCJ”) handed down its decision in a critical appeal, overturning an injunction obtained by the Government of Belize against the British Caribbean Bank (“BCB”) in 2010, in breach of BCB’s right to international arbitration under the UK-Belize Bilateral Investment Treaty (“BIT”). Debevoise & Plimpton’s chair of European and Asian litigation, Lord Goldsmith QC, and a team from Debevoise’s London office represented BCB in the CCJ during the appeal.

The appeal arose from a long running battle between BCB and the Government of Belize over the nationalisation of BCB’s assets in the telecommunications industry in 2009. In early 2010, BCB initiated UNCITRAL arbitration against Belize under the BIT to seek compensation for the nationalisation. However, in response, the Government passed legislation empowering the Belize courts to impose injunctions against international arbitrations anywhere in the world, and to impose significant fines on parties (including arbitrators and lawyers) who failed to observe the terms of anti-arbitration injunctions.

The Government then obtained an injunction restraining BCB from continuing its BIT arbitration, on the basis that the issues should be litigated in the Belize courts, and as such the arbitration was vexatious and oppressive. Although BCB was initially successful in challenging the constitutionality of the nationalisation in the Belize

courts, the Government immediately re-nationalised BCB's assets under new legislation in 2011, with a specific constitutional amendment to stop the courts from enquiring into the constitutionality of the legislation.

Although the Court of Appeal upheld the Government's injunction, in December 2012 Lord Goldsmith QC successfully obtained leave from the CCJ for BCB to bring an appeal before it (the CCJ has replaced the Privy Council as the final appellate court in the Caribbean region for certain countries, including Belize). Lord Goldsmith QC argued the appeal before the CCJ in February of this year.

In its 25 June decision, the CCJ held that there were three key issues in the case:

- Whether the BIT created an unqualified or indefeasible right to arbitration;
- Whether the Supreme Court of Belize should have limited its inquiry to whether there was a serious issue to be tried, or whether it should have proceeded to determine the merits of the application; and
- Whether there was sufficient basis for the injunction to have been granted.

On the first issue, the CCJ held that BCB did not have an unqualified right to arbitration, as such a right does not exist, but that the BIT was binding on the Government, and afforded BCB a right to arbitration under Article 8. Therefore, BCB was within its rights to commence arbitration. The CCJ rejected the Government's argument that BCB's right to arbitrate was conditional on the prior exhaustion of domestic court proceedings.

On the second issue, the CCJ held that the *American Cyanamid* test for the granting of an injunction is not to be applied where the facts are not in dispute or where there was no further material which could be presented to the trial court on the full hearing of the matter. Therefore, the Court should have determined the merits of the application.

On the third issue, the CCJ held that the Belize Supreme Court's ability to restrict arbitral proceedings under the Supreme Court of Judicature Act, on the grounds that they are vexatious or oppressive, is subject to a high threshold. The CCJ held that the Court must exercise restraint and only grant interlocutory injunctions against arbitral proceedings in the rarest circumstances, and in the most exceptional cases. There was nothing to support the Government's assertion that BCB's initiation of related domestic litigation rendered the arbitration oppressive or vexatious. The CCJ emphasised the distinctiveness of the international law remedies available under investment treaties as opposed to domestic constitutional or public law remedies.

In allowing the appeal, the CCJ discharged the interim injunction, leaving BCB free to pursue its arbitration against the Government of Belize.

The decision is the first decision of a very senior supranational common law court on the availability of anti-arbitration injunctions, and provides a clear and welcome statement that only in the rarest cases and in exceptional circumstances should a party be prevented from pursuing an international arbitration.

Investors, particularly investors in the Caribbean, will be pleased to see that their rights to submit disputes under bilateral investment treaties must be upheld by national courts. National courts will no longer be able to prevent investors from pursuing independent arbitral proceedings under bilateral investment treaties except in exceptional circumstances.

The appeal marked the first time a non-Caribbean firm has argued a case in front of the Caribbean Court of Justice, with Lord Goldsmith QC appearing for the BCB. The Debevoise team also included international counsel Jessica Gladstone and associates Nicola Leslie and Conway Blake.

Debevoise (with the same London team) continues to be involved in other related litigation, including the constitutional challenge to the nationalisation (judgment is awaited from the Court of Appeal in Belize), and the Government's appeal to the CCJ against the findings that its amendments to the contempt legislation and injunction powers were unconstitutional (a date for the hearing has not yet been set).

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Please do not hesitate to contact us with any questions.

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