ARBITRATION CASE DIGEST

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Table of Contents

Siong Beng Seng, Ching Hui Huat and Springfield Investments & Nominees Pte Ltd v Caldicott Worldwide Ltd - BVIHCMAP2021/0007

Case Title:	Siong Beng Seng, Ching Hui Huat and Springfield Investments & Nominees Pte Ltd v Caldicott Worldwide Ltd - BVIHCMAP2021/0007
Jurisdiction	Territory of the Virgin Islands (BVI)
Court	The Eastern Caribbean Supreme Court, Court of Appeal
Date of Decision	22nd March 2023
Attorneys for Appellants	Mr. Timothy Collingwood, KC with him Mr. Iain Tucker
Attorneys for the Respondent	Mr. Stephen Moverley Smith, KC with him Mr. James Noble, Mr. Dhanshuklal Vekaria and Ms. Amelia Tan
Keywords/Tags	Arbitration agreement, Stay of proceedings, Unfair prejudice, Collateral attack, Arbitrability, Shareholder disputes
Summary of Facts	• The dispute in issue began when Caldicott Worldwide Ltd, the largest minority shareholder in Hector Finance Group Limited, was denied dividend payments based on alleged outstanding liabilities. The majority shareholders (the appellants) formally backed this decision through the November Resolution (a resolution ratifying the exclusion. Caldicott sued, claiming unfair prejudice and seeking payment of the withheld dividends, invalidation of the resolution, and the appointment of a liquidator. The Company quickly applied to halt the court action against it, citing an arbitration clause in its Articles of Association that required all disputes with its members (shareholders) to be settled by arbitration.

Issues for Determination

The Court of Appeal considered whether the appeal amounted to a collateral attack on the earlier First Appeal concerning the stay of proceedings, whether the correct legal test was applied in deciding which claims should be stayed under the arbitration agreement, whether declarations concerning the November Resolution and the dividends should have been stayed, and whether the judge erred in permitting some claims to proceed on a provisional basis.

Parties' Arguments

Caldicott argued that the appeal was an abuse of process because it sought to re-litigate issues already addressed in the First Appeal. It maintained that the judge applied a coherent test by allowing only those claims that could proceed without requiring resolution of arbitrable differences with the Company. Caldicott submitted that the declarations sought were incidental to factual findings the court could properly make and that the wait and see approach was a legitimate case management decision.

The appellants argued that the appeal raised distinct issues of law not resolved in the First Appeal and therefore could not amount to an abuse of process. They submitted that the judge misapplied the law by requiring resolution of company disputes before granting a stay of shareholder claims. They contended that the declarations concerning the November Resolution and dividends were inherently disputes with the Company and fell within the arbitration clause. They further argued that the wait and see approach was contrary to the BVI Arbitration Act 2013 and created legal uncertainty.

Decision

The Court of Appeal allowed the appeal. It set aside the orders permitting Caldicott to pursue declarations that the November Resolution was unlawful and that dividends were due and stayed both heads of relief in favour of arbitration. Costs were ordered to be assessed in favour of the appellants.

Reasoning

- The Court held that the appeal was not a collateral attack on the First Appeal. Applying Koza Ltd v Koza Altin Isletmeleri and Johnson v Gore Wood and Co, it held that the First Appeal dealt with case management stays while the present appeal raised new questions about arbitrability that could not have been addressed earlier.
- The Court clarified the test under section 18(1) of the BVI Arbitration Act 2013, adopting the two-stage approach confirmed in Republic of Mozambique v Credit Suisse. First, the court must identify the matter in dispute, looking to substance rather than form and adopting a practical, common-sense approach. Second, it must determine whether that matter falls within the arbitration agreement through proper construction of the clause. The Court emphasised that the Act requires only the existence of a dispute, not a genuine dispute, endorsing Halki Shipping v Sopex Oils. Wallbank J had erred by applying the outdated requirement of a genuine dispute.
- The Court further found that the declarations concerning the November Resolution and dividends were fundamentally differences between Caldicott and the Company and therefore arbitrable. It also rejected the judge's wait and see approach as unlawful. Courts must identify all actual or reasonably foreseeable defences at the outset to determine arbitrability and cannot defer this question.

CASE RELEVANCE

This judgment provides authoritative clarification of the approach to stays under section 18(1) of the BVI Arbitration Act 2013. It establishes the two-stage test for arbitrability, confirms that courts need only be satisfied that a dispute exists, and makes clear that stay decisions cannot be deferred. It also clarifies that shareholder unfair prejudice claims may proceed only where they address shareholder conduct that does not overlap with arbitrable company disputes. This case strengthens the enforceability of arbitration agreements in shareholder disputes and reinforces the BVI's position as a jurisdiction supportive of arbitration in complex commercial cases.

Caldicott Worldwide Ltd v Siong Beng Seng, Ching Hui Huat and Springfield Investment & Nominees Pte Ltd - BVIHCMAP2023/0009

Case Title:	Caldicott Worldwide Ltd v Siong Beng Seng, Ching Hui Huat and Springfield Investment & Nominees Pte Ltd - BVIHCMAP2023/0009
Jurisdiction	Territory of the Virgin Islands (BVI)
Court	The Eastern Caribbean Supreme Court, Court of Appeal
Date of Decision	23rd October 2023
Attorneys for Appellants	Mr. Stephen Moverley Smith KC for the Appellant
Attorneys for the Respondent	Mr. Timothy Collingwood KC, with him Mr. Iain Tucker for the Respondents
Keywords/Tags	Commercial appeal – Section 184I of the Business Companies Act of the Territory of the Virgin Islands; Unfair prejudice; Arbitration agreement; Whether the learned judge erred in understanding the scope of the Second Appeal Judgment; Whether the learned judge erred in law in deciding that the issue in the proceedings of whether dividends were improperly withheld from Caldicott was required to be stayed
Summary of Facts	• Following the Court of Appeal's 2023 ruling, which stayed Caldicott's claims for declarations regarding the validity of the November Resolution and dividend entitlement, the Shareholder Defendants applied to vacate a scheduled trial on a preliminary issue: whether Caldicott held its Hector shares as a nominee for Mr. Chan Chew Keak. This nomineeship issue was central to their defence, alleging that even if dividends were prima facie payable, withholding them was justified due to Mr. Chan's alleged breaches of duty to Hector. Wallbank J granted the application, staying the nomineeship issue and the broader question of whether dividends were improperly withheld, reasoning that these matters 'touched and concerned' Hector's conduct and fell within the arbitration agreement between Caldicott and Hector. • Caldicott appealed, arguing Wallbank J misconstrued the scope of the Second Appeal Judgment and erroneously extended the arbitration agreement's reach the arbitration agreement and stayed the trial accordingly. Caldicott has appealed this stay

Issues for Determination

The issues determined in the appeal were twofold: first, whether Wallbank J correctly understood the scope of the Second Appeal Judgment, and second, whether the learned judge erred in law by deciding that the issue of whether dividends were improperly withheld from Caldicott must be stayed.

Parties Arguments

The Appellants argued that the Second Appeal Judgment was limited to addressing relief against Hector and did not impose any orders to stay heads of relief specifically against the Shareholder Defendants. They maintained that the unfair prejudice claim constituted a separate cause of action from the arbitration, a finding which had been upheld by the First Appeal Judgment, and that the "real complaint" was that the Shareholder Defendants caused Hector to withhold dividends. Because Caldicott has no direct arbitration agreement with the Shareholder Defendants, causes of action between them should proceed ahead of or in tandem with any arbitration.

Conversely, the Respondent argued that the Second Appeal Judgment dictated that the correct test for a stay is whether *any issue* before the Court falls within the scope of the arbitration agreement, regardless of whether claims between Caldicott and the Shareholder Defendants required a prior resolution of an issue involving Hector. The Respondents emphasized that the Second Appeal Judgment explicitly held that the issue concerning the improperly withheld dividends was caught by the arbitration agreement and was therefore stayed. Furthermore, they contended that the arbitration agreement in Hector's articles, which requires differences between Hector and its members relating to company affairs to be referred to arbitration, binds the Shareholder Defendants as parties to the agreement between the shareholders. They also noted that the Second Appeal focused specifically on which "matters" fell within the arbitration agreement, distinguishing it from the First Appeal, which was purely concerned with case management grounds.

Decision

The appeal was dismissed, meaning the Court upheld Wallbank J's decision to vacate the preliminary issue trial and to stay the specific issue in the proceedings of whether dividends were improperly withheld from Caldicott until a further order was made. As a result, the appellant was ordered to pay the respondents' costs of the appeal.

Reasoning

- The Court found that Wallbank J correctly understood the Second Appeal Judgment, even though he voiced concerns about its implications, and the Judgment was deemed clear and binding precedent on the lower court and the current Court of Appeal. Because Hector was no longer a party to the appeal, the relief granted in paragraph 143 of the Second Appeal Judgment plainly related to the heads of relief sought against the Shareholder Defendants. The argument that the Second Appeal Judgment did not stay heads of relief against the Shareholder Defendants was deemed unsustainable, particularly since the stayed heads of relief concerned the very basis for Caldicott's unfair prejudice claim. The Court supported Wallbank J's proper application of the test set out in the Second Appeal Judgment, which requires determining "whether any issue before the court falls within the scope of the arbitration agreement". Applying this test, Wallbank J correctly determined that the nomineeship issue, which was a fundamental aspect of the dispute relating to whether Hector was right to withhold dividends, fell within the arbitration agreement and thus required a stay.

- The Court acknowledged that the First Appeal Judgment drew a distinction between causes of action against a company and those between shareholders, which the Second Appeal Judgment appeared to blur. Nevertheless, the Court stressed that it was bound by the Second Appeal Judgment's conclusions, which implicitly found that Wallbank J had erred by not giving sufficient regard to the strong presumption in favour of arbitration established in *Fiona Trust*. Ultimately, the Court concluded that the heads of relief relating to the dividends were stayed by the Second Appeal Judgment, meaning general heads of relief (like buyout or compensation) could potentially remain, but they could not be pursued based on unfair prejudice stemming from the dividend withholding because that specific issue was caught by the arbitration agreement.

CASE RELEVANCE

The case reinforces that the courts must apply a simple test: whether any issue before the court falls within the scope of the arbitration agreement to determine if a stay is required. Although an arbitration agreement in the company's Articles is binding on the company and its members, it does not automatically cover disputes strictly between members; however, issues touching upon company affairs, such as dividend validity, may still be stayed even within shareholder claims if they constitute a difference under the arbitration clause. Ultimately, the construction of these clauses is guided by the principle that parties generally intend all disputes arising from their relationship to be decided by the same tribunal.

Flex Ocean Freight Ltd. v Century Insurance Agency Limited & Nagico Insurance Company Limited- BVIHCV 2023/0262

Case Title:	Flex Ocean Freight Ltd. v Century Insurance Agency Limited & Nagico Insurance Company Limited- BVIHCV 2023/0262
Jurisdiction	Territory of the Virgin Islands (BVI)
Court	The Eastern Caribbean Supreme Court, Territory of the Virgin Islands, High Court of Justice (Civil)
Date of Decision	15th May 2024
Attorneys for Claimant	Dancia Penn K.C., Astra Penn, and Khyra Powell
Attorneys for the Defendant	John Carrington K.C.
Keywords/Tags	
Summary of Facts	• Flex Ocean Freight Ltd. (the Company) owned a vessel insured under a Marine Hull Policy of Insurance, renewed by Nagico Insurance Company Limited (the 2nd Defendant) and valid until October 20, 2017. The Company's vessel was destroyed during a hurricane between September 17-20, 2017. In June 2018, the Company filed an insurance claim with the 2nd Defendant, which was rejected the same month. The Company subsequently filed a claim in court seeking damages for breach of contract due to the rejection of the insurance claim. • The Insurers (collectively, the 1st and 2nd Defendants) did not submit to the court's jurisdiction but instead filed an application for a declaration that the court should not exercise jurisdiction and should stay the proceedings pursuant to Section 18(1) of the Arbitration Act and Rule 9.8 of the Civil Procedure Rules 2023. The Insurers asserted that the parties were bound by an arbitration clause, General Change Endorsement #1, within the Policy, which mandated arbitration for "any and all controversies arising under this schedule".

Issues for Determination

The primary issues determined by the Court were whether a valid arbitration agreement existed within the meaning of Section 17 of the Arbitration Act, whether the specific dispute outlined in the Claim was solely arbitrable, and critically, whether the Agreement was invalid, inoperative, or incapable of being performed. The Claimant sought to prove the agreement's invalidity based on seven specific group abandonment or repudiation by the Insurers, the clause being contradictory or ambiguous, the clause being against public policy, the clause being unconstitutional, the application being contrary to the overriding objective of the Civil Procedure Rules, non-disclosure by the Insurers, and the potential for further delay and increased cost.

Parties Arguments

The Claimant advanced several arguments against granting the stay, including that the Insurers should be estopped from relying on the clause because their participation in proceedings before the Insurance Tribunal without invoking arbitration demonstrated abandonment or repudiation, causing prejudice to the Company. They further contended that the arbitration agreement was invalid because its wording was contradictory and ambiguous, specifically regarding the Pre-Dispute Arbitration Clause designation and the disclosures on the limitations of arbitration. The Claimant also argued that the agreement was against public policy and unconstitutional, asserting it sought to oust the Court's jurisdiction, stipulated arbitration was final and binding, allowed for awards without reasons, and limited the right to appeal. Finally, they argued the application contradicted the overriding objective of the Civil Procedure Rules 2023, and that the Insurers failed in their duty of full and frank disclosure by omitting details of prior settlement attempts.

The Respondent Insurers argued that the parties were bound by the mandatory arbitration clause in the Policy, which governed the refusal of the insurance claim. They asserted that waiving or abandoning the right to arbitrate required an express or implied agreement that was absent, and that the pro-arbitration policy of the Arbitration Act supported referral. The Insurers also maintained that any interpretative issues regarding the clause were for the arbitrator under the *kompetenz-kompetenz* principle, that statutory provisions permitting limited recourse against awards did not violate public policy, and that there was no duty of full and frank disclosure regarding settlement attempts in a fully *inter partes* hearing.

Decision

The Court ruled in favour of the Insurers, granting the application to stay the claim and referring the parties to arbitration. As a consequence of the outcome, costs were awarded to the Applicants (Insurers), subject to assessment if the parties could not agree on the amount.

Reasoning

- The Court first established that an arbitration agreement undoubtedly existed within the meaning of Section 17 of the Arbitration Act, citing the Company's own affidavit admission, and confirmed the dispute concerning the loss and quantum fell squarely within the clause's scope, making it solely arbitrable. The Court systematically rejected the Claimant's arguments for invalidity: it found no evidence of an agreement or common understanding between the parties to abandon the right to arbitrate, noting that the Insurers' cooperation in Tribunal proceedings did not constitute a waiver. It determined there was no contradiction or ambiguity in the clause, holding the "Pre-Dispute Arbitration Clause" term was logical and the disclosures about the arbitration process (e.g., limited discovery, limited appeal) were informative and consistent with the Arbitration Act. Citing the clear pro-arbitration policy of the Act, the Court ruled the agreement was not against public policy, confirming that the Act allows for parties to agree that no reasons are given for an award (Section 65) and that the phrase "final and binding" does not diminish the court's supervisory jurisdiction.

- Furthermore, the Court found nothing unconstitutional in the agreement, noting that arbitration tribunals are authorities established by law. The Court held that the overriding objective of the Civil Procedure Rules was inapplicable as the Court was exercising its mandatory statutory power under the Arbitration Act, and rejected the non-disclosure claim, stating that in a fully *inter partes* hearing, the Insurers had no duty of full and frank disclosure regarding settlement attempts. Although the Court noted the Claimant's submission regarding potential delay and increased costs was supported by evidence, it highlighted that this perception ran contrary to the Arbitration Act's objective of facilitating fair and speedy resolution.

CASE RELEVANCE

This case strongly affirms the pro-arbitration policy prevalent in the Eastern Caribbean Supreme Court, especially in the British Virgin Islands, by upholding the mandatory nature of Section 18(1) of the Arbitration Act. The ruling provides clear and comprehensive guidance on the high threshold required to prove that an arbitration agreement is invalid, inoperative, or incapable of performance, firmly rejecting various common arguments that seek to avoid arbitration, such as assertions of ambiguity, waiver by conduct, violations of public policy, or unconstitutionality. By balancing competing considerations, the Court emphasized that the Arbitration Act mandates stays in favour of arbitration where an agreement exists, reinforcing the increasing tendency of courts to uphold the parties' choice of alternative dispute resolution. Furthermore, it clarified that even the use of the term final and binding does not fully eliminate the court's supervisory jurisdiction over an award, although it prevents an appellate right.

Global Mining Development L.P. & Gerald Metals LLC v. China National Gold Group Hong Kong Limited & Soremi Investments Limited - BVIHCM2023/0070

Case Title:	Global Mining Development L.P. & Gerald Metals LLC v. China National Gold Group Hong Kong Limited & Soremi Investments Limited - BVIHCM2023/0070
Jurisdiction	Territory of the Virgin Islands
Court	Eastern Caribbean Supreme Court, High Court of Justice, Commercial Division
Date of Decision	15th April 2024 (ex tempore ruling, orally delivered)
Attorneys for Claimant	Mr. Ali Malek, KC, with Ms. Judy Fu, Mr. Peter Ferrer, and Mr. Andrew Thorp
Attorneys for the First Defendant	Mr. Vernon Flynn, KC, with Miss Rosalind Nicholson
Attorneys for the Second Defendant	Ms. Grainne Hussey on a watching brief
Keywords/Tags	Enforcement of foreign arbitral award; New York Convention; Not yet binding; Functus officio; Jurisdiction of arbitral tribunal; Specific performance; Public policy; BVI Constitution Section 25; Fair compensation; Deprivation of property; Full and frank disclosure; Stay of enforcement; Hong Kong seat of arbitration; Share transfer.
Summary of Facts	• The dispute involved Soremi Investments Ltd (SIL), a BVI company in Congo. In 2013, CNG acquired 65% of SIL from Global/Gerald, followed by a 2014 Shareholders' Agreement. • The Hong Kong arbitral tribunal issued the 1st FPA on 8 February 2023, ruling Global/Gerald owned 100% of SIL and ordering CNG to transfer its 65% stake for USD 86.32 million. CNG did not comply. Global/Gerald registered the award in the BVI in April 2023. • CNG's Hong Kong challenge was dismissed on 27 February 2024. A subsequent SP FPA ordering specific performance was issued on 21 November 2023, again not complied with by CNG, leading to registration in the BVI in December 2023. • CNG then applied in the BVI to set aside both enforcement orders and stay enforcement, which is the subject of this judgment.

Issues for Determination

The BVI Commercial Court was required to resolve several critical questions regarding the enforcement of two related arbitration awards against CNG. The first key issue was whether the initial award (the 1st FPA) was not yet binding on the parties, which would prevent its enforcement under the BVI Arbitration Act. Related to this, the Court had to determine if the arbitral Tribunal had lost its authority, or was *functus officio*, after issuing the 1st FPA, meaning it would have lacked the substantive jurisdiction needed to issue the subsequent Specific Performance Final Partial Award (SP FPA). The Court also considered whether enforcement of the SP FPA should be stayed due to pending set-aside proceedings initiated by CNG in Hong Kong. A major defence raised by CNG was that enforcing the awards would be contrary to the public policy of the Virgin Islands, specifically claiming it breached CNG's constitutional right to protection from property deprivation without fair compensation. Finally, the Court examined whether the Claimants, Global/Gerald, failed to discharge their duty of full and frank disclosure when they obtained the initial *ex parte* enforcement orders.

Parties' Arguments

The applicants countered CNG's motions, arguing they were made for "cynical reasons, to manufacture delay". They maintained that the 1st FPA was final and binding, supported by the HKIAC Rules (Article 35.2) and the Hong Kong Arbitration Ordinance (Section 73). Global/Gerald insisted the Tribunal retained jurisdiction to issue the SP FPA because it had explicitly reserved the power to make further specific performance orders. This reservation, they argued, aligns with Hong Kong law, which permits tribunals to supervise the implementation of specific performance awards. They stressed the strong public policy favoring the enforcement of arbitral awards and argued that the constitutional right to fair compensation applies only to statutory schemes, not to contractual disputes.

The Respondent asserted that the 1st FPA was not yet binding because Global/Gerald's subsequent request for the SP FPA proved the initial award required "variation, supplementation". CNG argued that the Tribunal was *functus officio* after the 1st FPA and thus lacked jurisdiction for the subsequent award. They sought a stay of enforcement pending a *de novo* review of the Tribunal's jurisdiction in the Hong Kong set-aside proceedings. CNG also contended that enforcement would breach BVI public policy and their constitutional rights, particularly because of the large disparity between the awarded price ($86.32 million) and Global/Gerald's own alleged valuation of the shares ($510 million). The Court noted that CNG's argument that the 1st FPA was not binding was "not an attractive starting point," given their counsel had previously stated the opposite to the arbitral tribunal.

Decision

The BVI Commercial Court dismissed both of CNG's applications. As a result, the orders registering and permitting enforcement of both the 1st FPA (April 2023 Order) and the SP FPA (December 2023 Order) remained in full effect. The Court specifically refused to grant a stay of enforcement for the SP FPA, and Global/Gerald was awarded their costs.

Reasoning

- The Court confirmed that the party resisting enforcement (CNG) bears the burden of proving an award is "not yet binding". The Court made a crucial distinction: an award remains binding if only subject to extraordinary recourse (like set-aside applications based on procedural irregularity), but it is "not yet binding" if subject to ordinary recourse (a genuine appeal on the merits). Since CNG's challenges were extraordinary recourse, the Court found the 1st FPA was clearly final and binding (para. 33). The Court rejected the *functus officio* argument, finding that the Tribunal had expressly reserved the power in the 1st FPA to issue "further or other directions" regarding the claims. This reservation is consistent with Hong Kong law (Section 70 of the Hong Kong Arbitration Ordinance), which gives tribunals court-like power to order specific performance, inherently including ongoing supervision of performance. The Court explained that the 1st FPA was an "award" (a finding of entitlement), and the SP FPA contained the "order" (the mechanics of enforcement), clarifying how jurisdiction was reserved (para. 178).

- Regarding public policy, the Court held that constitutional rights related to fair compensation apply only to statutory dispossession, not to rights arising from contractual arrangements. Enforcing the award upheld fundamental public policies: *pacta sunt servanda* (agreements must be kept), promotion of arbitration, and the principle that there must be an end to litigation (*interest reipublicae ut sit finis litium*). The Court refused the stay because CNG's arguments were deemed "extremely weak" and because even if the SP FPA were set aside, the BVI Court could still enforce the 1st FPA itself, meaning a stay would only cause prejudice and delay the inevitable share transfer. Finally, CNG failed to prove any material non-disclosure that would have altered the initial decision to grant the *ex parte* orders.

CASE RELEVANCE

This judgment significantly enhances the understanding of international commercial arbitration enforcement, specifically by clarifying the interpretation of "not yet binding" under the New York Convention. The ruling affirms the strong pro-enforcement bias by differentiating between ordinary and extraordinary recourse, confirming that procedural challenges do not render an award non-binding. Furthermore, the case affirms the broad powers of arbitral tribunals to issue specific performance awards and retain jurisdiction for their supervision and implementation, preventing the tribunal from being considered *functus officio*. Critically, it limits the scope of the public policy defense in commercial contexts, reinforcing the sanctity of contract (*pacta sunt servanda*) and ensuring constitutional arguments about property rights are appropriately applied only to statutory expropriation, not to contractual obligations or prices determined through arbitration.

Waterfront Property Investment Limited v Arius Litigation Funding Limited - BVIHCM 2023/0192

Case Title:	Waterfront Property Investment Limited v Arius Litigation Funding Limited - BVIHCM 2023/0192
Jurisdiction	Territory of the Virgin Islands
Court	Eastern Caribbean Supreme Court, High Court of Justice, Commercial Division
Date of Decision	27th March 2024
Attorneys for Applicant	Christopher McCarthy and Richard Brown
Attorneys for the Respondents	Ryan Hocking, Olwyn Barry and Grainne Hussey
Keywords/Tags	
Summary of Facts	• Waterfront Property Investment Limited, a BVI company, was involved in property investment and development in the U.A.E. Arius Litigation Funding LLC, a Delaware Corporation, provided third-party litigation funding to WPIL for certain matters. Arius served a statutory demand on WPIL on 29th September 2023, regarding an alleged debt it claimed was not substantially or genuinely disputed. WPIL applied on 12th October 2023, under section 156 of the Insolvency Act 2003, to set aside the statutory demand. The Funding Agreement between WPIL and Arius contains a governing law and jurisdiction clause stating that any dispute arising from the agreement "shall be settled by arbitration in accordance with the provisions set forth under the DIAC Arbitration Rules" and seated in Dubai. Prior to serving the statutory demand, Arius had initiated arbitration proceedings with DIAC on 26th March 2023 (case number 23-065), seeking relief, including declarations as to its alleged entitlement to sums due under the Funding Agreement, which are now claimed in the statutory demand. The arbitration proceedings remained at an early stage, with WPIL refuting the allegations and Arius yet to commit to paying its share of fees. Arius obtained a copy of a settlement agreement between WPIL and DWLLC on 15th September 2023 and subsequently served the statutory demand on 29th September 2023.

Issues for Determination

The primary issues for determination involved whether the statutory demand should be set aside under Section 156 of the Insolvency Act 2003. Specifically, the Court had to decide if there was a substantial dispute as to the debt, which would mandate setting aside the demand under Section 157(1) of the Act. Alternatively, the Court considered whether substantial injustice would be caused if the statutory demand were allowed to stand, permitting the Court to exercise its discretion to set it aside under Section 157(2).

Parties' Arguments

The Claimant (WPIL) argued that the alleged debt was disputed on substantial grounds, meaning no debt was due under the Funding Agreement. WPIL contended that the Statutory Demand constituted a clear abuse of process because the debt was already subject to exclusive determination by DIAC (Dubai International Arbitration Centre). WPIL asserted that Arius was pursuing parallel proceedings (insolvency in BVI and arbitration in Dubai) for the exact same subject matter, which was an inappropriate use of court procedures. Furthermore, WPIL maintained that Arius had already made its election by initiating arbitration, and that substantial injustice would result if the demand were not set aside, as it would undermine the due process of the Arbitration. WPIL firmly relied on the grounds of abuse of process and substantial injustice under Section 157(2), distinct from Section 157(1), relying on the Privy Council decision in *Family Mart* which emphasizes the paramountcy of the parties' agreement to arbitrate.

Conversely, the Respondent (Arius) argued that the *Family Mart* decision was of little assistance as it related to just and equitable winding up, not a creditor's petition. Arius claimed the primary purpose of their arbitration was merely to obtain disclosure and offered to dismiss the arbitration if the application to set aside the statutory demand was rejected. Arius contended that the debtor (WPIL) must still show a genuine and substantial dispute under Section 157(1) notwithstanding the arbitration agreement, citing several cases to support the position that the court must still embark on an inquiry into whether the debt is bona fide disputed.

Decision

The Court ultimately decided to set aside the Statutory Demand dated September 29, 2023, which had been served by Arius on WPIL. The Court further ordered that costs be awarded to WPIL.

Reasoning

- The Court primarily exercised its discretion under Section 157(2) of the Insolvency Act, finding it patently clear that substantial injustice would otherwise be caused. This finding was anchored in the existence of the ongoing arbitration, which Arius itself had initiated, and which remained active. The Court held that pursuing parallel insolvency proceedings in the BVI and arbitration in Dubai for the identical subject matter constituted an inappropriate use of court procedures, as Arius had already made its election by initiating arbitration. The judgment emphasized the crucial principle that courts must respect the autonomy of parties to choose their dispute resolution mechanism, referencing the *Family Mart* decision which generally points to the paramountcy of agreements to arbitrate. The Court rejected Arius's attempt to minimize the arbitration's purpose as merely seeking disclosure, noting the arbitration sought broad relief including payment orders.
- Furthermore, the Court found Arius's eleventh-hour undertaking to dismiss the arbitra-

tion, should the set-aside application fail, to be 'nakedly self-serving' and clear evidence of abusive behavior aimed at using the statutory demand improperly to exert pressure. A separate principle noted was that a statutory demand is only properly issued for a debt that is due and payable, not for a claim for damages. In the alternative, the Court noted that genuine grounds of dispute concerning the termination and interpretation of the Funding Agreement (governed by UAE law) did exist, which would justify setting aside the demand under Section 157(1) as well, as these issues must be resolved in arbitration. The Court also clarified that where there is an ongoing arbitration regarding a disputed debt, the Court should not investigate the dispute's merits or engage in a 'mini-trial'.

CASE RELEVANCE

This decision significantly reinforces the BVI courts' commitment to upholding arbitration agreements, aligning BVI jurisprudence more closely with the pro-arbitration principles established by the Privy Council in *Family Mart*. The ruling signals that parties are expected to adhere to their chosen dispute resolution mechanisms. Crucially, the judgment provided a clear precedent for the application of Section 157(2) of the Insolvency Act, establishing that an existing and active arbitration covering the same dispute serves as a strong basis for setting aside a statutory demand due to substantial injustice and abuse of process. The decision aims to deter the strategic misuse of insolvency proceedings to pressure debtors into paying debts that are actively subject to arbitration. The case also differentiated itself from previous BVI and Cayman Islands decisions because, unlike those cases, the party serving the statutory demand had already commenced and maintained extant arbitration proceedings, which led the Court to view the situation differently through the lens of *Family Mart*.

Kenworth Industrial Ltd v Xin Gang Power Investments Ltd - BVIHCOM2023/0006

Case Title:	Kenworth Industrial Ltd v Xin Gang Power Investments Ltd - BVIHCOM2023/0006
Jurisdiction	Territory of the Virgin Islands
Court	Eastern Caribbean Supreme Court, High Court of Justice, Commercial Division
Date of Decision	6th December 2023 (finalized written judgement – 1st February 2024)
Attorneys for Applicants	Robert Nader and Sam Robertson
Attorneys for the Respondents	Stephen Moverley-Smith KC with him James Noble and Yan Chng
Keywords/Tags	
Summary of Facts	• Kenworth Industrial Ltd filed an originating application on 1 January 2023 to wind up Xin Gang Power Investments Ltd on just and equitable grounds under the Insolvency Act 2003. This was Kenworth's second attempt, after a March 2022 application expired in September 2022. On 21 June 2023, Xin Gang filed a stay application under section 18 of the Arbitration Act 2013, arguing the dispute should proceed to arbitration. Arbitration, begun in June 2022, with a full hearing scheduled for December 2023, focuses on whether Kenworth's shares are paid up and whether Xin Gang can forfeit them. Kenworth alleged board misconduct, while Xin Gang maintained the shares issue is central and should be resolved in arbitration.

Issues for Determination

The court needed to determine two primary issues: (a) whether the Originating Application for winding up should be stayed pursuant to section 18 of the Arbitration Act 2013, section 174 of the Insolvency Act, or rule 26.1(2)(q) of the Civil Procedure Rules, and/or the Court's inherent jurisdiction; and (b) whether the arbitration agreement contained within Xin Gang's Articles of Association bound the parties, and whether all issues, particularly the "Paid-Up Shares Issues," raised by the Originating Application, were within the scope of the agreement and thus arbitrable.

Parties' Arguments

The Applicants argued for a mandatory stay of the entirety of the Originating Application under section 18 of the Arbitration Act because the parties were bound by Article 103(a) of Xin

Gang's Articles of Association, which requires referral to arbitration for disputes concerning the affairs of Xin Gang. Xin Gang asserted that the matters raised in the liquidation application, especially the Paid-Up Shares Issues, fell within the scope of the arbitration agreement and were arbitrable, noting that the arbitration had commenced before the Originating Application and its outcome was likely to determine Kenworth's standing. They argued that public policy favors arbitration and that section 18 mandates a stay unless the agreement is null, void, or incapable of performance. Furthermore, mandatory stay provisions apply to liquidation applications, as confirmed by *Sian Participation Corp* and *Caldicott No. 2*, the latter establishing a two-stage test for mandatory stays. Xin Gang contended that the prior dismissal of the First Stay Application by Jack J should not create an estoppel because the Court of Appeal had stated the current court was not bound, *Caldicott No. 2* showed Jack J's approach was wrong, and Kenworth's failure to extend the first application deprived Xin Gang of an appeal opportunity. Alternatively, they requested a discretionary stay under the Court's inherent jurisdiction and sought costs due to Kenworth's inconsistent positions and "atrociously wasteful behaviour".

The Respondent contended that the current Stay Application was not new and should be dismissed because Xin Gang's identical First Stay Application was already dismissed by Jack J. Kenworth argued that the court should adopt Jack J's findings for consistency and certainty, as there was no material change in factual or legal circumstances, and Xin Gang should be estopped from challenging those findings. They maintained that the issues in a just and equitable Winding Up Application are within the Court's exclusive jurisdiction and are not arbitrable. Kenworth cited *C-Mobile Services Ltd v Huawei Technologies Co Ltd*, asserting that there is no mandatory stay of winding up applications under section 18 because it is a class remedy, and not an action on a debt. They argued that Section 18 requires an entire proceedings approach, not a partial stay, and therefore Xin Gang's arguments were inconsistent. Kenworth also claimed the Stay Application was academic due to prolonged delays and scheduling developments that had already resulted in a de facto stay, asserting that Xin Gang's continued pursuit was an abuse of process aimed at exerting pressure for security for costs. Kenworth claimed it acted correctly, and if the merits of the Stay Application were not determined, costs should be reserved.

Decision

The court ultimately granted the Applicants' Application, ordering a stay of the Originating Application as prayed until further order. Furthermore, Xin Gang was awarded costs against Kenworth, which the court summarily assessed in the amount of US $201,449.03.

Reasoning

- The Court found it necessary to rule on the Stay Application to provide clarity on BVI law regarding the interplay of arbitration agreements and liquidation applications, especially following the Privy Council's *Family Mart* decision. The Court ruled that it was not bound by Jack J's First Judgment, noting that the Court of Appeal had intended for a fresh discretion on a new application, and described the First Judgment as a 'thing writ in water'. It determined that it would be unfair to hold Xin Gang responsible for Kenworth's failure to extend the first application, which had rendered the initial appeal academic. The Court was bound by *Caldicott No. 2*, which established that the mandatory stay test under section 18 of the BVI Arbitration Act is essentially the same as that under overseas legislation, aligning with the international uniformity principle of UNCITRAL Model Law Article 8. The wide definition of "action" in the BVI Interpretation Amendment Act 2013 further supported a broad interpretation of section 18's mandatory stay provision. Applying the two-stage approach derived from *Family Mart*: (i) identifying the matters raised, and (ii) determining if they fall within the arbitration agreement, the Court concluded that the grounds for the winding up application constituted a "matter" for section 18 purposes, found to be arbitrable and within the scope of Xin Gang's Articles of Association.

- Alternatively, the court held that even if section 18 did not apply, it possessed a circumscribed or presumptive discretion to stay proceedings in just and equitable applications to uphold arbitration policy and promote curial efficiency. Given the centrality and potentially dispositive nature of the "Paid Up Shares Issues" being arbitrated (which would determine Kenworth's standing), the court found no strong reason for refusing a discretionary stay. The costs award was aided by the court's stern disapproval of Kenworth's 'two-facedness' and its determination not to allow the use of court processes for improper tactical advantage when a valid arbitration agreement existed.

CASE RELEVANCE

The judgment is significant because it clarified the interplay between the BVI's Arbitration Act and Insolvency Act, particularly concerning just and equitable winding-up applications where the underlying disputes are subject to an arbitration agreement. It established a strong precedent that such applications, even while seeking a court-ordered remedy, must yield to arbitration for the determination of the factual matters giving rise to the dispute. This ruling emphasizes the supremacy of arbitration agreements and reinforces the BVI courts' commitment to pro-arbitration principles, aligning BVI jurisprudence more firmly with the Privy Council's *Family Mart* decision. The court affirmed the principle from *Caldicott No. 2* that section 18 of the BVI Arbitration Act is to be interpreted in harmony with UNCITRAL Model Law Article 8 to promote uniformity.

Furthermore, the case offers important guidance for shareholder disputes in the BVI, especially those relying on grounds like "lack of probity" or "loss of trust and confidence", clarifying that if these matters are covered by an arbitration agreement, a mandatory stay of the whole application is required under section 18.

Qu Haiping v Window of Trade International Ltd - BVIHCOM2023/0169

Case Title:	Qu Haiping v Window of Trade International Ltd - BVIHCOM2023/0169
Jurisdiction	Territory of the Virgin Islands
Court	Eastern Caribbean Supreme Court, High Court of Justice, Commercial Division
Date of Decision	29th December 2023
Attorneys for Claimant	Neil McLarnon
Attorneys for the 2nd Defendant	John Carrington, KC
Keywords/Tags	
Summary of Facts	• This case concerned the adjourned hearing of the Claimant's Fixed Date Claim seeking the enforcement of a New York Convention Arbitration Award. The award had ordered the Second Defendant (Wu Wei, referred to as "D2" in the judgement) to restore shares in the First Defendant (Window of Trade International Limited, referred to as "D1") to the Claimant. At the initial hearing on 24th January 2023, D2 opposed the enforcement, leading to an adjournment pending an application before the People's Republic of China (PRC) Courts to suspend enforcement of the award. On 14th March 2023, the PRC Court dismissed D2's application to suspend enforcement. D2 then raised four main objections to enforcement in the BVI Court: (i) the award contained matters beyond the scope of arbitration; (ii) inability to present his case at the arbitration; (iii) concerns over the composition of the arbitration tribunal; and (iv) the existence of a pending application in China to suspend enforcement.

Issues for Determination

The central issue for determination by the BVI Commercial Court was whether the New York Convention Arbitration Award, granted in favour of Qu Haiping (Claimant) against Wu Wei (Second Defendant, D2), should be enforced in the BVI.

Parties' Arguments

The Applicant's arguments emphasized a pro-enforcement approach to New York Convention awards, stressing that the burden of proof to resist enforcement rests with the defending party. The Claimant argued that refusal is permitted only under the narrow, specified grounds outlined in Section 86 of the BVI Arbitration Act 2013, none of which D2's objections met. Furthermore, the PRC Court's dismissal of D2's application to suspend enforcement rendered D2's objection regarding the pending application moot and significantly weakened his arguments concerning the scope of arbitration and inability to present his case. The Claimant contended that D2's evidence regarding the scope of arbitration was insufficient, lacking proper independent expert foreign law evidence, and that the award merely ordered D2 (a party to the agreement) to restore equity to the Claimant without impacting non-parties. Regarding the claim of inability to present the case, the Claimant noted that this was merely the tribunal rejecting late evidence, an action confirmed by the PRC Court as being within the tribunal's powers. Finally, allegations of bias lacked legitimate evidence, had already been rejected by the PRC Court, and were too tenuous to justify breaching BVI public policy.

The Respondents sought refusal of enforcement based on several narrow grounds under Section 86 of the BVI Arbitration Act. D2 contended that the Award dealt with matters beyond the scope of the Arbitration (Section 86(2)(d)(ii)) by impacting the equity of non-parties (Dongfang Fuyun Company and Zhanling Company), thereby violating the principle of privity of contract. D2 also claimed he was unable to present his case at the arbitration (Section 86(2)(c)(ii)) because the Tribunal rejected his attempt to adduce further (late) evidence, allegedly violating the Arbitration Rules. Additionally, D2 raised concerns over the composition of the Arbitration Tribunal (Section 86(2)(e)(i) and (ii) and Section 86(3)(b)), citing apparent bias due to the arbitrator Mr. Lu Chao's law firm previously acting for an affiliate and an undisclosed "close friends and alumni" relationship with the Claimant's legal representatives. D2 argued that enforcement under these circumstances would be contrary to public policy. Lastly, D2 submitted that enforcement should be refused because an application had been made to a competent authority in China to suspend enforcement of the award (Section 86(5)).

Decision

The Court rejected all of the Second Defendant's objections to enforcement. The Court ordered the enforcement of the Arbitration Award in favour of the Claimant. Specifically, the orders required the enforcement of the Shenzhen Court of International Arbitration Award, compelling the Second Defendant to return 100% of the equity in the First Defendant to the Claimant and assist in restoring registration. The Court further ordered the First Defendant's register of members to be rectified to remove the Second Defendant and restore the Claimant. If the Second Defendant defaulted on assisting, the First and/or Third Defendants were ordered to immediately rectify the company's register. Costs were awarded to the Claimant against the Second Defendant.

Reasoning

- The Court's reasoning emphasized the established pro-enforcement policy governing New York Convention Awards, noting that refusal is permitted only on narrow grounds under Section 86 of the BVI Arbitration Act. Citing established precedents, the Court affirmed that the burden of proof rests squarely on the party resisting enforcement, who must demonstrate good reasons for refusal. Regarding the scope of arbitration objection, the Court found D2's argument misconceived because the award solely ordered D2 (a party to the arbitration) to return shares in the BVI company, thus relating only to matters between the parties and not binding non-parties or impacting third-party equity. Crucially, D2's evidence challenging the scope was found to be inadmissible as he failed to produce proper expert evidence on foreign law compliant with CPR Part 32, relying instead on what the court viewed as self-serving legal opinion.

- Concerning the claimed inability to present the case, the court reasoned that D2 had fully participated in the arbitration. The BVI Court narrowly interprets this ground to mean prevention from presenting a case due to matters beyond one's control, rather than the tribunal's procedural rejection of late evidence, which the PRC Court had confirmed was valid under arbitration rules. Furthermore, allegations of arbitrator bias were found to be insufficient and unsupported by evidence, and the Court confirmed that public policy grounds for refusing enforcement must be approached with extreme caution. Such grounds would not be breached on tenuous allegations of bias, requiring instead a fundamental breach of natural justice. Lastly, the court pointed out that the PRC Court's dismissal of the suspension application rendered D2's related objection regarding pending proceedings moot. Significant weight is attached to such prior decisions made by competent supervisory courts regarding the award's validity.

CASE RELEVANCE

The case is significant as it demonstrates the strict evidentiary requirements and the high bar imposed on parties attempting to resist enforcement of New York Convention awards in the BVI. It highlights the necessity for robust, independent expert evidence on foreign law when foreign law issues are raised, compliant with BVI procedural rules (like CPR Part 32), rather than relying on self-serving legal opinions.

The judgment also provides useful guidance on the narrow interpretation of common grounds for refusal, confirming that 'inability to present case' is interpreted restrictively, applying typically only when a party is prevented from presenting their case by matters beyond their control. Additionally, the decision reaffirms that courts cannot refuse enforcement based merely on errors of law or fact, and that refusal on public policy grounds requires extreme caution. The outcome also stresses that significant weight is attached to prior decisions of supervisory courts regarding the award's validity or suspension.

Sian Participation Corp (in Liquidation) v Halimeda International Limited - BVIHCMAP2021/0017

Case Title:	Sian Participation Corp (in Liquidation) v Halimeda International Limited - BVIHCMAP2021/0017
Jurisdiction	Territory of the Virgin Islands
Court	The Eastern Caribbean Supreme Court in the Court of Appeal
Date of Decision	24th April 2023
Attorneys for Applicant	Mr. Tom Smith, KC with Mr. Paul Fradley, Mr. André McKenzie and Ms. Jhneil Stewart
Attorneys for the Respondent	Mr. Paul Lowenstein, KC with Mr. Rupert Hamilton, Mr. Andrew Willins and Ms. Tamara Cameron.
Keywords/Tags	Leave to appeal, Privy Council, Insolvency, Winding-up order, Final decision, Arbitration clause, Arbitration Issue, Value threshold, Great general or public importance, Fresh evidence, Virgin Islands (Appeals to the Privy Council) Order 1967, Jinpeng Group Limited, Salford Estates (No. 2) Ltd, Eastern Caribbean Supreme Court, Genuine dispute.
Summary of Facts	• Halimeda International Limited applied in September 2020 to appoint liquidators over Sian Participation Corp, a BVI company, alleging a debt of approximately US$226,000,000 and claiming Sian was insolvent. Sian resisted, arguing it was not insolvent, the debt was not due, it was an intra-company debt, and that an arbitration clause in their loan agreement meant the application should be dismissed or stayed in favour of arbitration. Sian also claimed a crossclaim and improper purpose by Halimeda. • In May 2021, the learned judge found the US$226,000,000 loan was due, Sian failed to show the debt was genuinely disputed, and that the arbitration issue was raised too late. Consequently, liquidators were appointed over Sian, and Sian's applications to admit further evidence were refused. Sian appealed to the Court of Appeal, which upheld the judge's decision and again refused Sian's applications to adduce fresh evidence, including the outcome of a confidential LCIA Arbitration. Sian then sought leave to appeal this decision to His Majesty in Council (the Privy Council).

Issues for Determination

The Court needed to determine four key issues regarding Sian's intended appeal to the Privy Council. First, whether the appeal lay as of right under section 3(1)(a) of the Virgin Islands (Appeals to the Privy Council) Order 1967. Second, whether the learned judge's decision to appoint liquidators over Sian constituted a final decision. Third, whether the appeal involved a claim to or question respecting property or a right valued at £300 or more. Finally, the Court considered whether the appeal concerned the liquidation of a company in respect of an alleged debt more than US$226 million.

Parties' Arguments

The Applicant argued that the Winding-Up Order was a final decision and that the underlying debt, exceeding US$226,000,000, met the required value threshold for an appeal as of right to the Privy Council. Sian contended that the appeal raised points of great general or public importance, particularly by challenging the established BVI law set out in the *Jinpeng Group Limited* decision regarding the effect of arbitration clauses in insolvency, which differs from English law. Given the seriousness of a winding-up order, Sian argued the arbitration defence should not have been rejected on the basis of lateness. Furthermore, Sian asserted that the refusal to admit fresh evidence prevented it from presenting its full case and was intertwined with the decision to appoint liquidators, thus warranting Privy Council review.

On the other hand, the Respondent submitted that considerable doubts existed regarding whether the Winding-Up Order decision, specifically the rejection of the arbitration issue based on lateness as a discretionary case management matter, met the requirements for an appeal as of right. The Respondent noted that Sian needed to succeed on both the substantive arbitration point and the discretionary lateness point. The Respondent argued that the arbitration issue was not of great general or public importance because the law was settled in the BVI by *Jinpeng Group Limited*, which had deliberately adopted a different approach from the English courts, and this difference did not justify Privy Council intervention. The Respondent also argued that the Court had the discretion to refuse leave even if an appeal seemingly lay as of right, especially where there was no genuine dispute. Lastly, because Sian failed to provide the confidential arbitration award, the Court could not assess its relevance or potential impact on the appeal, meaning Sian failed to meet the requirements for admitting fresh evidence and no major point of law arose from this refusal.

Decision

The Court ruled against the applicant, dismissing Sian's application for conditional leave to appeal to the Privy Council. Halimeda, the opposing party, was awarded costs, which were to be assessed if the parties could not reach an agreement within 21 days.

Reasoning

- Regarding the 'appeal as of right' issue (Section 3(1)(a) of the 1967 Order), the Court affirmed that winding-up orders are definitively final judgments in civil proceedings and are eligible for appeal as of right. However, Sian failed to satisfy the value threshold requirement. The Court reasoned that the value necessary to meet the statutory threshold (£300 or more) must be the value of the specific dispute being appealed, and not merely the value of the underlying subject matter, such as the total US$226 million debt, which was not genuinely disputed on appeal. As the Court of Appeal found no determination concerning Sian's interest in any property, the appeal did not involve a claim to property meeting the statutory value.

- Concerning the aspect of 'great general or public importance' (section 3(2)(a)), the Court commented that while the arbitration issue involved a question of law, it was not considered of 'great general or public importance'. This issue was deemed settled in the BVI by the ruling in *Jinpeng Group Limited*. The fact that *Jinpeng* adopted a different stance from the English Court of Appeal in *Salford Estates (No. 2) Ltd* did not automatically necessitate resolution by the Privy Council. The Court emphasized its existing power to refuse leave when there is no genuine dispute. Finally, regarding the fresh evidence application, the Court agreed that Sian had not demonstrated how the rejection of the application could properly be placed before the Privy Council. Without access to the confidential arbitration award, the Court could not determine if its contents would significantly impact the appeal's outcome, meaning no issues of great general or public importance or points of law arose from this refusal. The criteria for granting leave based on 'great general or public importance' typically requires a serious issue of law, an unsettled constitutional provision, an area of law in dispute, or a legal question whose resolution has dire public consequences; it is not satisfied merely because an issue may occasionally arise for other parties.

CASE RELEVANCE

This case is significant because it affirms the BVI Court of Appeal's established position on the interaction between arbitration agreements and insolvency proceedings, confirming that the *Jinpeng* approach is the settled law within the BVI. BVI law, as articulated in *Jinpeng Group Limited*, maintains that the statutory jurisdiction to wind up a company based on unpaid debt is met if the debt is not disputed on genuine and substantial grounds. Consequently, a debtor is generally not entitled to an automatic stay of liquidation proceedings simply by invoking an arbitration agreement, nor must a creditor prove exceptional circumstances to proceed with a winding-up application when the debt is not genuinely disputed, a position that may differ from other common law jurisdictions.

Anadarko China Holdings 2 Company v Win Business Energy (Caofeidian) Limited - BVIHC(COM) 2022/0217

Case Title:	Anadarko China Holdings 2 Company v Win Business Energy (Caofeidian) Limited - BVIHC(COM) 2022/0217
Jurisdiction	British Virgin Islands
Court	Eastern Caribbean Supreme Court, British Virgin Islands, High Court of Justice, Commercial Division
Date of Decision	Oral Judgment: 23rd December, 2022 Written Judgment: 21st March, 2023 Order entered: January 6, 2023
Attorneys for Claimant	Mr Merrick Ricardo Watson and Mr Timothy de Swardt of Kobre & Kim (BVI) LP
Attorneys for the Respondent	Mr Phillip Riches KC and with him Ms Olga Osadchaya of Harneys
Keywords/Tags	
Summary of Facts	• The Applicants sought to wind up Win Business Energy (Caofeidian) Ltd on the grounds of insolvency, as it owed them over US$7 million under LCIA arbitration awards, including a Final Award on 13 October 2021. The dispute arose from a Stock Purchase Agreement involving a Bahamian company (KMCPL) and resulting tax obligations to China. The First Applicant paid US$193.8 million to the tax authority on KMCPL's behalf and later recovered part of it through arbitration. The Final Award directed the Company and KMCPL to pay the Debt. The Company did not challenge the award and was time-barred. A statutory demand served on 2 March 2022 was upheld, and the Company's appeal was pending. The current application sought the appointment of liquidators.

Issues for Determination

The court needed to determine several key issues, including whether the Company was insolvent and should be wound up pursuant to section 8(1)(a) and (c) of the Insolvency Act. Relatedly, the court had to assess whether there was a bona fide dispute on substantial grounds regarding the debt and whether the Company had successfully rebutted the presumption of insolvency. Finally, the court needed to decide whether the Winding Up Application should be Dismissed or Stayed Pending Appeal.

Parties Arguments

The Applicants argued that the Company was insolvent because it failed to comply with the requirements of an un-set-aside statutory demand, satisfying section 8(1)(a) of the Insolvency Act. They contended that the debt could not be disputed since the Company's prior application to set aside the statutory demand had been dismissed. Furthermore, the Applicants asserted that the revenue rule did not apply because the dispute was entirely private, concerning reimbursement between contracting parties, and the Chinese tax authorities, having been paid years ago, had no interest in the current proceedings. They maintained that a stay of the winding-up application was unnecessary because the appeal grounds were deemed barely arguable by the Court of Appeal and no other compelling circumstances existed.

The Applicants also invoked the principles of issue estoppel and *res judicata*, arguing that the Company could not re-argue the debt's validity or the revenue rule, as these points were already decided in the unsuccessful set-aside application. In contrast, the Respondent Company argued that it was not insolvent, asserting a bona fide dispute regarding the validity of the alleged debt's enforcement in the jurisdiction. They requested a stay pending appeal, claiming the appeal raised a crucial public policy question regarding the enforceability of a foreign tax that formed the substratum of the debt. The Company claimed solvency, evidenced by paying appeal costs and offering to put up security. They also argued that appointing liquidators would be catastrophic, likely triggering a change of control under Chinese law and potentially causing ruinous losses far exceeding the debt, noting that the court retains wide discretion to consider opposition *de novo*, even if the statutory demand was not set aside.

Decision

The court found it just and equitable to make the order appointing liquidators over the Company, being satisfied that the Company was insolvent. Wesley Edwards and Yeung Mei Lee of Alvarez & Marsal were appointed as joint and several liquidators. However, the court conditionally stayed the orders for the appointment of liquidators until January 20, 2023, dependent on the Company paying the whole debt into court or the Applicants' legal practitioner's trust account. If the Company makes this payment, the order will be stayed pending the determination of its appeal. The Company was also ordered to pay the costs of the application to the Applicants.

Reasoning

- The court reasoned that following the precedent set in *Sparkasse Bregenz Bank AG v Associated Capital Corporation*, the burden shifted to the Company to prove its solvency. The Company failed to rebut this presumption of insolvency because it provided no financial documentation whatsoever. Additionally, the Company was statutorily deemed insolvent because it failed to comply with an outstanding statutory demand, satisfying section 8(1)(a) of the Insolvency Act. The court rejected the Company's argument based on the revenue rule, reiterating that the Debt arose from a private dispute for reimbursement between contracting parties, not an attempt by a foreign state to enforce its tax laws, as the Chinese tax authorities had already been paid and had no interest. This identical argument had been fully litigated and rejected previously in the Set Aside Application.
- Relying on precedent, the court emphasized that a company is barred by the principle of *res judicata* (cause of action estoppel) from resisting a winding-up application on

grounds already rejected in a failed statutory demand challenge unless special circumstances exist, which were absent here. The court found that the debt's validity and enforceability were conclusively determined against the Company via estoppel, that the revenue rule argument was meritless, that the appeal prospects were weak and did not justify a stay, and that statutory insolvency was proven and unrebutted, with no overriding discretionary factors outweighing the need for liquidation.

CASE RELEVANCE

This judgment is significant because it clarifies the application of the revenue rule in the context of commercial arbitration award enforcement, specifically in the BVI, by distinguishing private reimbursement claims from direct foreign tax enforcement. It established that the revenue rule does not apply to private disputes concerning contractual obligations to reimburse tax payments already made to the foreign authority. The judgment strongly reinforces the finality of determinations regarding statutory demands and establishes a strict presumption of insolvency that must be rebutted by credible evidence. Moreover, it underscores that the *res judicata* principle limits the scope for re-litigating previously decided issues (like debt validity) in subsequent winding-up proceedings, barring such resistance absent good and substantial reasons or special circumstances.

Win Business (Caofeidan) Limited Formerly Win Business (Africa) Ltd v. Anadarko China Holdings 2 Company Anadarko Petroleum Corporation - BVIHCMAP2022/0044

Case Title:	Win Business (Caofeidan) Limited Formerly Win Business (Africa) Ltd v. Anadarko China Holdings 2 Company Anadarko Petroleum Corporation - BVIHCMAP2022/0044
Jurisdiction	Territory of the Virgin Islands (BVI)
Court	The Eastern Caribbean Supreme Court in the Court of Appeal
Date of Decision	July 5, 2023
Attorneys for Appellant	Mr. Stewart Buckingham KC
Attorneys for the Respondent	Mr. Timothy de Swardt and Mr Merrick Watson
Keywords/Tags	Interlocutory appeal – Statutory Demand – Judge's refusal to set aside Statutory Demand served on Appellant by Respondents – Appellant arguing new grounds on appeal during hearing of appeal – New grounds of appeal not mentioned in notice of appeal or Appellant's written submissions – New grounds of appeal not advanced in court below – No formal application made to advance new grounds of appeal – Rule 62.4(8) of the Civil Procedure Rules 2000 – Whether the Appellant ought to be permitted to rely on the new grounds of appeal – Whether the new grounds of appeal were pure points of law or further evidence would be needed on appeal - Whether the Respondents would be substantially prejudiced
Summary of Facts	• On March 2, 2022, the Respondents served a Statutory Demand on the Appellant for costs, disbursements, and interest, arising from an arbitration between the parties at the London Court of International Arbitration (LCIA). The arbitration concerned a dispute over payment of tax liabilities under a Stock Purchase Agreement, where one of the Respondents had made a payment of US$193.8 million to the Tianjin Offshore Oil Tax Bureau (TOOTB) on behalf of BECB Limited (KMCPL). The Appellant applied to set aside the Demand, arguing it was defective, raised issues of LCIA jurisdiction over KMCPL, and caused substantial injustice.

- Later, the Appellant sought to amend its application to argue that the Demand sought to enforce foreign revenue laws of the People's Republic of China (PRC), which BVI courts would not enforce. Jack J [Ag.] dismissed the application to set aside the Demand, ruling that the BVI court would not enforce foreign revenue laws, but found that the Chinese tax authorities had already been paid, and the dispute was a private law issue between private companies, not involving the enforcement of a sovereign nation's tax laws.

Issues for Determination

The Court of Appeal faced several interconnected issues for determination. The primary substantive issue was whether the judge applied the correct legal test regarding the foreign revenue rule and, subsequently, whether the Demand Debt sought the vindication of foreign revenue law. Procedurally, the court had to determine whether the Appellant should be allowed to introduce new grounds of appeal, specifically, the nominee/coercion argument, which had not been included in the notice of appeal, written submissions, or advanced in the court below, and for which no formal application was made. Related to the new grounds, the court needed to ascertain if they constituted pure points of law or required additional evidence, and whether allowing them at such a late stage would result in substantial prejudice to the Respondents.

Parties' Arguments

The Appellant argued that the Demand Debt, stemming from an LCIA award, indirectly sought to enforce a tax liability owed by KMCPL to TOOTB, thereby violating the foreign revenue rule. The Appellant further contended that the judge failed to consider that costs and disbursements are unenforceable if the primary liability is deemed unenforceable. During the appeal hearing, the Appellant raised the novel argument that the Respondents were coerced into acting as nominees for TOOTB in settling the tax, essentially transforming the Respondents into tax collectors. The Appellant asserted that this nominee/coercion argument was either a pure point of law or could be debated based on existing facts without causing significant prejudice to the Respondents. Conversely, the Respondents contended that the foreign revenue rule was irrelevant because TOOTB had already received full payment, meaning there were no outstanding tax liabilities. They maintained that the core dispute was a private law matter between private companies seeking reimbursement.

The Respondents strongly argued that the Appellant's new arguments were introduced too late, involved mixed questions of fact and law requiring fresh evidence, and would substantially prejudice them. Critically, the Respondents pointed out that the Appellant had previously explicitly denied to the court below (Jack J [Ag.]) that the Respondents were representatives of TOOTB, meaning the Appellant was now running a "diametrically opposite argument" on appeal.

Decision

The Court of Appeal made a two-part decision: it refused permission for the Appellant to argue the new points on appeal (the nominee/coercion arguments). Furthermore, the court dismissed the appeal entirely. The Appellant was subsequently ordered to pay the Respondents' assessed costs related to the appeal.

Reasoning

- The Court's reasoning addressed both the procedural issue of new grounds and the substantive application of the foreign revenue rule. Regarding procedure, the court emphasized that parties are required to raise all points at first instance, as an appeal is not intended to be a "dress rehearsal" for subsequent arguments. Permission to raise new points requires a cogent explanation for the delay in omission. While an appellate court maintains caution, it may permit a new point if it is a pure point of law that can be argued based on existing findings, drawing on principles established in *Notting Hill Finance Limited v Sheikh*. However, the court generally disallows new points that necessitate further evidence or that would have altered the course of evidence during the initial trial, referencing *Singh v Dass*. Similarly, if a point was not raised below, and evidence could have been presented to refute it, it cannot be raised later, as per the principle from *Ex parte Firth, In re Cowburn*. The court also confirmed, citing *Prudential Assurance Co Ltd v Revenue and Customs Comrs*, that a clear explanation is necessary for omitting a point at first instance. Applying these principles, the court concluded that the nominee/coercion arguments were not pure points of law but rather a mixture of fact and law that would require evidence to ascertain the nature of the relationship. The nominee argument was deemed entirely new and, in fact, contradicted the position the Appellant previously argued. The Respondents would have suffered substantial prejudice if these points were permitted, as they lacked adequate time to address the late arguments and would have needed to adduce evidence to counter them. The attempt by the Appellant to argue the opposite of its original stance after losing was not permitted, as the court views this as "approbating and reprobating".
- Concerning the original appeal merits, the Court affirmed the finding of Jack J [Ag.] that the enforcement of the arbitration award did not violate the foreign revenue rule. Relying on precedents like *Government of India v Taylor* and *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd*, the court confirmed that the narrow limb of the foreign revenue rule applies only where the foreign tax debt remains unpaid (a highly persuasive rule in the BVI). Since TOOTB had been paid, the narrow rule was not engaged. Moreover, the wider foreign revenue rule (prohibiting the assertion of a foreign sovereign right) was also inapplicable because the Demand was not issued by TOOTB, the Respondents were not acting as agents, and the dispute was ultimately a private law matter between parties seeking reimbursement.

CASE RELEVANCE

This ruling significantly strengthens the procedural rules governing appeals in the Eastern Caribbean Supreme Court, particularly regarding the belated introduction of new grounds. It underscores the legal requirement that all arguments must be raised during the first instance, necessitating a cogent explanation for any delay in omission. The case confirms that a party is prohibited from arguing a position diametrically opposite to one taken earlier after having lost at first instance. Furthermore, the case clarifies the application of the foreign revenue rule in the BVI. It confirms that the narrow limb, applying against the collection of foreign taxes, only operates where the foreign tax debt remains unpaid. The foreign revenue rule is not engaged when the foreign tax liability has already been settled and the dispute centres purely on reimbursement between private parties. This ruling reinforces the courts' dedication to judicial efficiency, preventing appeals from being used as dress rehearsals, and addressing the inefficient use of court time resulting from late changes in legal strategy.

BEC Limited v A2 and A1- BVIHC (COM) 2022/0059

Case Title:	BEC Limited v A2 and A1- BVIHC (COM) 2022/0059
Jurisdiction	Territory of the Virgin Islands
Court	Eastern Caribbean Supreme Court, In the High Court of Justice (Commercial Division)
Date of Decision	31st May 2022,
Attorneys for Applicant	Mr. Phillip Riches QC with Ms. Olga Osadchaya of Harneys
Attorneys for the Respondent	Mr. Timothy de Swardt and Mr. Merrick Ricardo Watson of Kobre & Kim
Keywords/Tags	
Summary of Facts	• BEC Limited applied to set aside a statutory demand served by A2 and A1 on 2nd March 2022. The statutory demand was for US$6,185,886.85 and £618,249.91 sterling, plus post-award interest, representing costs and disbursements incurred in an LCIA arbitration. The arbitration tribunal, constituted on 26th August 2015, had issued awards requiring BECB (a company related to BEC Limited) and the Company to jointly and severally pay these amounts, among others. The Company's initial application to set aside the demand was based on "substantial injustice" under section 157(2)(a) of the Insolvency Act 2003. At the hearing, the Company sought to amend its grounds to include a 'substantial dispute' argument under section 157(1)(a) of the Insolvency Act, primarily contending that the debt was unenforceable due to the 'revenue rule'. The Company had also changed its legal team to focus on this new argument

Issues for Determination

The primary issues for determination involved assessing the Court's jurisdiction to allow BEC Limited to amend its application to set aside the statutory demand, especially given the procedural rules in insolvency matters. Crucially, the Court had to decide if the debt claimed by A2 and A1 was unenforceable under the revenue rule, which prohibits common law courts from enforcing the tax laws of foreign states. Additionally, the proceedings required a determination of whether a substantial dispute existed concerning the debt, a condition necessary for setting aside the statutory demand under section 157(1)(a) of the Insolvency Act 2003, as mandated by the *Sparkasse Bregenz* test. Finally, the Court considered whether the underlying arbitration award, which established the debt, was sufficient evidence of an undisputed debt for the purpose of supporting the statutory demand.

Parties' Arguments

The claimant primarily contended that the debt arising from the arbitration award was unenforceable under the revenue rule, which forbids common law courts from enforcing the tax laws of foreign states. They further argued that, on public policy grounds, the related principal claim for fees and disbursements was "parasitic" on the underlying, allegedly unenforceable tax claim, and therefore should also be deemed unenforceable. Procedurally, BEC Limited asserted that the Court's general powers of case management under CPR Part 26 allowed for the amendment to include the "revenue rule" argument, notwithstanding the exclusion of CPR Part 20 from insolvency matters and the strict 14-day limit for setting aside applications. Lastly, regarding the sufficiency of evidence, the Claimant suggested that the arbitration award itself needed to be registered under the Insolvency Act to be properly taken as evidence and emphasized that the debt must be genuinely undisputed to support the statutory demand.

The Respondents countered that the Court lacked jurisdiction to allow the proposed amendment to BEC Limited's application. Substantively, they maintained that the argument concerning the application of the revenue rule to the current case was "hopeless" and lacked merit. The Respondents emphasized that the underlying debt was definitively established by the arbitration award, which they asserted was sufficient evidence of an undisputed debt. Critically, they highlighted that BEC Limited's failure to challenge the Final Award, coupled with the fact that the Company was time-barred from doing so as of November 24, 2021, meant the debt could not genuinely be disputed for the purpose of setting aside the statutory demand.

Decision

The Court ruled against the applicant, BEC Limited, refusing the application to set aside the statutory demand. This decision resulted in the statutory demand remaining valid and enforceable.

Reasoning

- Although the Court exercised its discretion to permit the amendment to the application so the merits of the revenue rule argument could be heard, it definitively rejected the argument itself. The Court found that the revenue rule did not apply because the debt arose from a private contractual dispute for reimbursement between commercial parties (BECB and A2) concerning tax payments that had been already made years earlier to the Chinese tax authorities (TOOTB). Since the foreign tax authority had already been paid and had no current interest in the proceedings, the enforcement of the arbitration award was deemed not to be an indirect attempt to enforce foreign tax law. Consequently, the Court implicitly rejected the connected public policy argument, as that argument was premised entirely on the applicability of the revenue rule. Furthermore, in evaluating the "substantial dispute" argument, the Court concluded that BEC Limited failed to satisfy the *Sparkasse Bregenz* test. The Court viewed the arbitration award as sufficient evidence of an undisputed debt, noting that BEC Limited had failed to challenge the Final Award and was now time-barred from doing so.

CASE RELEVANCE

This judgment is highly relevant as it strictly defines the limited scope and application of the "revenue rule" within the British Virgin Islands (BVI). Specifically, the Court confirmed that the rule does not apply to private disputes between commercial parties concerning contractual obligations to reimburse tax payments already made to a foreign authority, particularly when the foreign state has no ongoing interest in the current proceedings. Furthermore, the case reinforces the high threshold for establishing a "substantial dispute" when challenging a statutory demand (per the *Sparkasse Bregenz* test), clarifying that arguments founded on inapplicable legal principles are insufficient to satisfy this requirement. Finally, the decision underscores the strength and finality of valid, unchallenged arbitration awards as compelling evidence of debt in BVI insolvency proceedings, making it more challenging for debtors to resist statutory demands based on such awards.

BEC Limited v A2 and A1- BVIHC (MAP)2022/0044

Case Title:	BEC Limited v A2 and A1- BVIHC (MAP)2022/0044
Jurisdiction	Territory of the Virgin Islands
Court	The Eastern Caribbean Supreme Court, Court of Appeal
Date of Decision	September 9, 2022
Attorneys for Appellant	Mr. Phillip Riches QC with Ms. Olga Osadchaya of Harneys (on the papers)
Attorneys for the Respondent	Mr. Merrick Ricardo Watson and Mr. Timothy de Swardt (on the paper)
Keywords/Tags	Commercial appeal; Refusal of application to set aside statutory demand; Section 156 of the Insolvency Act, 2003; Refusal of adjournment application; Whether or not leave to appeal was required; Application test; Rule 62 1 (3) of the Civil Procedure Rules 2000; Application to strike out notice of appeal; Application for stay of execution; Application to adduce fresh evidence; Test for admitting fresh evidence; Whether appellant satisfied three limbed test for admitting fresh evidence; Principles governing a stay; Whether there is a reasonable prospect of success on appeal; Whether appeal would be rendered nugatory if stay is not granted
Summary of Facts	• On appeal, BEC Limited challenged the judge's refusal to set aside the statutory demand and the denial of its adjournment application. The appeal was filed without leave, prompting the Respondents to apply to strike it out. BEC Limited also sought a stay of execution of the lower court's order dismissing the set-aside application and applied for permission to adduce fresh evidence in support of its arguments, including the contention that the debt was unenforceable under the revenue rule. The appeal thus concerned both procedural issues from the lower court and the merits of the Company's contentions regarding enforceability of the statutory demand. BEC Limited appealed the trial judge's decision of refusal to set aside the statutory demand served by A2 and A1 on 2nd March 2022, and the denial of its adjournment request. The Company filed the appeal without leave, while the Respondents moved to strike it out. BEC Limited further sought a stay of execution of the order dismissing its set-aside application and applied for permission to adduce fresh evidence.

Issues for Determination

The issues for determination in this case centred on four main legal and procedural points: whether the order dismissing the Set Aside Application was interlocutory or final, as this was crucial for determining the appealability of the order; whether the fresh evidence sought to be adduced by the Appellant should be admitted; whether the threshold for the grant of a stay of execution of the judge's order, which refused to set aside the statutory demand, had been met; and finally, whether the Appellant's notice of appeal was null and void and incapable of founding the Court's jurisdiction, thus requiring it to be struck out.

Parties' Arguments

The Appellant argued that the order dismissing the Set Aside Application was amenable to appeal, and the appeal should proceed. They sought the admission of fresh evidence, asserting it was relevant and could influence the appeal, particularly since it was central to the revenue rule argument, which posits that the debt was unenforceable as it amounted to the indirect enforcement of a foreign tax liability. The Appellant contended that the principal claim for fees and disbursements was parasitic and should also be unenforceable, excusing their lack of diligence in obtaining the evidence due to prior legal advice. Further, the Appellant sought a stay of the order, claiming the appeal had a reasonable prospect of success and would be rendered nugatory if the stay was denied.

Conversely, the Respondents contended that the order dismissing the Set Aside Application was not a final order "in the true sense" for appeal purposes because it did not determine the final rights or obligations of the parties but was merely a preliminary step toward establishing insolvency. The Respondents argued that the fresh evidence should be rejected because it was available with reasonable diligence before the original hearing, and a change of legal counsel was not a valid excuse; they also argued the evidence was not decisive. They maintained that the revenue rule did not apply to the dispute, as the debt arose from a private contractual dispute for reimbursement of tax payments already made to Chinese authorities, and this argument had been consistently rejected by all courts that considered it. Finally, the Respondents argued that the Company failed to satisfy the conditions for a stay, emphasizing that the appeal grounds were barely arguable and that unchallenged arbitration award constituted sufficient evidence of an undisputed debt.

Decision

The Court of Appeal dismissed all of BEC Limited's applications, which included the Strike Out Application, the Stay Application, and the Fresh Evidence Application. This decision effectively upheld the learned judge's original ruling to refuse the Company's application to set aside the statutory demand and the application for adjournment.

Reasoning

- The Court determined that the order dismissing the application to set aside the statutory demand was not a final order required for an appeal because it did not resolve the final rights or obligations of the parties. Instead, the order served as a preliminary mechanism for a creditor to establish a ground for appointing liquidators. The refusal to admit fresh evidence was based on the Company's failure to satisfy the three limbs of the test established in *Ladd v Marshall*. The Court found that the evidence was either available or could have been obtained with reasonable diligence prior to the original hearing, and a change of legal representation was not accepted as a sufficient excuse for the delay. Furthermore, the Court reasoned that, even if admitted, the fresh evidence concerning the revenue rule argument was without merit. The revenue rule did not apply because the dispute involved a private contractual obligation between commercial parties for the reimbursement of tax payments already made, and the foreign state had no ongoing interest.

- Regarding the application for a stay of execution, the Court considered the five guiding principles articulated in *C-Mobile Services Ltd v Huawei Technologies Co. Limited*. The Court concluded that the Company had not demonstrated that the appeal would be stifled or rendered nugatory if a stay were denied. The arguments raised, particularly the revenue rule contention, were assessed as barely arguable and had been consistently rejected by all courts that had considered the issue.

CASE RELEVANCE

This case is significant as it clarifies that orders relating to statutory demands are often viewed as preliminary steps rather than final decisions for the purpose of appeal. It reaffirms the rigorous test for admitting fresh evidence on appeal, requiring that the evidence must have been unavailable despite reasonable diligence, explicitly stating that a change of legal team is not a valid excuse for the lack of diligence. The case illustrates the BVI courts' procedural approach to insolvency appeals and their reluctance to permit the re-litigation of issues that were previously available to the parties. Critically, the Court's consistent rejection of the revenue rule argument solidifies its interpretation in the BVI context, emphasizing that the rule does not apply to private contractual disputes over the reimbursement of tax payments made to a foreign authority.

AB Limited, CD Limited, EF Limited v GH LIMITED - BVIHCM 2021/0192

Case Title:	AB Limited, CD Limited, EF Limited v GH LIMITED - BVIHCM 2021/0192
Jurisdiction	Territory of the Virgin Islands
Court	The Eastern Caribbean Supreme Court, High Court of Justice, Commercial Division
Date of Decision	27th January 2023 (Judgment handed down)
Attorneys for Applicant	Mr. Stephen Moverley Smith, KC with him Mr. Merrick Ricardo Watson
Attorneys for the Respondent	Mr. Alain Choo-Choy, KC with him Ms. Tameka Davis
Keywords/Tags	
Summary of Facts	• GH Limited sought to set aside an order enforcing three Singapore arbitration awards (the Phase 1 Awards) in the BVI. The awards arose from Share Purchase Agreements (SPAs) under Thai law, where the Claimants sold shares to GH Limited and JKL Ltd., with a clause providing 15% interest compounded monthly on late payments. • During Phase 1 arbitration, the Tribunal consulted Thai law experts and initially believed monthly compounding was impermissible but overlooked that compound interest was generally unlawful in non-loan agreements. Despite this, the Tribunal awarded interest at 15% compounded annually. The Claimants later attempted to correct a similar error in Phase 2 awards, but the Tribunal refused, citing functus officio. Parts of Phase 2 were set aside in Singapore, including the compound interest, but the Phase 1 Awards were not challenged there. The Claimants then sought enforcement of Phase 1 in the BVI, prompting GH Limited to apply to set aside the order, particularly the compound interest element.

Issues for Determination

The case required the determination of three main issues: the Compound Interest Issue, which asked whether it offends BVI public policy to enforce an arbitration award granting compound interest when all present parties accepted that the award was made in error, contrary to the governing Thai law which prohibits such interest, especially since the error was not discovered until after the statutory time limit for appealing the award had expired and the party seeking enforcement contributed to the error. The second issue was the Allocation Issue, concerning how a payment made by GHL should be treated (i.e whether it was appropriated to principal or interest). The third issue was the JKL Issue, addressing whether any sum remained due under the JKL Award.

Parties' Arguments

The Applicants (seeking enforcement) argued that the BVI Court must recognize the Tribunal's finding that recovering compound interest was legal under Thai law, asserting that this determination was final and could not be revisited. They contended that the relevant public policy referred to in Section 86(3)(b) of the BVI Arbitration Act 2013 is that of the BVI, not Thai law, and BVI public policy does not object to compound interest awards. They emphasized that the public policy exception is "narrowly circumscribed" and should not be used to review an arbitral tribunal's decisions on facts or law, citing the Privy Council decision in *Betamax*.

The Respondents, on the other hand, argued that regardless of the Tribunal's finding, the BVI Court is entitled to refuse enforcement in these exceptional circumstances because it would be contrary to BVI public policy and manifestly unjust to enforce a contractual provision that is illegal under the governing Thai law. They argued that judicial comity dictates that the BVI should not enforce a contract illegal under the law of a friendly foreign state. They noted that the Claimants themselves accepted the award was based on a mistake regarding Thai law and that enforcing the award would allow them to take advantage of this error. Additionally, the Respondents asserted that the award violated Thai laws concerning public order and good morals and argued that the *Betamax* decision permitted the Court to consider the effect of such illegality.

Decision

The Court granted the application to set aside the order that had been enforcing the compound interest elements of the three Singapore arbitration awards. The Court concluded that the awards in relation to compound interest should not be enforced, and the Enforcement Order was set aside insofar as it related to those compound interest portions.

Reasoning

- The Court accepted that while BVI public policy applies, the principle of comity is integral to BVI public policy. The Court accepted that it could refuse to enforce a contract governed by the law of a foreign friendly state (Thailand) if performance is illegal by that country's law. The Court found that the Tribunal's own GHL and JKL Awards made clear the illegality of the underlying contractual agreement for monthly compound interest under Thai law, and the substitute annual compounding obligation imposed by the Tribunal was also subsequently accepted by both parties as illegal under Thai law.
- Applying the principle established in *Betamax*, the Court reasoned that where an arbitral tribunal makes clear the illegality of the underlying agreement but then makes an award

enforcing that illegality, the enforcing court is entitled to set aside the award as conflicting with public policy. The refusal to enforce was based on the exercise of the Court's discretion to protect the integrity of its process from abuse and to prevent the Claimants from using the BVI Court to obtain compound interest that they acknowledged they were not permitted to recover under the governing Thai law.

CASE RELEVANCE

This case provides significant clarification on the scope and application of the public policy exception under the BVI Arbitration Act 2013, particularly when enforcing foreign arbitration awards where the underlying contract's legality under foreign law is challenged. It establishes that the BVI courts, through the principle of judicial comity, will refuse to enforce an award that grants something illegal under the law of the foreign friendly state governing the underlying contract, even if the subject matter (like compound interest) is not per se objectionable under BVI domestic public policy. The judgment offers crucial guidance on interpreting the *Betamax* decision, emphasizing that court intervention on public policy grounds is appropriate when the arbitral tribunal itself made clear the illegality of the underlying contract or its terms. It also underscores the court's role in safeguarding the integrity of its own processes from abuse.

Sonera Holding B.V. v Cukurova Holding A.S.

Case Title:	Sonera Holding B.V. v Cukurova Holding A.S.
Jurisdiction	Territory of the Virgin Islands
Court	The Eastern Caribbean Supreme Court in the Court of Appeal
Date of Decision	June 23, 2016
Attorneys for Appellant	Mr. Ben Valentin with Mr. John Carrington, QC
Attorneys for the Respondent	Mr. Kenneth MacLean, QC with Ms. Arabella di Iorio and Mr. David Caplan
Keywords/Tags	Interlocutory appeal – Arbitration – Anti-arbitration injunction – Foreign arbitral proceedings – Arbitration Act, 2013 – Interpretation of s. 3(2)(b) of Arbitration Act, 2013 – Whether court has jurisdiction under Arbitration Act, 2013 to grant anti-arbitration injunction so as to restrain party from pursuing foreign arbitral proceedings – If so, whether such injunction ought to be granted in present proceedings to restrain respondent from pursuing foreign arbitral proceedings – Whether learned judge erred in interpreting s. 3(2)(b) of Arbitration Act, 2013 – Whether learned judge erred in dismissing appellant's application for antiarbitration injunction as a result of his interpretation of s. 3(2)(b)
Summary of Facts	• Sonera Holding obtained a Final ICC arbitral award in Geneva (1 September 2011), enforced in the BVI as a High Court judgment (24 October 2011). Cukurova Holding unsuccessfully challenged enforcement in various courts. CH then initiated a second arbitration under a separate SPA clause, seeking a declaration it never entered the SPA and compensation equal to the Final Award. Sonera raised preliminary objections, partially rejected, allowing the arbitration on the merits. In September 2014, CH sought orders restraining Sonera from relying on the Enforcement Judgment and to unwind a BVI charging order. Viewing this as a collateral attack, Sonera applied for an anti-arbitration injunction (27 October 2014), which was dismissed by the court under the new Arbitration Act 2013, removing jurisdiction for such injunctions. Sonera therefore appealed.

Issues for Determination

The primary issue for determination was whether the court retains jurisdiction under the Arbitration Act, 2013, to grant an anti-arbitration injunction to restrain a party from pursuing specific relief in foreign arbitral proceedings.

Parties' Arguments

The Appellant argued that the learned judge erred because the court retains its general power to grant injunctive relief under section 24(1) of the Supreme Court Act, independent of the Arbitration Act, 2013. They contended that the Arbitration Act, 2013, primarily governs domestic arbitrations, and section 6(3) provides an exhaustive list of provisions applicable to foreign arbitrations, which does not include section 3(2)(b). Furthermore, they argued that the principle of non-interference in section 3(2)(b), derived from Article 5 of the UNCITRAL Model Law, is universally understood to apply solely to domestic arbitrations. The injunction was necessary because the Respondent's (CH) new claims directly interfered with the BVI court's processes, judgments, and orders, thereby justifying intervention to protect the court's integrity and the enforcement of a Convention award.

The Respondent maintained that the learned judge was correct, arguing that the prescriptive wording "shall not interfere" in section 3(2)(b) of the Arbitration Act, 2013, removed the court's jurisdiction to grant anti-arbitration injunctions. CH asserted that the principles outlined in section 3(2) are of general application to all arbitrations, whether domestic or foreign, and that section 6(3) merely limits exercisable powers, not foundational principles. They also argued that Sonera was guilty of inordinate and inexcusable delay since the arbitration had progressed for almost three years with Sonera's full participation. Finally, they contended that granting the injunction would contravene principles of international comity and the international arbitral order, as the BVI court was merely an enforcing court under the New York Convention, not a supervisory court for this foreign arbitration.

Decision

The appeal was allowed. The Court of Appeal ordered that CH be restrained from causing or seeking to cause the Second Tribunal to grant any relief which would have the effect of preventing Sonera from enforcing the Enforcement Judgment (issued October 24, 2011) or the final charging order (issued November 4, 2014). The injunction also barred CH from seeking relief that would require Sonera to discharge, reverse, or unwind these specific BVI court orders. Crucially, the Court specifically refrained from restraining CH from pursuing the SPA Arbitration proceedings in and of itself.

Reasoning

- The Court of Appeal held that the learned judge erred by concluding that section 3(2)(b) of the Arbitration Act, 2013, abrogated the court's jurisdiction to grant injunctive relief derived from section 24 of the Supreme Court Act. The court confirmed that it retains its general power and jurisdiction under section 24, which exists independent of the Arbitration Act, 2013, and that ousting such jurisdiction requires clear and express statutory language, which is absent in the Arbitration Act. While section 3(2)(b) expresses a policy of non-interference, it does not eliminate the court's inherent power to grant injunctions, especially to protect against unconscionable conduct or abuse of court processes. The court further reasoned that the Arbitration Act, 2013, is primarily designed as a complete arbitral code for arbitrations seated in the Virgin Islands, and sections 3 and 10 (which incorporates Article 5 of the UNCITRAL Model Law) are not among the exhaustive list of provisions applied to foreign arbitrations under section 6(3). Article 5 itself applies only to arbitrations seated in the enacting state.

- The court emphasized that restraining foreign proceedings is an exceptional remedy exercised with caution, typically reserved for circumstances involving vexatious, oppressive, or unconscionable conduct, or the infringement of a legal right. The court dismissed CH's delay argument, finding that Sonera acted promptly after CH's September 2014 statement of claim explicitly sought remedies aimed at unwinding the BVI court's orders, which constituted a "radical change" from the initial request for arbitration. The court viewed CH's specific prayers for relief aimed at unwinding and nullifying the BVI court's judgments as a blatant and direct interference with the BVI court's processes and an attack on its final, unimpeachable Convention Award. The Court relied on established principles, citing cases such as *Turner v Grovit* and *Karaha Bodas Company v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, which support a court's inherent power to protect its own processes, judgments, and the New York Convention enforcement regime from collateral or vexatious attacks in other jurisdictions. The court clarified that restraining a party from abusing its processes in this manner is an act of protecting the BVI court's integrity, rather than interfering with the foreign arbitral tribunal's jurisdiction.

CASE RELEVANCE

This case significantly clarifies the interaction between the BVI's Arbitration Act, 2013, and the general equitable jurisdiction of the Eastern Caribbean Supreme Court concerning arbitration matters. It establishes the critical legal principle that Section 3(2)(b) of the Arbitration Act, 2013, does not abrogate or restrict the BVI court's general power to grant injunctive relief under section 24 of the Supreme Court Act. The decision reinforces that courts retain an inherent jurisdiction to protect their own judgments, processes, and orders from abuse, even when such abuse is attempted through the pursuit of foreign arbitral proceedings. Therefore, this case reinforces the court's vital role in preventing the abusive utilization of arbitral proceedings to subvert its final decisions and enforcement processes, particularly concerning New York Convention awards.

Richard Vento and Others v Keithley Lake and Others - AXAHCVAP2014/0004

Case Title:	Richard Vento and Others v Keithley Lake and Others - AXAHCVAP2014/0004
Jurisdiction	Anguilla (Eastern Caribbean Supreme Court)
Court	The Eastern Caribbean Supreme Court in the Court of Appeal
Date of Decision	October 15, 2015
Attorneys for Appellant	Mr. Gerhard Wallbank and Ms. Rayana Dowden
Attorneys for the Respondent	Mr. D. Michael Bourne and Ms. Dana Campbell
Keywords/Tags	Arbitration agreement – Foreign arbitral award – Enforcement of foreign arbitral award in jurisdiction – Whether learned judge erred in dismissing appellants' application to register and enforce final arbitral award in jurisdiction – Arbitration Act 1996 (UK) – Means of enforcement of arbitral awards under Arbitration Act 1996 (UK) – Whether learned judge misdirected herself as to correct interpretation of Arbitration Act 1996 (UK) as imported into the laws of Anguilla – Whether learned judge erred in construction of s. 66 of Arbitration Act 1996 – Whether learned judge had jurisdiction under s. 66 of Arbitration Act 1996 to direct that judgment be entered in terms of final arbitral award
Summary of Facts	• The Appellants obtained a final arbitral award of US$7,419,000.00 against the Respondents and others, issued pursuant to an arbitration agreement executed in the United States Virgin Islands (USVI). The agreement stipulated that the governing law was that of the USVI and that the award would be binding and enforceable in both foreign and US jurisdictions without procedural or substantive objections. The Respondents are ordinarily resident in Anguilla and/or companies incorporated there. The Appellants applied to the Anguilla court to register and enforce the award as a judgment under sections 66 and 101 of the United Kingdom Arbitration Act 1996, which applies to Anguilla. The learned judge dismissed the application, holding that section 66 applies only to arbitrations governed by Anguillan law and is not for enforcing foreign awards. The judge further ruled that section 66 could not be used as a statutory basis for enforcement in this case because the arbitration was not governed by Anguillan law. The Appellants appealed this decision.

Issues for Determination

The main issues for determination included whether the learned judge erred in dismissing the application to register and enforce a final arbitral award in Anguilla. Crucially, the court had to determine whether the learned judge misdirected herself on the correct interpretation of section 66 of the Arbitration Act 1996 (UK), as adopted into Anguilla law, specifically concerning the enforcement of foreign arbitral awards. Finally, the court considered whether the learned judge possessed jurisdiction under section 66 of the Arbitration Act 1996 to direct that judgment be entered in terms of the final arbitral award.

Parties' Arguments

The Appellant argued that the judge had incorrectly construed the Arbitration Act 1996, asserting that section 66 does not explicitly or implicitly limit enforcement only to domestic awards. They maintained that Section 2(2)(b) of the Act expressly applies section 66 even if the seat of arbitration is outside the jurisdiction or not designated, making it applicable to foreign awards. The Appellants also stressed that the phrase "Nothing in this section affects..." in section 66(4) means that section 66 provides an additional and independent means of enforcement, which is not qualified by other conventions (such as the New York or Geneva Conventions) or common law. Furthermore, the Claimant argued there is no statutory requirement for Anguilla law to be the governing law for section 66 to apply, and that the contractual term allowing enforcement in any location where assets are situated should be upheld.

The Respondent argued that section 66 could not be used because Anguilla has not ratified or incorporated the New York Convention into its domestic law. They contended that the Anguilla Act only incorporates the UK Arbitration Act 1996 "so far as the same are applicable and mutatis mutandis," which they viewed as limiting phrases. The Respondent asserted that a literal interpretation of section 66 to include foreign awards would be absurd and contrary to Parliament's intent, further claiming that the Anguilla Legislature had not provided for the enforcement of such foreign awards in the same manner as the UK. Finally, the Respondent argued that section 66 was not intended to operate without the related provisions and defences found in the New York Convention sections (sections 101-103).

Decision

The Court of Appeal allowed the appeal, setting aside the orders of the learned judge. The Court ordered that the arbitration award dated 23rd August 2013 shall be registered so that it may be enforceable as if it were an order of the court. Consequently, the award shall be enforced as if it were an order of the court. Additionally, the Appellants were awarded costs of US$7,000.00 in the court below, with costs on appeal to be assessed if not agreed.

Reasoning

- The Court of Appeal, led by Baptiste JA, concluded that the learned judge had misdirected herself. The key reasoning centred on the necessity of construing the Arbitration Act 1996 to give effect to its clear, user-friendly language and core principles of arbitration law, avoiding technicalities. The court reasoned that section 66 of the Arbitration Act 1996 applies generally to any arbitration under the Act and offers a procedural, summary means for enforcing consensual arbitral awards, which is a common and convenient method. Crucially, the court relied on section 2(2)(b) of the Act, which explicitly states that section 66 applies even if the seat of arbitration is outside the jurisdiction (like England

and Wales or Northern Ireland) or if no seat has been designated. The court held that this provision is clear and unambiguous and must be given effect, thus finding that section 66 is neither expressly nor implicitly limited to domestic awards.

- The court also confirmed that the phrase "Nothing in this section affects..." in section 66(4) establishes section 66 as an additional and independent means of enforcement, which is not curtailed by other statutory, common law, or conventional methods. Furthermore, the Court rejected the argument that section 66 could not operate without the New York Convention's provisions (sections 101-103) and its defences, affirming that section 66 is a separate enforcement scheme and was not intended to give effect to the Convention.

CASE RELEVANCE

The ruling is significant because it reinforces the principle that arbitration statutes must be interpreted in a user-friendly and commercially pragmatic manner, aligning with the modern ethos of arbitration. It established the legal principle that the UK Arbitration Act 1996, as applied to Anguilla, requires interpretation that adheres to its clear language and that Section 66 is generally applicable regardless of whether the arbitration seat is domestic or foreign. This ruling confirms that Section 66 provides an enforcement mechanism that is separate from and not prejudiced by rights found under international conventions or common law

ANZEN LTD., LUND 3 APS, TRAVELLAB GLOBAL AB v. HERMES ONE LTD - BVIHCMAP2014/0013

Case Title:	ANZEN LTD., LUND 3 APS, TRAVELLAB GLOBAL AB v. HERMES ONE LTD - BVIHCMAP2014/0013
Jurisdiction	Territory of the Virgin Islands
Court	The Eastern Caribbean Supreme Court in the Court of Appeal
Date of Decision	11 June 2014
Attorneys for Appellant	SCA Creque (on written submissions)
Attorneys for the Respondent	Forbes Hare (on written submissions)
Keywords/Tags	Interlocutory appeal – Arbitration – Option to arbitrate – Construction of arbitration clause in shareholders' agreement – Application by appellant in court below under s. 6(2) of Arbitration Act, Cap. 6, for stay of proceedings commenced by respondent – Whether learned judge erred in refusing to stay proceedings – Whether parties obliged to refer disputes falling under shareholders agreement to arbitration
Summary of Facts	• A shareholder's agreement (SHA) for a BVI company contained an arbitration clause (Clause 19.5) stating: "If a dispute arises... any Party may submit the dispute to binding arbitration". Disputes arose between the parties. The respondent commenced proceedings in the Commercial Court without referring the disputes to arbitration. The appellants applied to the court under section 6(2) of the Arbitration Act, Cap. 6, to stay the court proceedings, arguing a valid and binding arbitration agreement existed. The learned judge dismissed the stay application, holding that no party was obliged to refer a dispute to arbitration, but if one did, it would be settled by arbitration. The appellants appealed this ruling.

Issues for Determination

The court was tasked with deciding two key issues: firstly, whether clause 19.5 of the SHA is an arbitration agreement that obliges the parties to refer disputes to arbitration and secondly if a disputing party bypasses the clause and goes to court, whether the other party is entitled to a stay of court proceedings under section 6(2) of the Arbitration Act.

Parties Arguments

The Appellants' Arguments maintained that Clause 19.5 was a binding arbitration agreement. They argued that the judge was therefore obliged under section 6(2) of the Act to stay the proceedings, citing established precedent, including *Fiona Trust & Holding Corporation and Others v Yuri Privalov and Others* and *Lobb Partnership Ltd v Aintree Racecourse Co Ltd*.

The Respondent's arguments countered that the specific wording in clause 19.5, which stated "any Party may submit the dispute to binding arbitration," was permissive only and did not create an obligation for a party to arbitrate. Furthermore, the Respondent argued that because the appellants themselves had not referred the disputes to arbitration, there was no current agreement to submit to arbitration within the meaning required by section 6(2), meaning the judge correctly refused the application for a stay.

Decision

The Court of Appeal dismissed the appeal. Consequently, the Court upheld the decision of the Commercial Court judge, which had refused the appellants' application for a stay of the court proceedings.

Reasoning

- The court reasoned that an arbitration clause that grants an option to arbitrate, particularly one using permissive language such as "any party may submit..." does not instantly create a binding contractual obligation to arbitrate. A binding agreement to arbitrate is only established when one of the parties takes the affirmative step of invoking the arbitration clause by actually referring the dispute to arbitration. This invocation is the necessary step for the matter to be covered by section 2 of the Arbitration Act. The court found that in this specific case, the appellants had failed to refer the disputes to arbitration. Since the appellants had not referred the matter to arbitration, there was no binding agreement to refer the disputes to arbitration that could be enforced via a stay under section 6(2) of the Arbitration Act. The court noted that the appellants "could not have their cake (by not referring the matter to arbitration) and eat it too (by securing a stay of the court proceedings under section 6(2))". The court cited previous cases, such as *Lobb Partnership Ltd v Aintree Racecourse Co Ltd*, which supported the view that while an optional clause allows either party to insist on arbitration, that insistence and subsequent application for a stay must follow the active step of invocation.

CASE RELEVANCE

This case is highly relevant as it clearly establishes the legal principle concerning optional arbitration clauses. Such clauses, characterized by permissive language, do not create an immediately binding obligation to arbitrate. The clause becomes a binding agreement only when a party actively exercises the option by referring the dispute to arbitration. Furthermore, this ruling clarifies that to successfully obtain a stay of court proceedings under section 6(2) of the Arbitration Act based on an optional clause, the party seeking the stay must first have invoked the arbitration clause. Failure to undertake this affirmative act of invoking arbitration means the mere existence of the optional clause is insufficient to secure a stay or automatically halt court proceedings.

BCB Holdings Ltd and the Belize Bank Ltd v Attorney General of Belize - BZ 2013 CCJ 3

Case Title:	BCB Holdings Ltd and the Belize Bank Ltd v Attorney General of Belize - BZ 2013 CCJ 3
Jurisdiction	Belize
Court	Caribbean Court of Justice
Date of Decision	26 July 2013
Attorneys for Appellant	Mr. Edward Fitzgerald QC, Mr Eamon Courtenay SC and Mrs Ashanti Arthurs-Martin
Attorneys for the Respondent	Mr Michael Young QC, Ms Magalie Perdomo and Ms Iliana Swif
Keywords/Tags	Arbitration-Award—Enforcement—Whether it is contrary to public policy to enforce the award—Convention award—Whether the Act is valid—Whether the award should be refused because it is in respect of a matter not capable of settlement by arbitration—Restrictive scope and high threshold of the public policy exception—Whether enforcement of the award will violate some fundamental principle of powers—Prerogative powers—Constitutionality of the 1980,Arbitration Ordinance—Whether ultra vires legislation is saved as existing law—Whether Belize was estopped from arguing that the New York Convention is not applicable
Summary of Facts	• A Settlement Deed ("Deed") was made between the parties which afforded the claimant a unique tax regime independent of Belizean tax laws. The Deed also sought to settle a pre-existing dispute between the parties as the terms restrained the claimant from pursuing existing claims against the Government in relation to the dispute. Two years later, following a general election and change in administration, the Deed was repudiated by the Government and the claimant, BCB Holdings Limited and The Belize Bank Limited ("the Companies") commenced arbitration proceedings according to the clause in the Deed. The London Court of International Arbitration ("LCIA") gave an award in favour of the Companies and the Companies applied to the High Court of Belize to have the award enforced, however the Attorney General resisted the application. The High Court was in favour of the claimant and the respondent then appealed to the Court of Appeal who agreed with the Attorney General submissions. Subsequent to this, the Companies appealed to the Caribbean Court of Justice ("CCJ").

Issues for Determination

There were three central issues that formed the crux of this Appeal. Firstly, the court had to determine whether the 1980 Arbitration Ordinance (the "Act") was valid in terms of its enactment which may have been an encroachment by the Belize colonial legislature upon the preservation of the Crown. Secondly, if the Act was considered to be valid, whether the CCJ should remit the case to the Court of Appeal so that the latter could address the arbitrability and public policy points, and finally ff the Act is valid and the case not remitted to the Court of Appeal, should the application be refused on grounds either that the dispute was not arbitrable or that enforcing the award would be contrary to public policy.

Parties' Argument

The Appellant asserted that he constitutionality of the Act and the Deed and therefore its right to be enforced against the Government of Belize. Despite the change in administration, the Companies purport that the Deed should continue to stand for the duration of the agreement as it is a lawful and legally binding commercial agreement. Further, the 1980 Ordinance dealt with the internal affairs of Belize (recognition and enforcement of awards), not external affairs or the Crown's prerogative in treaty-making. The State benefited from this agreement because the Deed amicably settled prior and pending claims of the Companies against the Government. They argued that the award is finding and binding and therefore enforceable and therefore the Government was estopped from denying the applicability of the Convention

The Respondent, on the other hand, based their defence on the basis of the Act pursuant to which enforcement of the award was sought was unconstitutional in that it was enacted by Belize colonial legislature specifically for the purpose of giving effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention") at a time when Her Majesty had not yet accepted the Convention on behalf of Belize. The dispute was not arbitrable as it related to the tax rates and liabilities of the Companies which was a matter for the Parliament of Belize. They argued that enforcement of the award would be contrary to public policy since the Deed was repugnant to the legal order of Belize

Decision/Outcome

The Court found the Ordinance to be valid but ruled that enforcing the award would violate fundamental principles of Belizean law, such as the separation of powers and Parliament's exclusive authority over taxation, leading to the award's non-enforcement. The CCJ dismissed the appeal finding that the Act was intra vires as the powers of the legislature did not encroach into the domain of the Royal Prerogative in treaty-making. The CCJ also determined that the Deed was contrary to public policy and to enforce the award will be unsound. However, with due regard to the Arbitration Ordinance and the Convention and therein the arbitral process, the CCJ decided that the most appropriate award would be for each party to bear its own costs.

Reasoning

- The CCJ found that the Act was valid despite the fact that it was enacted prior to the acceptance of the Convention by the Government. Frankly, the passage of the Act indicated the way in which foreign awards would be recognized and enforced in Belize. The Act did not make Belize a party to the Convention and its enactment was intra vires with the authority of the legislature. The CCJ did not remit the case to the Court of Appeal and instead deliberated on the matters in the judgment.

- The CCJ found that the enforcement of a foreign arbitral award should be refused only in the rarest of circumstances; an infringement of the core principles of justice and the rule of law. The fact that the Deed specified a unique tax regime, without the legislative approval, was unlawful as this executive action undermines the authority of the legislature, contradicting the legal doctrine of the separation of powers. There was no authority for the Minister to enter into such an agreement and hence, the CCJ found the Deed illegal, void and contrary to public policy. The CCJ noted that public policy should be applied in a more restrictive manner in scenarios involving foreign awards.

CASE RELEVANCE

This case signified the court's respect for the judgments of foreign tribunals, by upholding that the enforcement of foreign arbitral awards will only be inclined where it violates core principles of justice and the rule of law. The judgment also emphasised the doctrine of separation of powers which prevent the Executive from entering into a law-making actions, without legislative approval.

British Caribbean Bank Limited v The Attorney General of Belize - BZCV2017/001

Case Title:	British Caribbean Bank Limited v The Attorney General of Belize - BZCV2017/001
Jurisdiction	Belize
Court	Caribbean Court of Justice
Date of Decision	25 June 2013
Attorneys for Appellants	Lord Peter Goldsmith, QC and Mrs Ashanti Arthurs Martin
Attorneys for the Respondent	Mr Denys Barrow, SC and Ms Magalie Perdomo
Keywords/Tags	Interlocutory injunctions, jurisdiction of domestic courts in international arbitration
Summary of Facts	• Through compulsory acquisition, the Government of Belize ("GOB") obtained loan and mortgage debenture facilities with a face value of US $24M owed to BCB by Belize Telemedia Ltd. After multiple proceedings at the domestic level, British Caribbean Bank Limited ("BCB") initiated international arbitration proceedings against GOB under the Bilateral Investment Treaty ("BIT") between GOB and the United Kingdom. Consequently, HOB sought an interlocutory injunction from the court to curtail this arbitral proceedings. The injunction was granted and further upheld by the Belize Court of Appeal. The reasoning relied on by the appellate court was that the right to arbitration was dependent on the completion of the proceedings between the two parties in the domestic courts. BCB appealed the matter to the Caribbean Court of Justice ("CCJ").

Issues for Determination

The key issues to be determined by the court were whether the BIT created for BCB an unqualified or indefeasible right to arbitration, whether the Court should have determined the merits of the claim for a permanent injunction or should strictly limit its enquiry to whether there was a serious issue to be tried and whether there was sufficient basis for the interlocutory injunction granted to restrain the arbitration.

Parties' Arguments

The appellants purported that GOB was wrong in its compulsory acquisition of the debenture facilities owed to BCB. BCB contended that the BIT provided it with a right to international arbitration that was not contingent on any preconditions, including the prior exhaustion of domestic remedies. By initiating arbitration, BCB was acting within its rights under the BIT. The Court of Appeal in Belize acted outside of its jurisdiction when it granted GOB an injunction to inhibit the arbitral proceedings which had commenced in a foreign jurisdiction.

GOB, the respondents, argued before the Belize Court of Appeal that the right to arbitration was contingent upon the completion of domestic court proceedings, thereby justifying the injunction. The multiple proceedings commenced by the claimant, at the domestic and international level, were vexatious and therefore warranted the respondent's application for an injunction.

Decision

The CCJ upheld the appeal by BCB against GOB, discharging the interlocutory injunction and allowing BCB to continue with the arbitration proceedings against GOB. The CCJ also ordered GOB to pay the costs of the appeal before the CCJ.

Reasoning

- BCB did not have an unqualified or indefeasible right to arbitration, however, the BIT binds Belize under international law regardless of the ratification status of the treaty. Therefore, the BIT afforded BCB the right to arbitration.
- While the Belizean court derived its power from Section 27(1) of the *Supreme Court of Judicature Act* which states that the court may grant an interlocutory injunction in all cases where it appears to be 'just and convenient', it did not hold in this instance. The CCJ cited that the test established in *American Cyanamid Co v Ethicon* did not extend to the circumstances between GOB and BCB as the application for the injunction, in effect, sought to dispose of the dispute between the two parties.
- Section 106(A)(8) of the *Supreme Court of Judicature Amendment Act* authorises the court to restrict proceedings that would be oppressive, vexatious or an abuse of process. The CCJ determined that the threshold was not met. Thus, the court was incorrect to grant an interlocutory injunction and that applications for interlocutory injunctions should only be entertained in the most exceptional of cases.

CASE RELEVANCE

This case clarified that despite the fact that Arbitration Acts may empower courts to grant injunctions, courts must be cautious in restraining arbitration between the contracting parties, reserving injunctions for rare instances. It reinforces the autonomy of arbitration clauses and the pro-arbitration stance that courts in the region should adopt. It clarifies the scope of a state's obligations under international investment treaties and the limited role of national courts in restraining arbitral processes initiated under such treaties

The CCJ distinguished a party's 'indefeasible' or 'unqualified' right to arbitration, compared to a right established under an agreement or treaty and highlighted that more often than not one's rights infringe another's and therefore careful consideration must always be applied in the appropriate distribution of rights.

This case is highly significant for Caribbean arbitration law as it solidifies the principle of judicial non-interference with international arbitration proceedings.

C-Mobile Services Limited v Huawei Technologies Co. Limited - BVIHCMAP 2014/0017

Case Title:	C-Mobile Services Limited v Huawei Technologies Co. Limited - BVIHCMAP 2014/0017
Jurisdiction	The British Virgin Islands
Court	Eastern Caribbean Supreme Court
Date of Decision	15 September 2015
Attorneys for Appellant	Mr. Jason Nickless of Pump Court Chambers
Attorneys for the Respondent	Mr. Mungo Lowe of Harney Westwood & Riegels
Keywords/Tags	Civil appeal - application for appointment of liquidators - stay of proceedings - winding up - insolvency - mandatory stay - class remedy - statutory demand - contractual dispute
Summary of Facts	• The respondent made the application for the appointment of liquidators over the claimant. The claimant applied to stay the respondent's application on the basis that the agreement ("the Supply Contract") under which the underlying debt arose contained an arbitration clause. In finding that the commencement of the winding up proceedings did not engage the arbitration clause in the Supply Contract, the trial judge dismissed the appellant's application for a stay. With the leave of the court, the appellant appealed the dismissal of its application for a stay.

Issues for Determination

The courts were tasked with determining whether the winding up proceedings which have been commenced on the basis of an underlying debt are caught by the arbitration clause in the Supply Contract so as to bring the liquidation proceedings within the ambit of section 6(2) of the Arbitration Ordinance (the "Mandatory Stay Provision").

Parties' Arguments

The appellants argued that the agreement under which the underlying debt arose contained an arbitration clause and thus, the Wind-Up Application should be stayed pursuant to the Mandatory Stay Provision, in favour of arbitration. The claimant raised three grounds of appeal, alleging error on the part of the judge: (a) finding that the Mandatory Stay Provision was not applicable instead, as C-mobile purported, that the judge ought to have had regard for the fact that the Wind Up Application was based upon a disputed debt arising pursuant to the Supply Contract which contained an arbitration clause; (b) failing to give effect to the mandatory wording of section 6(2) of the Arbitration Ordinance; and (c) deciding that C-mobile was attempting to bring liquidation proceedings within the ambit of the arbitration clause in the Supply Contract

The respondents, HTC's position, as upheld by the courts, was that the winding-up proceedings were distinct from a dispute under the contract.

Decision

The court dismissed the appeal as the issue of the insolvency of the appellant falls outside the scope of the arbitration clause and that the Mandatory Stay Provision does not apply to the Wind Up Application.

Reasoning

- The court emphasised that the Supply Contract and the Mandatory Stay Provision indicate that the dispute must arise out of or be in connection with the formation, construction and performance of the contract. When considering whether the wind-up proceedings fell within this category, the court relied on the precedent of *Sanpete* and *Community Development,* and determined that it did not come within the scope of the arbitration clause. The appellate judge upheld the Chancellor's decision to the non-applicability of the Mandatory Stay Provision that winding up application, although it may be premised on the underlying debt, is not an action or proceeding on the debt or under the contract. Winding up is a collective remedy undertaken for the benefit of all creditors.
- While the claimant's counsel countered with the granting a stay of application for the winding up of a company on the grounds of its inability to pay its debts as they fell due in *Salford Estates*, the court found that the arbitration clause in that instance was wider than the one under consideration. The judge reiterated that a winding up petition should not be used as a means of oppression by way of enforcing payment of a debt which is bona fide disputed on substantial grounds as this would be an abuse of process.

CASE RELEVANCE

This case highlight Winding up proceedings as proceedings that are not intended to be caught within the ambit of the mandatory stay provisions contained in the Arbitration Ordinance unless the arbitration agreement itself is so drawn as to encompass such a proceeding. This case is highly significant in Caribbean arbitration law, particularly for jurisdictions with similar arbitration statutes to the BVI Arbitration Ordinance.

It clearly defined the limited scope of mandatory arbitration stays in the context of insolvency proceedings, specifically winding-up petitions. It reinforces the principle that courts will protect the statutory nature of insolvency remedies and prevent arbitration clauses from unduly impeding the public interest in winding-up proceedings. It also provides crucial clarification on the different thresholds for "dispute" depending on whether the issue is a contractual claim subject to arbitration or a statutory insolvency application.

Canisby Limited v Flat Point Development Limited - ANUHCVAP2016/0005

Case Title:	Canisby Limited v Flat Point Development Limited - ANUHCVAP2016/0005
Jurisdiction	Antigua and Barbuda
Court	Court of Appeal - Eastern Caribbean Supreme Court
Date of Decision	13 February 2017
Attorneys for Appellant	Mr. Anthony Astaphan, SC and Ms. Rika Bird
Attorneys for the Respondent	Mr. Frank Walwyn, Ms. Jacqueline Walwyn and Mr. Wesley George
Keywords/Tags	Interlocutory appeal – Application by defendant in court below to stay proceedings in favour of arbitration – Construction of arbitration clause in Preliminary Sale Agreement – Determination of existence of a dispute between the parties with respect to a matter to be referred to arbitration – Role of the court and the arbitration tribunal with respect to disputes – Whether the master erred in finding that the appellant had failed to discharge the burden of showing there was no dispute between the parties
Summary of Facts	• The appellant and respondent jointly purchased a resort in Antigua, to be constructed by the respondent. This was confirmed through the contracting of a Preliminary Sale Agreement ('Agreement'). This Agreement contained an arbitration clause which mandated that any dispute between the parties should be resolved through arbitration. The claimant initiated proceedings against the respondent in the High Court for non-performance and the respondent applied for a stay of the claim in light of the arbitration clause. When the respondent applied for a stay of proceedings the court agreed that the matter should be referred to arbitration as whether the respondent had breached any of the specific terms in the Agreement, constituted a dispute between the parties. The parties had varied their agreement and this was the reason the defendant did not meet its obligations under the terms of the original contract. Thus, the defendant did not accept that the claimant's right to terminate the Agreement had arisen.

Issues for Determination

There were five principal issues which the court had to determine. Firstly, whether a controversy exists and if there is a dispute, whether the dispute is one that falls within the arbitration clause. Further, whether there is sufficient reason as to why the matter in dispute should not be referred to arbitration, whether 'execution of the Agreement' includes performance and whether the desire to settle implies an admission of liability.

Parties' Arguments

Canisby commenced proceedings against the respondent in the High Court contending that the respondent had failed to complete its obligations under that agreement, in particular, it failed to submit the quarterly work-in-progress report signed by the architect. The appellant asserted that there was no dispute between the parties and consequently, the arbitration clause did not apply. Canisby advanced that the court's decision to stay the proceedings was wrongly decided with respect to the arbitration clause as the master only considered the statement of claim without examining the accompanying evidence. The claimant insisted that the defendant's non-performance of the agreement did not indicate a dispute and therefore the matter should not be subject to arbitration. Further, he argued that his evidence did not disclose any arbitrable matters**.**

Flat Point Development applied for a stay for the claim due to the clause through which the parties are to submit to arbitration and therefore that the jurisdiction of the High Court was improperly engaged. The respondent insisted that the parties had varied the Agreement and this explained why Flat Point Development did not meet its obligation under the terms of the original contract and thus, refused to accept the claimant's termination of the Agreement**.**

Decision

The appeal was dismissed and costs were awarded to the respondent. The judgment also confirmed the Court's jurisdiction to determine as a preliminary issue whether a controversy exists. The court determined that a dispute existed as the respondent disputed the appellant's claim and this dispute was in relation to the execution of the Agreement and the validity of the termination by the appellant. Hence, both of these disputes fell within the matters agreed to be referred to arbitration under the Agreement.

Reasoning

- The court relied on the principles of *Ocean Conversion* and *Heyman,* which ascertain whether there is a dispute. The court determined that in the respondent's application for a stay of proceedings is a clear indication that there is a dispute. The appellate court found that it was the master's jurisdiction to determine whether the dispute was between the parties. Contrary to the appellant's assertions, the court found that the master appropriately considered the evidence with the statement of claim. The fact that the defendant disputed the claimant's claim and the nature of the dispute was in relation to the execution of the Agreement as well as the claimant's purported termination of the Agreement.
- Moreover, the issue of the interpretation of the Agreement provides additional support for the master's decision to stay the claim. The Supreme Court found that there was indeed sufficient basis on the evidence and in law for the master's finding that there was a dispute between the parties with respect to a matter to be referred to arbitration and his decision that the appellant had not discharged the burden of showing why the proceedings on the claim should not be stayed in favour of

arbitration. The court also clarified that an expression of a desire to settle does not amount to an admission of liability. A dispute can still exist if the quantum of damages is not admitted, even if liability is conceded.

CASE RELEVANCE

This case reinforces that arbitration agreements generally make it a precondition of the right to arbitrate that there must be a dispute between the parties about an arbitrable matter, that is, a matter that is covered by the arbitration agreement.

Motor Union Insurance Company Ltd v Linzey - MS 1959 FSC 1

Case Title:	Motor Union Insurance Company Ltd v Linzey - MS 1959 FSC 1
Jurisdiction	Caribbean States
Court	Federal Supreme Court (West Indies)
Date of Decision	12 November 1959
Attorneys for Appellant	-
Attorneys for the Respondent	-
Keywords/Tags	Insurance policy - waiver - arbitration clause - contractual liability - estoppel - condition precedent - liability of insurance company
Summary of Facts	• This was an appeal in respect of the appellant's liability under a policy of insurance. The respondent had insured his motor car with the appellant insurance company. The respondent's car was involved in three accidents, the third of which is the issue at hand. A passenger of the respondent was injured and he claimed damages for injuries and subsequently brought an action. He was awarded damages, however Motor Union Insurance ('the Company') only paid the respondent's passenger, the appellant claimed and obtained a judgment for the outstanding sum. Linzey did not refer the matter to arbitration before initiating legal proceedings. The trial judge found that the Company had waived its right to rely on the arbitration condition precedent by not referring the dispute to arbitration itself, not seeking a stay, or not using the lack of an award as a defence. The trial judge also concluded that the £500 liability limit was not part of the contract due to the Company's agent's failure to inform Linzey of it. The Company appealed to the Federal Supreme Court.

Issues for Determination

The issues to be determined in this matter were as follows: first, the court must ascertain the meaning and effect of the arbitration clause contained in the insurance policy. Second, it must be determined whether the appellant was under a duty to submit the dispute to arbitration. Third, the court must consider whether reference to arbitration was a condition precedent to bringing an action against the company. Fourth, it must be examined whether the effect of the clause in the policy was to limit the liability of the insurance company to £500. Fifth, the court must determine whether the company had waived the condition precedent provided by the arbitration clause. Finally, the court must address whether the trial judge erred by adjudicating on issues that were not raised in the pleadings.

Parties' Arguments

The appellants poisted that the policy of the insurance: (i) limits the appellant's liability to £500 in respect of injury to a passenger in any one accident; and (ii) requires differences arising out of the policy to be submitted to arbitration.

Further, the appellant pleaded the payment of £500 to the respondent and referred to the clause of the policy insurance which dealt with passenger risk, arbitration concerning differences arising out of the policy, and disclaimer of liability by the Company. The arbitration clause made an award a condition precedent to any liability of the Company or any right of action against the Company and further provided that if the Company disclaimed liability to the insured for any claim under the policy and such claim was not referred to arbitration under the provisions of the policy within twelve calendar months of the disclaimer, the claim should for all purposes be deemed to have been abandoned and should not thereafter be recoverable under the policy. Motor Insurance Union said that it had exercised its right to disclaim and that there had been no award in pursuance of the arbitration clause.

The respondent countered that the company's liability was expressly limited to £500 by a clear proviso in the policy, and Linzey's subjective understanding did not signify agreement to an unlimited policy. The arbitration clause was a condition precedent to any liability of the Company or right of action against it, meaning Linzey's failure to refer the dispute to arbitration before bringing the action should result in the failure of his claim. The Company was not obligated to initiate arbitration as it was the defendant resisting a claim, not the claimant. The Company did plead the arbitration clause and the lack of an award as a defence. The Company had disclaimed liability in March 1955, and since the claim was not referred to arbitration within 12 months, it should be deemed.

Decision

The appeal was allowed as the court held that the appellant was not obliged to submit the dispute to arbitration, but the respondent was obliged to do so reference to the matter of arbitration was a condition precedent to the bringing of an action and the failure of the respondent to refer it to arbitration must necessarily result in failure of his claim. The policy was limited to the amount stated in the policy.

Reasoning

- The respondent's decision to amend his reply in the hearing, to deny the proviso in the policy which limited the appellant's liability, was refused by the Court as it would result in an injustice to the appellant. The justices determined that the policy can only be unlimited if the parties to it agree that it should be unlimited and in this instance, there is no agreement to reflect this. With regards to the arbitration clause, the clause clearly defined the terms of operation and because the respondent failed to follow suit, that is, to refer the matter to arbitration following a dispute, the respondent's claim is invalid. Moreover, contrary to what the respondent alleged, no duty to refer the dispute to arbitration is imposed on the Company, only the respondent.

Therefore, the appellant did not waive the arbitrator clause.

- The Court concluded that the Company had not waived the arbitration clause. The Company had pleaded the arbitration clause as a defence from the earliest stage. Furthermore, while the Company had the right to apply for a stay, its failure to do so did not constitute a waiver, especially given its reliance on the defence that the action could not be maintained due to the lapse of 12 months since disclaimer without arbitration. The Court stated that the trial judge's finding of estoppel regarding the arbitration clause was "completely alien" to the case and "without foundation

CASE RELEVANCE

This case is significant in Caribbean arbitration law for its strong emphasis on the enforceability of arbitration clauses that act as conditions precedent to legal action. It clarifies the onus on the claimant to initiate arbitration when such a clause exists and affirms that the defendant does not necessarily waive its rights by not participating or seeking a stay. It also underscores the importance of proper pleading in legal proceedings and reinforces the principle that courts should not create new issues beyond those framed by the parties. This judgment provides a clear historical precedent for how courts in the region approach such clauses, distinguishing between the claimant's obligation to seek an award and the defendant's right to rely on its absence.