The context, legitimacy and future of anti-arbitration injunctions in investment arbitration

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CHANCE

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Overview

- Cases
- ***British Caribbean Bank Ltd v Belize*, Caribbean Court of Justice, 25 June 2013**
- ***Independent Power Tanzania Limited v Standard Chartered Bank (Hong Kong) Limited*, High Court of Tanzania, 23 April 2014**
- Commercial arbitration equivalents
- Legitimacy
- Future

British Caribbean Bank v Belize

- Caribbean Court of Justice has taken over the appellate function of Privy Council for member states of the Caribbean Community and Common Market (CARICOM)
- The case concerned an appeal from an interlocutory order of the Court of Appeal of Belize
- Belize nationalized its telecoms industry in 2009
- As a result, the government compulsorily acquired certain loan facilities held by the BCB
- On the day the investment arbitration was filed (5 May 2010), an interim injunction application was filed in the Belize courts to prevent from proceeding with the arbitration
- Trial court issued the injunction on the belief that the "resolution of the disputes through the domestic courts was preferable"
- BCB appealed to the Court of Appeal, which upheld the injunction

British Caribbean Bank v Belize

- Ability to issue anti-injunction proceedings
- Article 106A(8) of the Supreme Court of Judicature Act:
- **"the Court shall have jurisdiction … to issue an injunction against a party or arbitrators (or both) restraining them from commencing or continuing any arbitral proceedings" where it is shown "such proceedings are or would be oppressive, vexatious, inequitable or would constitute an abuse of the legal or arbitral process"**
- Constitutionality of this provision is currently being challenged
- Court held that the right to arbitrate was not unqualified and indefeasible
- **"The exercise by one individual of his or her rights often infringes on the rights of other individuals or the society as a whole and the court must remain the final arbiter of the relative distribution of those rights"**

BCB v Belize

- BUT … :

•"it is 'only with extreme hesitation' that the court will interfere with the process of arbitration "

•"the jurisdiction to grant an anti-arbitration injunction must be exercised with caution and only granted if the arbitral proceedings are vexatious or oppressive"

- Court held that there is no presumption that a multiplicity of proceedings or bringing proceedings in an inconvenient place or the added expense of arbitration is vexatious

- The Court must redouble its caution because

(1) of importance of recognising the parties' agreement on dispute resolution

(2) the principle that the tribunal should not be subject to the control of the domestic courts before it makes an award

BCB v Belize

- Court recognised many advantages to BCB by pursuing arbitral proceedings:

- **subject matter in both proceedings qualitatively different**

- **BIT cause of action is under the treaty not a breach of the Constitution or legislation**

- **the rights alleged under international law exceeded the rights had under the Constitution (lawful expropriation under national law could be unlawful under international law)**

- **the likelihood that a court or tribunal would afford double relief is remote**

BCB v Belize

- International investment arbitration akin to contract based arbitration under *Carlill v Carbolic Smoke Ball Co* (1891)
- **Investor "makes free standing offer which is accepted on submission of the dispute to arbitration and becomes a binding contract"**
- **"The very purpose of the arbitration contract created or generated by the arbitration clause in the investment treaty was to provide for the protection of foreign investors … providing them with a right to pursue disputes about their investments through international and neutral arbitration as an alternative to submitting themselves to the national courts"**
- **This reverses the generally accepted view that the State makes the offer, which is accepted by the investor**
- **Should contractual analogies be applied to treaties?**

Thank you