**IN THE COURT OF APPEAL OF BELIZE, A.D. 2022**

**CIVIL APPEAL NO 12 OF 2018**

**BELIZE ELECTRICITY LTD** **Appellant**

**v**

**BELIZE CO-GENERATION LIMITED** **Respondent**

---

BEFORE:

| | | |
|---|---|---|
| The Hon Madam Justice Hafiz-Bertram | - | President (Ag) |
| The Hon Madam Justice Woodstock-Riley | - | Justice of Appeal |
| The Hon Mr. Justice Foster | - | Justice of Appeal |

**By written submissions**

Y Cave for the appellant.
I Swift for the respondent.

---

9 September 2022

**JUDGMENT**

**HAFIZ-BERTRAM P (Ag.)**

**[1]** I had the opportunity to read in draft the judgment of my learned brother, Foster JA, and I agree with his reasons for the judgment given and the orders proposed therein.

_____
HAFIZ-BERTRAM P (Ag.)

**WOODSTOCK-RILEY, JA**

**[2]** I concur.

_____
WOODSTOCK-RILEY, JA

**FOSTER, JA**

**[3]** The Appellant (BEL) is an electricity supply company established under the Electricity Act, Chapter 221 of the Laws of Belize. It is the main supplier of energy to primary consumers in Belize. The Respondent (Belcogen) is a generator and supplier of electrical energy and a licenced public utility provider.

**[4]** The parties entered into a Power Purchase Agreement (PPA) dated 2nd February 2007. The PPA was for the sale of electrical energy from Belcogen's Facility as defined in the PPA and the purchase by BEL of that energy in accordance with the terms of the PPA. Belcogen, at all material times would sell energy from its premises at Orange Walk. The facility is/was located adjacent to the Belize Sugar Industries Tower Hill sugar factory.

**[5]** Commercial operations did not begin until 2010. The compensation to be paid for the sale of the energy was governed by the PPA at clauses 2.1 and 17. Clause 2.1 provides "Sale and Purchase. Subject to and in accordance with the other terms and conditions of this agreement, from (and including) the Commercial Operation Date until (and including) the last day of the Term: (i) the Seller shall make available at the Delivery Point and sell to the Purchaser NEO associated with Firm Capacity as As-Available Capacity from time to time generated by the Facility and (ii) the Purchaser shall purchase from the Seller NEO associated with Firm Capacity for the consideration described in Article 17 (*Compensation*) and As-Available Capacity which it agrees to purchase from time to time for consideration agreed between the Parties at the relevant time in accordance with Article 2.4 (*Declared As-Available Capacity*)"

**[6]** Clause 17 of the PPA sets out the method of calculating the Compensation and includes the Base tariff provided in clause 17.1.1. The PPA also sets out an arbitration agreement at clause 25 under the heading "Resolution of Disputes".

**[7]** A dispute arose when BEL refused to compensate Belcogen for the supply of energy between 2016 and 2017. There were attempts at mutual resolution but on the failure of these attempts by letter dated October 16, 2017, the Director of Finance of Belcogen wrote to BEL as it concerned disputes and differences which have arisen between the parties, namely:

(i) is the tariff of US$0.1056/kWh approved by the Public Utilities Commission (PUC) via letter dated 2 February 2007 valid?

(ii) is the application of the tariff inflation index proposed by Belcogen since January 2016 in accordance with the PPA? If so, is the amount owed by BEL to Belcogen for the period January 2016 to September 2017 on account of their inflation index BZD 620,981 plus interest?

**[8]** In that letter Belcogen gave notice that it required BEL to join it in appointing one of two named arbitrators and if not to provide a list of two arbitrators from the roster of arbitrators of the British Virgin Islands Arbitration Centre (Caribbean region). Belcogen further gave notice that in default of joining with it in appointing a sole arbitrator within the time frame stated of seven days, it would apply to the Supreme Court to appoint an arbitrator pursuant to section 6 of the Arbitration Act.

**[9]** BEL responded by their lawyer by letter dated October 19, 2017 stating that the request for arbitration was misconceived and referred Belcogen to section 47(1) of the Public Utilities Act, Chapter 223 of the of the Laws of Belize. They set out the section of the Act and I do so as well as it is central to the issues:

> "*Subject to the provisions of this Act, the powers vested in the Commission by this Act shall apply notwithstanding that the subject-matter in respect of which the powers are exercisable is the subject-matter of any other Act or agreement and shall apply in respect of rates and services, whether fixed by or the subject of any other Act or agreement or otherwise and, where the rates and service are fixed by or are the subject of an agreement, shall apply whether the agreement is incorporated in or ratified or made binding by any general or special Act or otherwise*"

BEL further stated that any complaints in relation to the rates "*shall be made to the Commission and by virtue of section 22(1) (b) the Commission is empowered to determine and prescribe rates which may be charged in respect of utility services".*

**[10]** By letter dated October 20, 2017, BEL submitted an official complaint to the PUC *inter-alia* under the heading Biomass Component that "*On a PPA review conducted in 2016, BEL discovered that the base rate that was being applied to the annual escalation did not reconcile with Clause 17 (Compensation) of the PPA. Since then, BEL has asked Belcogen to present documents that can legally justify the rate being applied in the invoices being levied on BEL*".

**[11]** By reason of this dispute, which Belcogen claims is to be resolved by arbitration and which BEL states should be resolved by the PUC under the PUC Act, Belcogen applied to the Supreme Court for the appointment of an arbitrator. The application was supported by an affidavit made by Shawn N. Chavarria, the Director of Finance of Belcogen. In the affidavit, Belcogen claimed that "BEL has refused to compensate Belcogen for power provided in 2016 and 2017 at the rates prescribed in the PPA. Therefore, after mutual discussions, on October 16, 2017 Belcogen served notice to appoint an arbitrator pursuant to Article 25.2 of the PPA. BEL responded and filed an affidavit deposed to by Jeffrey Locke, its Chief Executive Officer stating at the following paragraphs:

> *"6. The compensation to be paid by the Respondent for the supply of the said electrical energy was governed by Articles 2.1 and 17 of the PPA.*
>
> *7. A dispute subsequently arose between the parties as to the rates that should be charged by the Applicant.*
>
> *8. Clause 17.1 of the PPA stipulates that the tariff for Net Energy Output shall be determined with reference to a base Tariff and the formulae as set out in Part 1 of Exhibit 11 of the PPA. The said formulae allowed for yearly adjustments in the tariff. The PPA, including the above formulae were required to be approved by the Public Utilities Commission before the PPA came into operation.*
>
> *9. Further, pursuant to Clause 20 of the PPA the Applicant was at liberty to apply to the Public Utilities Commission for an increase in the above rate on the grounds of material unanticipated changes in capital cost for the project or operating costs of the project due to circumstances which could not be reasonably foreseen or controlled by the Applicant.*

*10. Since commercial operations did not begin pursuant to the PPA until February 2010 the yearly escalations allowed by Clause 17 had to be calculated at the beginning of operations in order to determine the tariff to be utilized in 2010. The Respondent subsequently conducted a PPA review in 2016 and discovered that there was no approved justification for the base rate that was being applied to the annual escalation. The Respondent therefore requested that the Applicant present documentary evidence that can justify the rate being applied in the invoices submitted to the Respondent.*

*11. In response, the Applicant produced a copy of a letter from the then Chairman of the Public Utilities Commission, Mr. Roberto Young to the Applicant dated the same date as the execution of the PPA. The letter was addressed to the Applicant only and was copied to the Respondent. In the said letter Mr. Young approved the Applicant's request for an increase in the projected rates with no mention of the method utilized in calculating the escalation of the approved rates. (emphasis mine). It is the Respondent's understanding that the Applicant has been charging its increased rates based on this letter from the Public Utilities Commission, which the Applicant (*sic*) had no knowledge of.*

*12. The Dispute was exacerbated in June 2016 when, whilst discussions were ongoing between the parties as to the disparity in rates charged by the Applicant, the Applicant applied to the Public Utilities Commission for a further percent increase above the invoiced rates challenged by the Respondent. The said application by the Applicant is still before the Public Utilities Commission.*

*13. With respect to Paragraph 3 it is denied that the Respondent has refused to compensate the Applicant for power provided in 2016 and 2017 at the rates prescribed in the PPA. Article 15.4 of the PPA provides that where there is a dispute those amounts which are undisputed are payable and disputed amounts are payable only after resolution of the dispute. Therefore, the respondent, in good faith, has compensated the Applicant at the rates levied in 2015 until the dispute is properly resolved.*

*15. The Respondent has been advised by its Attorneys-at-law of Cave Lochan Watson LLP and verily believe that since the nature of the dispute between the parties is that of the applicable rates which should be levied for the provision of electrical energy the parties are required to refer their dispute to the Public*

*Utilities Commission in accordance with Sections 15 and 22 (1) (b) of the Public Utilities Commission Act Cap 223.*

*17. The Respondent is further advised and does verily believe that in the premises, notwithstanding that there is an arbitration clause contained in the PPA (Article 25), the said clause is void and unenforceable in relation to disputes between the parties as to the applicable rates which should be levied by the Applicant.*

**[12]** On 19th February 2018 and 13th and 16th March 2018 the application for the appointment of the arbitrator was heard by the Honourable Mr. Justice Courtney Abel and his written decision delivered on the 22nd March 2018.

**[13]** After a hearing the learned judge delivered his decision. He determined at paragraphs *[113] that '…the current dispute between Belcogen and BEL relates to the contractual rates, approved by the PUC, to be charged for electrical energy, and does not directly relate to the rates which are regulated by the PUC Act in the public interest. In any event this Court considers that any such question may be determined by the PUC in the Complaint which has been filed by BEL and which is no doubt before the PUC. In addition, this is something to which any arbitrator appointed could be asked to consider and determine. [114] As a consequence, this Court considers that it is for the PUC and any appointed Arbitrator, each or both of which, to consider and determine, and that both may well be proper bodies to determine any issues and disputes relating to rates, respectively the subject Complaint and the submission to arbitration, to be charged by BEL. [115] This Court therefore considers that Belcogen and BEL, having entered into an agreement, which has given rise to disputes, and which by such agreement, for their reasons, they have decided they want decided by an arbitrator, this Court, should take a hands off approach and allow the agreement to take effect.'*

**[14]** The learned judge found that apart from finding that the arbitration agreement was valid that the question of whether the arbitration agreement is void, was equally a question which any appointed arbitrator may decide. At paragraph [121] of his judgment the learned judge found that the PUC was not necessarily the party seized with the dispute. The Court below therefore dismissed the application by the PUC for joinder or to be added as a new Respondent to the application.

**[15]** The Court below disposed of the matter by determining that the dispute between Belcogen and BEL should be referred for consideration by an arbitrator. The Court below awarded cost to Belcogen against both BEL and the PUC.

**[16]** By order of the Supreme Court dated the 10th April 2018, it was ordered that Mr. Dennis Morrison QC of Kingston Jamaica was to be appointed the sole arbitrator in the reference of a dispute to arbitration under the arbitration agreement made between the Applicant and the Respondent dated 2nd February 2007. It is this order which is the subject of the appeal.

**[17]** The Grounds of Appeal set out in the Notice dated and filed on the 7th May 2018 are as follows:

> "2. Grounds of Appeal
>
> 2.1 The Learned Judge erred in finding that "the procedures which exist under section 15 of Public Utilities Commission Act Cap 223 of the laws of Belize may exist in addition to and not necessarily instead of the dispute resolution provisions under the Arbitration Clause contained in the Power Purchase agreement dated the 2nd February 2007";
>
> 2.2 The Learned Judge erred in finding that the provisions of Section 47 of the Public Utilities Commissions Act Cap 223 do not prevail and take precedence over the Arbitration Clause contained in the Power Purchase Agreement dated the 2nd February 2007;
>
> 2.3 The Learned Trial Judge misapprehended the facts and/or failed to give any consideration or sufficient consideration to the facts led by the Appellant in determining that "it is not clear to the Court that the dispute between the parties touches or concerns the powers which the Public Utilities Commission has under the Public Utilities Commission Act Cap 223 under the laws of Belize and is the subject matter in respect of which the powers of the Public Utilities Commission are exercisable.'"
>
> 2.4 The Learned Judge erred in failing to properly consider whether there are any inconsistencies between the Power Purchase Agreement and the Public Utilities Commission Act before determining the issue of whether an Arbitrator should be appointed.

2.5 The Learned Trial Judge erred by failing to determine the issue of whether the nature of the dispute between the parties relates to the rates that should be charged by the Respondent and are governed by the Public Utilities Commission Act Cap 223 before determining the issue of whether an arbitrator should be appointed.

2.6 The Learned Judge misdirected himself in failing to recognize that the determination of the issue of the nature of the dispute between the parties was a relevant and necessary finding that had to be made prior to the determination of the issue of whether an arbitrator should be appointed.

2.7 The Learned Judge misdirected himself in considering that the Public Utilities Commission and the arbitrator can both simultaneously determine the dispute between the parties.

2.8 The Learned Judge misdirected himself in construing the Arbitration Clause in the Power Purchase Agreement as requiring the parties to submit disputes relating to the reasonableness and validity of the rates to be charged to Arbitration.

2.9 The Learned Judge erred in determining that the dispute between the parties should be referred for consideration by an arbitrator.

3.0 The Learned Judge erred in finding that the Arbitration Act Cap 125 of the laws of Belize contemplates and authorizes a 'notice of application' to be filed when seeking an order for the appointment of an arbitrator.

3.1 The Learned Judge erred in finding that the Notice of Application filed by the Respondent for the appointment of the arbitrator was a proper means by which the jurisdiction of the Court can be invoked.

3.2 The Learned Judge erred in finding that the Notice of Application filed by the Respondent can be properly brought under Rule 8.1(6) of the Belize Supreme Court (Civil Procedure) Rules 2005.

3.3 That the decision of the Learned Judge is against the weight of the evidence."

BEL abandoned its grounds under 3.0, 3.1 and 3.2.

**[18]** The parties filed written submissions. The grounds sought to challenge the decision of the judge in appointing an arbitrator before first determining whether the nature of the dispute that arose between the parties was one that ought to be determined under the provisions of the PUC Act and not under the terms of the PPA which provided for disputes to be resolved by arbitration. I will state here from the outset that any court ought to be reluctant to strike down an arbitration agreement, especially on the basis of the nature of the dispute. The arbitrator, in most cases is charged with the responsibility of determining his own jurisdiction.

**[19]** In this matter, the relevant facts are that there was/is an agreement between the parties. The parties are also subject to the Public Utilities Act Cap 223 of the Laws of Belize.

**[20]** Article 25 of the PPA provides for the "Resolution of Disputes" and specifically 25.2 for resolution by arbitration. It provides *"Arbitration Generally. If a dispute cannot be settled in accordance with Article 25.1 (*Mutual Discussion*), then either Party may refer the dispute to arbitration under the Arbitration Laws of Belize as in effect at the date of such referral."*.

**[21]** The PUC Act at section 3 provides for the establishment of the Public Utilities Commission which is a body corporate with perpetual succession. Its powers and functions are derived from the Act. Part III of the Act provides for Provisions as to Rates. Section 15 provides for complaints made by any person to the Commission as it relates to the rates imposed by a public utility or public utility provider. The Commission will then deal with these complaints as provided for in sections 15 (2) and (3).

**[22]** By letter dated February 2, 2007, the Public Utilities Commission wrote to Belcogen in relation to the approval of the projected tariffs to be impose by it. I will set out the letter in full. It was addressed to Mr. Richard Harris, Director of Business Development, Belcogen, Tower Hill, Orange Walk, Belize.

> *Dear Mr. Harris,*
>
> *Through this medium the Public Utilities Commission (PUC) acknowledges receipt of your initial letter reference belcogen/puc/bel/ppa and subsequent submission reference rah/bel/cogen/puc/ppa/genlic as requested by the Director- Rate Setting and and Q.O.S.*
>
> *Subsequent to my e mail dated December 27, 2006 and your response dated January 10. 2007. The PUC has reviewed your response and approves the projected tariff of US$0.1056/kWh for 2009. As previously indicated the tariff will be reviewed at the end of construction.*

*The PUC appreciates the diligence displayed by Belcogen in seeking to build the Bagasse to Electricity generating facility, and indeed the Commission looks forward to the facility serving the Belizean public.*
*Sincerely,*

*PUBLIC UTILITIES COMMISSION*
*SGN Roberto Young*
*Chairman*

**[23]** BEL sets out its arguments at paragraphs 28 through to 70 of its submissions dated and filed 13 December 2018. In those submissions, the essence of the argument is that "the dispute between the parties' centers specifically on the applicable rates to be charged by Belcogen pursuant to the PPA and that the parties are obliged to follow the dispute resolution process prescribed by the PUC Act and that the dispute is not arbitrable". Belcogen argues that the arbitration agreement in the PPA provides for the resolution of all disputes and that it is for the arbitrator to determine his own jurisdiction. Apart from this argument on the part of Belcogen with which I agree, it is my opinion that in this case the nature of the dispute is the calculation of the amount claimed to be owed by BEL to Belcogen under the rates provided for and agreed by the PUC in its letter dated February 2, 2007. In my understanding of the facts in this matter, the dispute between the parties rest solely on the sums claimed by Belcogen as a debt due by BEL to it, calculated in accordance with the agreed rate provided in the PPA and approved by the Commission. It is not a dispute as to the fairness or reasonableness of the rates, or that Belcogen is imposing a rate that was not agreed. In my view, the dispute being the calculation of the sums claimed, is a dispute the parties agreed to resolve by arbitration. If however, the rates as agreed and approved by the PUC are being misapplied so that an unreasonable or unfair rate is being applied, the PUC as a regulatory authority would have the concurrent jurisdiction to intervene upon a complaint by "any person", in the public interest.

**[24]** This however is not the case here, as I have stated in the paragraph above. In any event, the parties by clause 25 of the PPA have agreed to resolve all disputes by arbitration. From the submissions we have discerned that this appeal was argued before a differently constituted court on the 18th June 2019. Counsel for the BelCogen in their submissions filed on the 1st October 2019 at paragraph 2 submitted that *"this Appeal was argued on 18th June, 2019. Since then, however, the arbitration proceedings have been completed and Final Award issued on 26th June 2019"*. The appeal came up before us and the parties agreed to have the matter determined on

paper. Since then, it is also our understanding that the arbitration proceedings were heard and completed before C. D. Morrison QC and a FINAL award handed down the 26th June 2019. BEL had challenged the Arbitrators jurisdiction as a preliminary point and was determined by the Arbitrator. In the final award, it was adjudged and declared by the arbitrator, we are told at paragraph 4 of the same submissions, that

> *"4. The oral evidence in the arbitration proceedings was completed on 1st February, 2019 and the Arbitrator delivered the Final Award on 26th June, 2019. BEL had challenged the Arbitrator's jurisdiction as a preliminary point which was considered and determined in the Final award against them. The Arbitrator also declared:*
>
> 1. *….the projected tariff of US$0.1056/kWh for 2009 for the supply of electrical energy by BELCOGEN to BEL under the terms of the PPA approved by the Public Utilities Commission in its letter of 2 February 2007 is valid"*
> 2. *....that the application of the tariff inflation index proposed by BELCOGEN since January 2016 is in accordance with the PPA".*

**[25]** Belcogen have argued at their paragraph 5 of the same submissions that there has been no challenge to the final award under the PPA and according to the PPA, the award is final and binding. Article 25.6 of the PPA provides "subject to Article 25.7 awards made by the arbitral tribunal shall be final and binding on the Parties". Article 25.7 provides "Notwithstanding Article 25.6 either party may appeal to the Supreme Court of Belize against the arbitration award (the "Award") within 21 days of the delivery of (sic) thereof upon the grounds of either "Error of Law" or "Serious Irregularity" as defined below….". Belcogen has submitted that "…while the appeal has been heard in this matter, a decision as to whether the judge erred in appointing the arbitrator is now academic. We submit that this court should exercise its discretion in favour of not delivering its decision."

**[26]** BEL argues that the present appeal concerns the decision of the trial judge's appointment of the arbitrator and attendant issues with respect to the judge's exercise of his discretionary powers in doing so. BEL further argues that should this court find that the Arbitral tribunal was improperly constituted or that the Arbitrator was not properly appointed owing to the failure of the learned trial judge to properly exercise his discretion then it follows that the Arbitrator's ruling cannot be final and binding.

**[27]** The arguments of the parties have disclosed that there was an arbitration hearing, and Belcogen argues further that the Arbitrator delivered an award which was final. Under the arbitration agreement in the PPA, the award "shall be final and binding". A final award in general means 'without appeal'. This of course is subject to an appeal on a question of law. An award is binding not only on the parties to the reference but to everyone who would be claiming through or under them, be privy to it. See the dicta of Lord Blackburn in **Martin v Boulanger (1883) 8 App. Cas. 296**

> *The Court goes on to say:- "The parties to that suit were therefore the plaintiff Robert and the defendant Martin plus the intervening parties just mentioned. They were the parties who appeared before the arbitrators and umpire, and were heard by them. Whatever was decided by the arbitrators, and finally affirmed by the umpire, and subsequently by the Court, can apply to and be binding on no one but the parties to the reference." It certainly seems to their Lordships that this is not quite accurate. What was found on the reference is binding, not only on the parties to the reference, but also on every one who would, in English law, by claiming through or under them, be privy to it. The same thing seems to be the law in France, and in truth the law must be in every country the same. It is not merely that a judgment shall be binding on the parties who are the actual parties to the suit, but it must be binding upon all who claim under or through the party to it in respect to the property in dispute. Otherwise there would be interminable litigation, and every judgment would be opened again and again, and the maxim "interest reipublicæ ut sit finis litium," to say nothing of justice and convenience between parties, would be completely lost sight of.*

**[28]** The PPA provides that clause 25.6 was subject to Article 25.7. Article 25.7 provides the grounds on which the award could be appealed and the time within which the appeal is to be made. The "Errors of Law or Serious Irregularity" which would ground the appeal were detailed in Article 25.7. Again, from my understanding of the matter before us discerned from the submissions, no appeal was filed in accordance with the provisions of the PPA, or a stay of the arbitral proceedings filed.

**[29]** This now leaves us with the status of the matter as we see it. There is an appeal before us which raises issues as it regards the exercise of the discretion of the trial judge in appointing an arbitrator in the circumstances of this case. On the other hand, there is now an award made by an arbitrator which for all intents and purposes has decided the fundamental

issue between the parties, that is, the validity of the claim for monies by Belcogen over a specific period of time, based on the rate calculations contained in the PPA. To argue that these two issues are different so that if the trial judge wrongly appointed the arbitrator would therefore mean that the arbitration proceedings were wrongly conducted and therefore the arbitration proceedings would have to be set aside is an argument, I respectfully do not find favour with. In the event I agreed with this proposition, it would mean that the proceedings within which the parties participated in, and for which no appeal was filed would make a nonsense of the PPA. To allow the appeal on the basis of a contingent issue which was an integral and necessary part of deciding the central issue of the parties, without more would in my view be inconsistent with the proper administration of justice and frankly the overriding objective. The award could not have been made without the appointment of an arbitrator. An arbitrator was appointed, a hearing carried out and an award made. No appeal was filed under the provisions of the PPA to challenge the powers and therefore the jurisdiction of the arbitrator. It would have made a nonsense of the time limit provided there within which to appeal. It would have rendered otiose the provision in the executed PPA by the parties agreeing to the final and binding nature of the award at Article 25.6 and the appeal provisions in Article 25.7.

**[30]** In this matter, the 'rate' was not the dispute. The rate was set in the PPA and approved by the Commission in its letter of 2 February 2007. It was not "any person" who filed the complaint as it related to the unfair and unreasonable rate, but rather the party who agreed to the rate in the PPA. Section 47 of the Public Utilities Act provides that

> *"(1) Subject to the provisions of this Act, the powers vested in the Commission by this Act shall apply notwithstanding that the subject- matter in respect of which the powers are exercisable is the subject- matter of any other Act or agreement and shall apply in respect of rates and services, whether fixed by or the subject of any other Act or agreement or otherwise and, where the rates and service are fixed by or are the subject of an agreement, shall apply whether the agreement is incorporated in or ratified or made binding by any general or special Act or otherwise.*
>
> *(2) For the avoidance of any doubt, where there is any inconsistency between the provisions of this Act and any other law, the provisions of this Act shall*

*prevail unless the Commission unanimously resolves to let that other law prevail."*].

**[31]** Simply put, the Commission will always have jurisdiction over complaints made by any person as it relates to fairness and reasonableness of rates for utilities. It also simply means that if any other legislation or agreement is inconsistent with this power, the PUC Act and the powers of the Commission would prevail. It has not been contended that an arbitrator in this case is going to decide the fairness or reasonableness of the rates agreed to by the parties. What was being contended is whether the calculation of the agreed rate was correct, a rate the very Commission approved.

**[32]** In all the circumstances of this case, I have therefore determined that the appeal before us has become an academic exercise. The 'dispute' has been determined and there has been no challenge to the Award given by the Arbitrator. It would be incredulous to allow the appeal and to therefore allow a reopening of the issues. Belcogen have relied on **Hutchenson v Popdog Ltd., [2011] EWCA Civ 1580** and the dicta of Lord Neuberger MR where he said *"Both the cases and the general principle seem to suggest that, save in exceptional circumstances, three requirements have to be satisfied before an appeal, which is academic as between the parties, may (and I mean 'may') be allowed to proceed: (i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or is at least completely indemnified on costs and is not otherwise inappropriately prejudiced; (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated",*

**[33]** Applying these principles, I have found that the issues raised in this matter and indeed in this appeal do not raise any points of general public importance. The appointment of an arbitrator and the arbitrator's jurisdiction have become settled law. The learned trial judge's statements at paragraphs [116] and [117] of his judgment are indeed correct. The trial judge stated …. *"that in accordance with the well-established principle of party autonomy which exist under arbitration law, and the well-established principle of kompetenz-kompetenz, the Belcogen and BEL as rational business entities, may nevertheless pursue the resolution of any dispute arising out of their relationship into which they have entered, in accordance with the dispute procedure upon which they have agreed….The question of whether the arbitration agreement is void, in the view of this Court, is equally a question which any appointed arbitrator may decide"*.

**[34]** Indeed, in **AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC - [2014] 1 All ER 335,** Lord Mance SJC stated at paragraph 40 that *'The principle of Kompetenz-Kompetenz—or, in an anglicised version suggested by Lord Sumption, jurisdiction-competence—makes sense where a tribunal is asked to exercise a substantive jurisdiction and hears submissions at the outset as to whether it has such a jurisdiction'.*

**[35]** The Arbitrator, by hearing the matter in dispute has not infringed on the powers or jurisdiction of the Commission.

**[36]** I accept the argument of Belcogen that the issues in this matter have been fully ventilated in this court. I have also presumed that they have also been fully ventilated before the arbitration tribunal as we have not been notified that any appeal has been filed by BEL in accordance with the provisions of Article 25.7 of the PPA.

**[37]** The issue initially raised by BEL as it concerns the manner and procedure of the appointment of the Arbitrator was abandoned in paragraph 16 of their skeleton submissions filed on the 13 December 2018. This is therefore not a live issue and I will say no more on that.

**[38]** I would agree with Belcogen's submission that the appeal, for the reasons I have stated above are academic.

**[39]** In all the circumstances, I would therefore dismiss the appeal and would award cost to Belcogen to be agreed within 21 days and if not agreed, assessed.

_____

FOSTER, JA