IN THE FEDERAL COURT OF MALAYSIA
[CIVIL APPEAL NO: 02(f)-37-2008(W)]

BETWEEN

LOMBARD COMMODITIES LIMITED … APPELLANT

AND

ALAMI VEGETABLE OIL PRODUCTS SDN BHD … RESPONDENT

(IN THE COURT OF APPEAL OF MALAYSIA
CIVIL APPEAL NO: W-02-449-2005)

BETWEEN

ALAMI VEGETABLE OIL PRODUCTS SDN BHD … APPELLANT

AND

LOMBARD COMMODITIES LIMITED … RESPONDENT

(IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
ORIGINATING SUMMONS NO: R2-24-04-2003)

BETWEEN

LOMBARD COMMODITIES LIMITED … PLAINTIFF

AND

ALAMI VEGETABLE OIL PRODUCTS SDN BHD … DEFENDANT

CORAM:

ARIFIN BIN ZAKARIA, CJ (MALAYA)

HASHIM BIN DATO' HJ YUSOFF, FCJ

GOPAL SRI RAM, FCJ

JUDGMENT OF ARIFIN ZAKARIA, CJ (MALAYA)

Introduction

This appeal is directed against the order of the Court of Appeal on 28.1.2008 which set aside the appellant's registration of a final arbitration award dated 10.7.2002 for the sum of USD135,623.96 ("the said award").

Background facts

[1] The facts are not in dispute. They are as follows: The appellant commenced an arbitration proceeding against the respondent in London for demurrage in the sum of USD135,623.96 together with interest and costs.

[2] The action was commenced pursuant to an arbitration agreement contained in Clause 30 of the Additional Clauses to the Charter party dated 22.9.2000 between the appellant and the respondent, which by the same clause was expressed to be governed by English law.

[3] The appellant appointed Mr. David Barnett as the arbitrator. The respondent, had failed, neglected and/or refused to appoint an arbitrator. Mr. David Barnett was appointed as the sole arbitrator pursuant to s.17 of the United Kingdom's Arbitration Act 1975.

[4] On 10.7.2002, Mr. David Barnett awarded and adjudged that the respondent was to pay the appellant the sum of USD135,623.96 together with interest on the said sum at the rate of 7% per annum compounded with quarterly rests.

[5] The appellant filed an application at the High Court pursuant to s.27 of the Arbitration Act 1952 to enforce the said award.

The decision of the High Court

[6] The learned High Court Judge gave leave and ordered the enforcement of the said award against the respondent in reliance on s.27 of the Arbitration Act 1952 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ("CREFA").

The contentions before the Court Of Appeal

[7] The respondent filed an appeal at the Court of Appeal. It was argued for the first time in the Court of Appeal that the said award is unenforceable on the ground that United Kingdom has not been gazetted under s.2(2) of the CREFA.

[8] The appellant, on the other hand, contended that the said provision does not make it mandatory for a gazette notification to be issued before a state can qualify as a Contracting State under the New York Convention ("NYC").

The decision of the Court of Appeal

[9] On 28.1.2008, the Court of Appeal allowed the appeal by the respondent. The appellant's registration of the said award was set aside on the basis that since no gazette notification has been issued by the Yang di-Pertuan Agong under s.2(2) of the CREFA declaring that the United Kingdom is a Contracting State under the NYC, the said award cannot be registered and enforced as a Convention Award under CREFA. In coming to this conclusion, the Court of Appeal relied on its earlier decision in *Sri Lanka Cricket v World Sport Nimbus Pte Ltd [2006] 3 MLJ 117*.

Leave Questions

[10] On 8.9.2008, leave to appeal was granted by this Court to the appellant on the following questions of law:

> "[a] Whether the failure to declare the United Kingdom as a party to the New York Convention by way of Gazette Notification under s.2(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320) prevents the recognition and

enforcement in Malaysia under the Act (Act 320) of an arbitral award handed down in the United Kingdom;

[b] Whether the Court of Appeal acted correctly in law in holding that the failure to declare United Kingdom by order in the Gazette as a Contracting State to the New York Convention deprives the High Court of Malaya of jurisdiction pursuant to s.3 of the Convention Recognition and Enforcement of Foreign Arbitral Awards Act 1985 to enforce an award handed down by Arbitral Tribunal whose seat of arbitration was in the United Kingdom in an arbitration governed by the New York Convention;

[c] Whether the definition of a 'Convention Award' under s.2(1) must be read together with s.2(2) for purpose of enforcement under s.3 of the Convention Recognition and Enforcement of Foreign Arbitral Awards Act 1985; and

[d] Whether the Court of Appeal acted correctly in deciding that s.2(2) of the Convention Recognition and Enforcement of Foreign Arbitral Awards Act 1985 was a piece of conditional legislation (i.e. that it is conditional upon the Yang di-Pertuan Agong to issue a Gazette notification before a state can qualify as a Contracting State under the New York Convention)."

[11] As suggested by the appellant's counsel I agree that the four questions may be reduced into a single question which reads as follows:

> "Does the failure of the Yang di-Pertuan Agong to issue a Gazette Notification pursuant to s.2(2) of the CREFA declaring the United Kingdom to be a party to the New York Convention render a Convention Award made in the United Kingdom unenforceable in Malaysia, notwithstanding the fact that all the conditions ordinarily required for the enforcement of the said Award under CREFA have been satisfied?"

CREFA

[12] CREFA came into force on 3.2.1986. The purpose of CREFA is expressed in the preamble to the Act to give effect to the provisions of the NYC on the Recognition and Enforcement of Foreign Arbitral Awards. "Convention Award" is defined in s.2(1) of the CREFA which reads:

> "Convention Award" means an award on differences between persons arising out of a defined legal relationship, whether contractual or not, considered as commercial under the law in force in Malaysia made-

(a) In pursuance of an arbitration agreement to which the New York Convention applies; and

(b) In pursuance of an arbitration agreement in the territory of a State other than Malaysia, which is a party to the New York Convention;"

[13] The scope of the NYC is extensive, thus an arbitral award in any foreign country, whether in a contracting state or not is covered by the NYC. However, Article 1(3) of the NYC gives a Contracting State two options either to apply the convention to awards made only in the territory of another contracting state on the basis of reprocity and to restrict its application to differences considered as commercial. Malaysia ratified the NYC on 15.11.1985 and it came into force on 3.2.1986, while the United Kingdom ratified the NYC on 24.9.1975 and it came into force on 23.12.1975. Under Article 111 of the NYC, it is provided that each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where these awards are relied upon. It was not in dispute that the said award was a Convention Award as defined in s.2(1) of the CREFA.

The Issues

[14] Before the Court of Appeal, the Respondent by letter dated 14.1.2008 raised a preliminary objection contending that:

> "That the Respondent was not entitled to commence or enforce the Arbitral Award dated 10.07.2002 as the United Kingdom was not a gazetted state within the meaning of Section 2(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ("CREFA")."

[15] Holding that the Court is bound by its earlier decision in *Sri Lanka Cricket v World Sport Nimbus Pte Ltd (supra),* the Court of Appeal upheld the preliminary objection.

[16] The learned counsel for the Appellant contends that the *Sri Lanka Cricket* was wrongly decided. He mounted several grounds in support of his contention. The decision in *Sri Lanka Cricket case* turns essentially on the effect to be given to s.2(2) of the CREFA which reads:

> "s.2(2) The Yang Di Pertuan Agong may, by order in the Gazette, declare that any State specified in the order is a party to the New York Convention, and that order shall, while in force, **be conclusive evidence that that State is a party to the said Convention."***(*emphasis added.)

[17] In that case, the arbitration was conducted and an award made in Singapore. The plaintiff sought to enforce the arbitral award in Malaysia. The High Court ruled in favour of the plaintiff. This

was overturned by the Court of Appeal on the sole ground that as there was no Gazette Notification made under s.2(2) of the CREFA declaring Singapore as a party to the NYC, therefore, the plaintiff could not rely on CREFA to enforce the award.

[18] The Court of Appeal held *inter alia* that the word "may" in s.2(2) when read in the context of s.2 and indeed the whole Act must be construed to mean "must". Therefore, if His Majesty the Yang Di Pertuan Agong wishes to extend the benefit under s.3(1) to a particular award, it is mandatory for His Majesty to declare the country through a Gazette Notification to be a party to the Convention. Since His Majesty did not do so, therefore, the benefit under CREFA is not available to the plaintiff in *Sri Lanka Cricket's case*.

[19] The reasons given by Gopal Sri Ram JCA (as he then was) in *Sri Lanka Cricket's case* are as follows:

> "In the first place, the word 'may' when read in the context of s.2 and indeed the whole Act means "must". If His Majesty (in effect the Federal Cabinet by virtue of art 40(1) of the Federal Constitution, see *Teh Cheng Poh v Public Prosecutor (1979) 1 MLJ 50)* wishes to extend the benefit of the summary method of enforcement provided for by s.3(1) to a particular award then it is logical that he must by Gazette Notification declare the country in which that

award was made to be a party to the Convention. If His Majesty elects not to do so, then that benefit is not available to the party seeking enforcement."

[20] The critical issue is whether a declaration in the Gazette Notification by the Yang Di Pertuan Agong is a condition precedent before an award made in a state, who is a party to the NYC, could be regarded as a Convention Award under CREFA. In my view the answer to this question does not depend on whether the word "may" appearing in s.2(2) CREFA has to be read to mean "must" or otherwise. As observed by Cotton LJ in re *Baker Nichols v Baker (1890) Ch.D 262* at pg 268 "It is an inaccuracy of language to say that "may" can mean "must" or "shall". It simply confers a power. We must look at the object of the statements to see whether a duty to exercise the power is imposed."

[21] In NS Bindra's Interpretation of Statutes Ninth Edition, pg 948, it is stated that:

"It is well-settled that the use of word "may" in a statutory provision would not by itself show that the provision is directory in nature. In some cases the legislature may use the word "may" as a matter of pure conventional courtesy and yet intend a mandatory force. In order, therefore, to interpret the legal import of the word "may", the court has to

consider various factors, namely, the object and the scheme of the Act, the context and the background against which the words have been used, the purpose and the advantages sought to be achieved by the use of this word, and the like."

And at pg 950 it is stated:

"The ultimate rule in construing auxiliary verbs like "may" and "shall" is to discover the legislative intent; and the use of words "may" and "shall" is not decisive of its discretion or mandates. The use of the words "may" and "shall" may help the courts in ascertaining the legislative intent without giving to either a controlling or a determinating effect. The courts have further to consider the subject matter, the purpose of the provisions, the object intended to be secured by the statute which is of prime importance, as also the actual words employed."

[22] Considering s.2(2) of the CREFA, I find there is much force in the contention of the appellant. It is to be noted that s.2(2) CREFA merely provides that if the Yang Di Pertuan Agong has issued a Gazette Notification declaring a particular state as a Contracting State, the Gazette Notification can be relied upon by the parties as forming conclusive evidence of the fact that the State is a Contracting State under the NYC. Hence,

the provision is evidential in effect. Learned counsel for the appellant drew support from the English case of *Minister of Public Works of Kuwait v Sir Frederick Snow & Partners [1981]1 Lloyd's Rep 596.* That case was concerned with the interpretation of s.7(2) of the English Arbitration Act 1975, which is similar to our s.2(2) of CREFA. S.7(2) reads:

> "If Her Majesty by Order in Council declares that any State specified in the Order is a party to the New York Convention the Order shall, while in force, be conclusive evidence that that State is a party to that Convention."

[23] Mocatta J in his judgment drew a distinction between the terms "conclusive evidence" and "exclusive evidence". This is what he said:

> **"The word used in the Act is "conclusive" and not "exclusive"** and the language of s.7(2) is to be contrasted with that of s.35(1) of the 1950 Act where the language used makes the relevant Orders in Council essential. In addition to this striking contrast between the two Acts, Mr. Phillips was able to refer me to *A-G v Bournemouth Corporation, (1902) 71 L.J.N.S. 731*, where it was held that a provision in the Tramways Act, 1870, that a notice by the Board of Trade in the London Gazette "shall be conclusive

evidence" of the non-commencement of works, was not the exclusive or only evidence of the non-commencement of the works which the Court could receive." (Emphasis added.)

[24] Although on appeal Mocatta J's decision that an arbitration award made in Kuwait was not a Convention Award was reversed but his observation as stated above was not challenged in the Court of Appeal.

[25] The term "conclusive evidence" was also used in s.5 of the Chief Minister (Incorporation) Ordinance of Sabah (Sabah Cap. 23) ("the Ordinance") which stipulates:

> "A notification in the Gazette of the appointment of any person to hold or act in the office of Chief Minister, State of Sabah, shall be **conclusive evidence** that such person was duly so appointed." (Emphasis added.)

In *Tun Dato Haji Mustapha bin Datu Haron v Tun Datuk Haji Mohamed Adnan Roberts & Ors (1986) 2 MLJ 420,* Tan Chiaw Thong J opined that section 5 of the Ordinance was merely evidential in nature. He said "It is apparent that it is primarily designed to dispense with the need of the proof of the appointment of "any person to hold or act in the office of Chief Minister, State of Sabah", upon

production of a notification in the Gazette for the purposes of the Ordinance."

[26] Black's Law Dictionary (Seventh Edition) pg 577 defines "conclusive evidence" as evidence so strong to overbear any other evidence to the contrary. And it defines "exclusive evidence" as the only facts that have any probative force at all on a particular matter in issue. S.2(2) provides that notification in the Gazette is a conclusive evidence on the issue whether a state is Contracting State or not.

[27] On the above premise I agree with the submission for the appellant that s.2(2) of the CREFA is merely an evidential provision and therefore the issue whether a State is a party to the NYC can be proved by adducing such other evidence as may be appropriate. In the present case, it was never in dispute that United Kingdom is a Contracting State under the NYC.

[28] In the *Kuwait* case, the fact that the Order in Council by the United Kingdom was only made after the enforcement proceedings were commenced was not an issue at all before the Court of Appeal and the House of Lords. Therefore, by analogy, the fact that no Gazette Notification was ever issued by the Yang Di Pertuan Agong similarly should not be an issue. The only issue for the Court to be satisfied is whether, on the date the appellant applied to register the said award before the

High Court, the United Kingdom is a Contracting State under the NYC.

[29] The scheme of the Act further fortifies the above stated conclusion. Firstly s.2(2) of the CREFA is inserted in section 2 of the CREFA which is the interpretation section, therefore, it is not intended to form part of the substantive provisions of the Act. As stated by the High Court of Australia in *Kelly v R (2004) 205 ALR 274:*

> **"The function of a definition is not to enact substantive law.** It is to provide aid in construing the statute. Nothing is more likely to defeat the intention of the legislature than to give a definition a narrow, literal meaning and then use that meaning to negate the evident policy or purpose of a substantive enactment..". See also *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd (2005) 215 ALR 385*." (Emphasis added.)

[30] In the present case, it is clear that s.2(2) of the CREFA is not an interpretation provision but an evidential provision. The reason why it was inserted in the interpretation section is may be to avoid it from been construed as a substantive provision of CREFA.

[31] Secondly it is important to see the legislative intent from the general scheme of the Act. Here the legislative intention is declared in the preamble to the Act as:

> "An Act to give effect to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on the 10th June 1958…".

[32] As was observed by Lord Blackburn in *Overseers of West Ham v Iles (1883) 8 AC 386:*

> "I quite agree with the argument which has been addressed to your Lordships, that in construing an Act of parliament where the intention of the legislature is declared by the preamble, we are to give effect to that preamble to this extent, namely, that it shows us what the legislature are intending; and if the words of an enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case, we prefer that meaning to one showing an intention of the legislature which would not answer the purposes of the preamble or which would go beyond them. To that extent only is the preamble material."

[33] The NYC is set out in the schedule to the CREFA. Article 111 of the NYC states, *inter alia*:

> "ARTICLE 111:
> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.

And Article IV of NYC reads:

> "ARTICLE IV:
> 1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
>
> (a) the duly authenticated original award or a duly certified copy thereof;
>
> (b) the original agreement referred to in article 11 or a duly certified copy thereof.
>
> 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition

> and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."

[34] S.4 of the CREFA enacted the provisions of Article IV of the NYC. Whereas s.5 of the CREFA is essentially a reproduction of Article V of the NYC.

[35] I agree with the appellant that considering ss.3 and 5 of the CREFA together with Article III of the NYC one would come to the natural conclusion that enforcement of the Convention Award may only be refused in the circumstances set out in s.5 of the CREFA.

[36] S.3(1) of the CREFA stipulates that "A convention award shall be enforceable in the same manner as the award of an arbitration is enforceable by virtue of section 27 of the Arbitration Act 1952."

[37] Whereas s.27 of the Arbitration Act 1952 provides:

> "An award on an arbitration agreement may, by leave of the High Court, be enforced in the same manner as a judgment or order to the same effect, and, where leave is so given,

judgment may be entered in terms of the award."

[38] From the above provisions it is clear that what was intended by CREFA was to allow the Convention Award to be enforceable in this country as if it is a domestic award. I am of the view that this was the clear intention of the legislature and we have to give effect to this. The Court of Appeal's decision in *Sri Lanka Cricket* would have the effect of imposing an additional condition before a Convention Award could be enforced in this country.

[39] In my view that would be contrary to the stated object and purpose of CREFA. Clearly such a condition is wholly repugnant to Article III of the NYC and undermines the regime for the enforcement of the Convention Award.

[40] For the above reasons, I am of the view that the Gazette Notification under s.2(2) of the CREFA could not be construed as a mandatory requirement before the Convention Award made in a Contracting State can be enforced within our jurisdiction. The provision in my view is merely evidential in nature and could not be regarded as a precondition before an award make in a Contracting State can be enforced under CREFA. Therefore, in the event a Contracting State has not been gazetted under s.2(2) of the CREFA as was the case here, evidence could thus be led to show that, in fact United

Kingdom is a Contracting State under the NYC. For this purpose the United Nations Treaty Collection may be consulted for authoritative status information on UNCITRAL Convention deposited with the Secretary-General of the United Nations. As I said earlier, in the present case the fact that United Kingdom is a Contracting State under the NYC was never in issue.

[41] The next issue raised by the respondent is that the respondent was never a party to the arbitration agreement. In this regard I agree with the submission for the appellant that if that is so, it is for the respondent to apply to the English Court, being the Court having supervisory jurisdiction, to have the award set aside instead of raising the issue before our court, which is merely an enforcement court.

[42] As observed by Coleman J in *A v B (2007)1 Lloyd's Report 358,*

> "… an agreement as to the seat of an arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the existence or scope of the arbitrator's jurisdiction or as to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as the seat of the arbitration."

[43] In *Sabah Gas Industries Sdn Bhd v Trans Samudera Lines (S) Sdn Bhd (1993) 2 MLJ 396*, it was similarly held that a party who had been given every opportunity to submit and to take part in arbitration proceedings in London ought to have challenged the conduct of the arbitrator and/or validity of the award in the English Courts and not here. Similarly in *Hebei Import & Export Corporation v Polytech Engineering Company Limited FAC V No 10 of 1988 (Hong Kong),* the Court of Final Appeal of Hong Kong held that a party may be precluded by his failure to raise a point before the court of supervisory jurisdiction from raising that point or issue before the court of enforcement.

[44] For the above reasons, I am in agreement with the appellant's submission that this issue could not be raised in the court here being the court of enforcement. If at all the respondent wanted to raise the issue that the respondent was not a party to the arbitration agreement this must be done in the English Courts as the supervisory courts.

[45] On the finding by the Court of Appeal that there had been non compliance with s.4(b) of the CREFA by the appellant, I agree with the appellant that this issue was never canvassed before the High Court and therefore, ought not to have been entertained by the Court of Appeal. In any event upon perusal of the affidavit of Wilfred John Ng Wan Yat affirmed on 29.1.2003, one will find annexed to it, the exhibit marked 'A',

a certified true copy of the charter party. The arbitration agreement is contained in clause 30 of the Additional Clauses to the charter party. Therefore, the finding of the Court of Appeal that the appellant failed to comply with s.4(b) of CREFA is clearly not supported by the evidence before the court.

Conclusion

[46] For the above reasons I would answer the single question posed to us in the negative. In the upshot I would, therefore, allow this appeal with cost both here and in the Courts below. The order of the High Court is accordingly reinstated. Deposit to be refunded to the appellant. My learned brother Hashim Mohd Yusoff, FCJ has seen this judgment in draft and has expressed his concurrence.

TAN SRI ARIFIN BIN ZAKARIA
Chief Judge of Malaya

Date of Hearing : 14.7.2009

Date of Decision : 3.11.2009

Counsel for Applicant	:	Mr. M. Nagarajah Ms. Tanya Lopez
Solicitors for Appellant	:	Messrs Shook Lin & Bok Advocates & Solicitors 20th Floor, Ambank Group Building 55, Jalan Raja Chulan 50200 Kuala Lumpur
Counsel for Respondent	:	Mr. Firoz Hussein Ms. Shanti Abraham
Solicitors for Respondent	:	Messrs Puthucheary Firoz & Mai Advocates & Solicitors A5, Taman Tunku 50480 Kuala Lumpur