readily distinguished from the *Romalpa* case on its facts, and is for all practical purposes more closely allied to the facts and circumstances in *Re Bond Worth*.

Having formed that view on the question of construction of condition 12, I have no hesitation in accepting the other submissions made by counsel for the defendant, which may perhaps be summarised (perhaps inelegantly) as follows: that the charge so created was registrable under s 95 of the Companies Act 1948 and being unregistered is void against the liquidator and any creditor of the buyer; that 'creditor' of the buyer for the purposes of s 95 means a secured creditor; that the defendant receiver held the yarn as receiver for the benefit of the debenture holders who had appointed him and who must in turn have been 'creditors' of the buyer within the meaning of s 95. It follows, in my judgment, that the plaintiff seller, having failed to register its rights under the provisions of condition 12 as a charge in accordance with requirements of s 95 of the Companies Act 1948, is not now entitled to complain if the receiver has chosen to treat those provisions as void against the creditors whom he represents. Accordingly, it must follow, in my judgment, that the present claim by the plaintiff seller for damages against the receiver must fail.

I must say that I am greatly indebted to both counsel for the careful and helpful manner in which they argued their respective cases.

Action dismissed.

Solicitors: *Foysters*, Blackburn (for the plaintiff); *Saffman & Co*, Leeds (for the defendant).

M Denise Chorlton Barrister.

Kuwait Minister of Public Works v Sir Frederick Snow & Partners (a firm) and others

HOUSE OF LORDS
LORD FRASER OF TULLYBELTON, LORD BRIDGE OF HARWICH, LORD BRANDON OF OAKBROOK AND LORD TEMPLEMAN
6, 7 FEBRUARY, 1 MARCH 1984

Arbitration – Award – Enforcement – Foreign award – Enforceability – Whether to be enforceable award must post-date foreign state becoming a party to convention – Arbitration Act 1975, s 3.

On the ordinary and natural meaning of s 7(1)[a] of the Arbitration Act 1975 the question whether a state 'is a party to the New York Convention' is to be determined by reference to the time of proceedings for the enforcement under that Act of an arbitration award rather than by reference to the date of the award itself. It follows that an arbitration award made in the territory of a foreign state is enforceable in the United Kingdom as a 'Convention award' under s 3[b] of the 1975 Act if the state in which the award was made is a party to the convention at the date when proceedings to enforce the award begin, even if it was not a party at the date when the award was made (see p 734 *d e*, p 736 *h j*, p 737 *b* to *e* and p 739 *e* to *g*, post).

Decision of the Court of Appeal [1983] 2 All ER 754 affirmed.

Notes

For arbitration awards, see 2 Halsbury's Laws (4th edn) paras 634–635, and for cases on the subject, see 3 Digest (Reissue) 303–305, 2040–2044.

For the Arbitration Act 1975, ss 3, 7, see 45 Halsbury's Statutes (3rd edn) 35, 36.

a Section 7(1), so far as material, is set out at p 736 *e f*, post

b Section 3, so far as material, is set out at p 735 *j*, post

Appeal

The defendants, Sir Frederick Snow & Partners (a firm), George Frederick Brian Scruby and Arthur Henry Brown, appealed, with leave of the Appeal Committee of the House of Lords granted on 28 July 1983, against the decision of the Court of Appeal (Stephenson, Kerr and Fox LJJ) ([1983] 2 All ER 754, [1983] 1 WLR 818) on 17 March 1983 allowing an appeal of the respondent plaintiff, the Minister of Public Works of the State of Kuwait, from part of the judgment of Mocatta J ([1981] 1 Lloyd's Rep 656) dated 19 February 1981 in proceedings by the respondent against the appellants to enforce an arbitration award made in Kuwait on 15 September 1973 whereby he held that the award relied on by the respondent was not a 'Convention award' for the purposes of the Arbitration Act 1975. The facts are set out in the opinion of Lord Brandon.

Desmond Wright QC and *Nicholas Dennys* for the appellants.
Bernard Rix QC and *J Tracy Kelly* for the respondent.

Their Lordships took time for consideration.

1 March. The following opinions were delivered.

LORD FRASER OF TULLYBELTON. My Lords, I have had the advantage of reading in draft the speech by my noble and learned friend Lord Brandon, and I agree with it. For the reasons given by him I would dismiss this appeal.

LORD BRIDGE OF HARWICH. My Lords, For the reasons given in the speech of my noble and learned friend Lord Brandon, with which I agree, I would dismiss this appeal.

LORD BRANDON OF OAKBROOK. My Lords, this appeal raises a short point of construction with regard to the meaning and effect of the expression 'Convention award', as used in those provisions of the Arbitration Act 1975 which relate to the enforcement in the United Kingdom of foreign arbitral awards.

The award with regard to which the question which I have stated arises is an award made by a Kuwaiti arbitrator in Kuwait on 15 September 1973 in respect of disputes arising out of a contract made as long ago as 1958 and relating to the construction of an international airport in Kuwait. The parties to the contract were, on the one side, the government of the State of Kuwait and, on the other side, a British firm of civil engineering consultants, then known as Frederick S Snow & Partners. The award required the payment by Frederick S Snow & Partners to the government of the State of Kuwait of a sum which, with interest up to 1979 only, amounted to well over £3·5m. Proceedings to enforce the award in England were only begun on 23 March 1979, and it is those proceedings that the point of construction referred to above arises for decision.

The history of the dispute between the parties, and of the long and convoluted proceedings which eventually followed, is fully set out in the judgment of Kerr LJ in the Court of Appeal (Stephenson, Fox and Kerr LJJ) ([1983] 2 All ER 754, [1983] 1 WLR 818), to which reference can be made if necessary. That being so, I do not think that it would serve any useful purpose for me to repeat that history here.

As the matter now stands before your Lordships, the only effective parties to the proceedings are George Frederick Brian Scruby and Arthur Henry Brown, the second and third appellants respectively, to whom I shall refer collectively as 'the appellants', and his Excellency the Minister of Public Works of the government of the State of Kuwait, who is the respondent. Further, the only question for decision is whether the respondent is entitled to enforce the award referred to earlier (the award) against the appellants as a Convention award under the enforcement provisions of the 1975 Act. In this connection it is common ground now (although it was not so earlier) that, if the award is a Convention award under the 1975 Act, the appellants are the only persons against whom,

subject to defences under that Act on which they would wish to rely, the award can be enforced under it.

Mocatta J at first instance ([1981] 1 Lloyd's Rep 656) decided that the award was not a Convention award for the purposes of the 1975 Act, and could not therefore be enforced by the respondent against the appellants under it. The Court of Appeal unanimously reached the opposite conclusion and reversed the judgment of Mocatta J in this respect. The appellants now bring a further appeal, with the leave of the Appeal Committee, to your Lordships' House.

My Lords, the long title of the 1975 Act is 'An Act to give effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards'. The New York Convention there referred to (the convention) (TS 20 (1976); Cmnd 6419) came into being on 10 June 1958. On 23 December 1975 the United Kingdom became a party to the convention, and the 1975 Act giving effect to it, which had been passed on 25 February 1975, was brought into force. On 27 July 1978 Kuwait became a party to the convention, and on 12 April 1979 an Order in Council, declaring that Kuwait, together with a large number of other states, was a party to the convention, came into operation.

It will be seen, therefore, that on 15 September 1973, when the award was made, Kuwait had not yet become a party to the convention; but that by 23 March 1979, when the present proceedings to enforce the award were begun, Kuwait had done so.

The case for the appellants is that a foreign arbitral award can only qualify as a convention award for the purposes of the 1975 Act if the state in which it was made was already a party to the convention at the date of the award. Accordingly, the award was not a convention award, and could not be enforced by the respondent against the appellants under that Act. The case for the respondent on the other hand is that it is sufficient for a foreign arbitral award to qualify as a convention award under the 1975 Act if the state in which it was made has become a party to the convention by the date when proceedings to enforce the award are begun, even though it was not such a party at the date when the award was made. Accordingly, the award was a convention award for the purposes of the 1975 Act and was enforceable by the respondent against the appellants under that Act. The question which of these cases should prevail depends on the true construction of the relevant provisions of the 1975 Act.

My Lords, the 1975 Act is divided, in form though not in express terms, into three parts, each with a different cross-heading. The first part of the Act, consisting of s 1 only, has the cross-heading 'Effect of arbitration agreement on court proceedings', and deals with the staying of actions, other than domestic actions as later defined, in cases where the parties to such actions have agreed to refer the subject matter of them to arbitration. The second part of the Act, consisting of ss 2 to 6, has the cross-heading 'Enforcement of Convention awards', which, subject to the later definition of the expression 'Convention award', summarises the scope of those sections. The third part of the Act, consisting of ss 7 and 8, has the cross-heading 'General'. Section 7(1) deals with matters of interpretation.

In relation to the question raised by this appeal the following provisions of the 1975 Act are relevant:

> *'Enforcement of Convention awards*
>
> **2.** Sections 3 to 6 of this Act shall have effect with respect to the enforcement of Convention awards; and where a Convention award would, but for this section, be also a foreign award within the meaning of Part II of the Arbitration Act 1950, that Part shall not apply to it.
>
> **3.**—(1) A Convention award shall, subject to the following provisions of this Act, be enforceable—(*a*) In England and Wales, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act 1950...
>
> **4.** The party seeking to enforce a Convention award must produce—(*a*) the duly authenticated original award or a duly certified copy of it; and (*b*) the original arbitration agreement or a duly certified copy of it; and (*c*) where the award or

agreement is in a foreign language, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

5.—(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.

(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves—(*a*) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or (*b*) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or (*c*) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (*d*) (subject to subsection (4) of this section) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or (*e*) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country where the arbitration took place; or (*f*) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award . . .

6. Nothing in this Act shall prejudice any right to enforce . . . an award otherwise than under this Act or Part II of the Arbitration Act 1950.

General

7.—(1) In this Act . . . "Convention award" means an award made in pursuance of an arbitration agreement in the territory of a State, other than the United Kingdom, which is a party to the New York Convention; and "the New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958.

(2) 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 . . .'

The dispute between the parties to the appeal was, as might have been expected, concentrated on the definition of the expression 'Convention award' contained in s 7(1) of the 1975 Act. Further, since the award plainly came within the first part of the definition as 'an award made in pursuance of an arbitration agreement in the territory of a State, other than the United Kingdom', the dispute was narrowed down further to the meaning to be given to the last part of the definition, namely 'which is a party to the New York Convention'. For the appellants it was contended that this phrase, although it used the present tense in the word 'is', related back to the time when the award was made. For the respondent it was contended that the phrase, by using the present tense in the word 'is', plainly referred to the time of enforcement, that is to say to the time when proceedings for enforcement under s 3(1)(*a*) were begun.

In order to see which of these two contentions is to be preferred, it is helpful to transpose the definition of the expression 'Convention award' contained in s 7(1) bodily into ss 2 and 3. If that is done, the relevant parts of those sections read:

'**2.** Sections 3 to 6 of this Act shall have effect with respect to the enforcement of awards made in pursuance of an arbitration agreement in the territory of a State, other than the United Kingdom, which is a party to the New York Convention . . .

3.—(1) An award made in pursuance of an arbitration agreement in the territory of a State, other than the United Kingdom, which is a party to the New York

Convention shall, subject to the following provisions of this Act, be enforceable—
a (*a*) in England and Wales, either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 26 of the Arbitration Act 1950 . . .'

Sections 2 and 3, being in the second part of the Act, which has the cross-heading 'Enforcement of Convention awards', are dealing, firstly, with the right to enforce foreign arbitral awards and, secondly, with the procedure by which that right of enforcement can be exercised. In that context it appears to me to be plain, when the definition of
b 'Convention award' contained in s 7(1) has been transposed bodily into ss 2 and 3, as has been done above, that the use of the present tense in the word 'is' in the phrase 'which is a party to the New York Convention' must, as a matter of the ordinary and natural interpretation of the words used, mean that the phrase relates to the time of enforcement and not to any other time. In particular, if it had been the intention of the legislature that the phrase should relate to the date of the award, then the draftsman would surely
c have used words which made that intention clear such as 'which is and was at the date of the award a party to the New York Convention'. It is my opinion, therefore, that the meaning of the expression 'Convention award' contended for by the respondent, according as it does with the ordinary and natural interpretation of the words used in the context of ss 2 to 6, is the correct one; and that the meaning of that expression contended for by the appellants, requiring as it does the insertion by implication into the phrase
d 'which is a party to the New York Convention', after the word 'is', the additional words 'and was at the date of the award', or some other words to the like effect, cannot be supported.

My Lords, counsel for the appellants put in the forefront of his argument against construing the expression 'Convention award' in the way that I have indicated that I think it should be construed what can conveniently be described as the retrospectivity
e point. His argument was that courts had always refused to give statutes retrospective effect unless they contained clear words which showed that such effect was intended, that, if the phrase 'which is a party to the New York Convention' were to be interpreted as relating to the time of enforcement of an award rather than the time of its making, the result would be to give the 1975 Act retrospective effect, and that there were in this case no plain words in the Act showing that such effect was intended. The way in which
f he contended that the Act would, on the assumption made, have retrospective effect was this. An award made in a foreign state which was not a party to the convention at the time of its making would not be enforceable in the United Kingdom under the 1975 Act unless and until that foreign state subsequently became a party to the convention. On that happening, however, an award which could not previously have been so enforceable would, immediately and ipso facto, become so.

g While this argument appears on first presentation to be of considerable force, there are, I think, two answers to it which show that it is not well founded. The first answer is that the presumption against interpreting a statute as having retrospective effect is based on the assumption that, if retrospective effect were to be given to it, the result would be to deprive persons of accrued rights or defences. In the present case I am not persuaded that to give the 1975 Act retrospective effect in the sense which has been discussed would
h deprive anybody either of an accrued right or of an accrued defence. On the footing that awards made in a foreign state before that state became a party to the convention are not convention awards for the purposes of the 1975 Act, and cannot therefore be enforced under it, the result is simply that a person wishing to enforce such an award in the United Kingdom would be obliged to bring an action on it at common law, the right to do this being expressly preserved by s 6 of the 1975 Act. It cannot therefore be said that, if the
j construction of the 1975 Act which I prefer is correct, the result is to make an award, which could not previously have been enforced against a person at all, newly enforceable against him under the 1975 Act. On the contrary, the award could always have been enforced against him by one form of procedure, and the only result is that it subsequently becomes enforceable against him by a second and alternative form of procedure.

Counsel for the appellants pressed strongly an argument that a wider range of defences

would be available to a defendant in an action to enforce an award at common law than would be available to him in enforcement proceedings under the 1975 Act, and that, because of this, the result of giving a retrospective effect to that Act would be to deprive a defendant of defences which would otherwise have been available to him. In my view, however, there is no legal basis for this argument. I set out earlier in full the provisions of s 5(2) and (3) of the 1975 Act. These provisions afford a wide range of defences to a person against whom an award is sought to be enforced under that Act. Moreover, although counsel for the appellants was asked by your Lordships on more than one occasion to give an example of a defence which would be available to a defendant to a common law action on an award, but would not be available to him in enforcement proceedings in respect of the same award under the 1975 Act, he was quite unable to do so. The true position, in my view, is that the statutory defences contained in s 5(2) and (3) of the 1975 Act cover the whole field of the defences which would be available in a common law action. Summing up, therefore, I would say that, in so far as the construction of the 1975 Act which I prefer involves giving retrospective effect to that Act, such effect does not take away any accrued rights or defences, and is therefore free from the objections to it which would exist if it did so.

The second answer to the retrospectivity point is this. If there is, contrary to the views which I have expressed above, any valid objection to giving the 1975 Act the kind of retrospective effect which has been discussed, then on a proper construction of the phrase 'which is a party to the New York Convention', as used in the definition of 'Convention award' in s 7(1) of the 1975 Act, the legislature has, in my view, shown in clear terms its intention to give the Act that retrospective effect.

On both these grounds, therefore, I am of the opinion that the argument based on retrospectivity fails and should be rejected.

My Lords, while I am content to decide the question raised by this appeal solely on what I consider to be the correct meaning of the expression 'Convention award' as defined in s 7(1) of the 1975 Act, it appears to me that that construction gains added support from the terms of s 7(2), which I also set out in full at an earlier stage. That subsection contemplates that the normal way in which a party, who seeks to enforce a foreign arbitral award under the 1975 Act, will prove that the state in which the award was made is a party to the convention is by producing an Order in Council of the kind there authorised. It is clear from the wording of s 7(2) that the only matter which an Order in Council made under it can declare is that one or more foreign states specified in the order are, as at the date of the order, a party to the convention. If the phrase 'which is a party to the New York Convention', as used in the definition of the expression 'Convention award' contained in s 7(1) of the 1975 Act, were to be construed in the way contended for by the appellants, one would expect that s 7(2) would authorise Orders in Council which not only declared that one or more foreign states were parties to the convention, but also stated the dates on which they became such parties.

There remains one further point with which I think that I ought to deal. It has long been established that, if a provision in a domestic Act giving effect to the adherence by the United Kingdom to an international convention is ambiguous, a United Kingdom court is entitled to refer to the text of the convention concerned in order to obtain assistance, if it can, in resolving the ambiguity. In the present case I do not consider, as I hope that I have made it clear, that the definition of the expression 'Convention award' contained in s 7(1) of the 1975 Act is ambiguous. If that is wrong, however, and the definition is ambiguous, it is permissible to refer to the text of the New York Convention in order to obtain assistance in resolving the ambiguity. Such assistance is, in my view, to be found in art VII, para 2, of that convention, which provides:

> '2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.'

The Geneva Protocol of 1923 (TS 4 (1925); Cmd 2312) and the Geneva Convention of 1927 (TS 28 (1930); Cmd 3655) there referred to were earlier international treaties dealing with the recognition of foreign arbitration agreements and the enforcement of foreign arbitral awards respectively. The United Kingdom was a party to both treaties and gave effect to the first by the Arbitration Clauses (Protocol) Act 1924, and to the second by the Arbitration (Foreign Awards) Act 1930, both of which were repealed by, and substantially re-enacted in, the Arbitration Act 1950.

The effect of art VII(2) of the New York Convention is that, on two or more states which were parties to the Geneva treaties of 1923 and 1927 becoming parties to the New York Convention, and thereby becoming bound by its provisions, the two earlier treaties shall no longer apply as between such states. If the expression 'Convention award' in the 1975 Act is construed in the way contended for by the appellants, the result of art VII(2) would be to produce a grave lacuna in the reciprocal recognition and enforcement of arbitral awards as between many states. The existence of this lacuna can be illustrated in this way. Suppose that before 1975 states A and B were both parties to the Geneva Convention of 1927: in that case awards made in state A could be enforced pursuant to that treaty in state B and vice versa. Suppose next that in 1975 both states A and B became parties to the New York Convention. Then, on the appellants' construction of the expression 'Convention award', an award made in state A in, say, 1970 could not be enforced as a convention award in state B because, at the time when such award was made, state A was not yet a party to the New York Convention. At the same time, by reason of art VII(2), of the New York Convention, the award made in state A could not be enforced in state B under the Geneva Convention of 1927 because that treaty would, on states A and B becoming parties to the New York Convention in 1975, have ceased to have effect as between them. The existence of this lacuna, as between the United Kingdom and other states who were previously parties to the Geneva Convention of 1927 and have since become parties to the New York Convention, cannot have been intended by the legislature when it passed the 1975 Act. These considerations strongly reinforce the view that the construction of the expression 'Convention award' in the 1975 Act contended for by the appellants is wrong, and the construction contended for by the respondent is right.

My Lords, for the reasons which I have given, I am of the opinion that the decision of the Court of Appeal was right, and that the appeal should accordingly be dismissed with costs.

LORD TEMPLEMAN. My Lords, for the reasons given by my noble and learned friend Lord Brandon I would dismiss this appeal.

Appeal dismissed.

Solicitors: *Blakeney's* (for the appellants); *Charles Russell & Co* (for the respondent).

Mary Rose Plummer Barrister.