Enforcement of a foreign arbitral award – Public policy – Assignment of rights under the contract – Request to enforce the award also in another country

[See Part I.C.2,5]

Abu Mansor J: By the plaintiff's application in encl (2), the plaintiff applied to have registered a foreign judgment which was the enforcement of an arbitrator's award, exh A6 attached to encl (1). At the hearing of the arbitration proceedings, the defendant did not appear despite due notice.

The debt arose as a result of a distribution agreement entered into between the defendant and Harris Corporation. The agreement was on 15 April 1987 and signed by the plaintiff in the United States and the defendant in Kuala Lumpur. As a result of products delivered by Harris Corporation to Perkom Sdn Bhd, the defendant became indebted to Harris Corporation in the sum of RM538,000, the sum of the award.

Thereafter, by an agreement dated the 9 January 1990, Harris Corporation sold all their interest in this division of their business and assigned all their rights to the plaintiff, Harris Adacom Corporation. The said agreement underwent some amendment as in exh A3 (at pp 28–37).

There were exchanges of letters after the assignment, between the defendant and Harris Corporation, and between the plaintiff personally and the defendant. When the defendant failed to pay the debt to the plaintiff, the plaintiff then went to arbitration in accordance with cl 15.4 (at p 13, encl (1)) of the distributorship agreement which reads:

> Any dispute arising out of or relating to this agreement, its construction or performance shall be finally settled by arbitration in accordance with the rules of the American Arbitration Association in Washington, DC.

As stated, the defendant did not appear at the arbitration and an award was made in terms of exh A6.

The plaintiff's counsel submitted that the distributorship cannot be assigned without the agreement of Harris Corporation but Harris Corporation itself can assign their rights even if it was incidental to the sale of its business and thereafter Harris Corporation informs the defendant (Perkom) of it.

After the award, the plaintiff is now taking steps to register the said award in Malaysia under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ('the Act').

* The text is reproduced from *Malayan Law Journal*, 3, p. 506 ff. (1994)

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It is common ground that this is a convention and if leave can be obtained, the award is similarly enforceable as, in s 27 of the Arbitration Act 1952, arbitration awards and judgments may be so entered. So in the originating summons, the present plaintiff seeks to enforce this award and to enter judgment.

It is not disputed that the plaintiff in their application have complied with all the requirements of ss 3 and 4 of the Act but, however, under s 5 of the Act, the enforcement of a convention award may be refused if the person against whom it is invoked proves one of the various factors set out therein s 5(1)(a)–(f).

The plaintiff submitted that the burden is on the defendant as it is the defendant the convention award is to be invoked. It is the plaintiff's submission that the defendant has not proved the five instances set out in s 5 for the court to exercise its discretion nor to enforce the award.

In anticipation, the plaintiff argued that the defendant wanted to raise that the defendant as a party was under some incapacity under s 5(1)(a) and the defendant wanted to say that it would be contrary to public policy to enforce the award. The applicant denied that the defendant could raise these two reasons.

The defendant says that it would be contrary to public policy to have the convention award enforced because the plaintiff is an Israeli registered company having 68% of its shares owned by an Israeli company. I find no merit in this argument of the defendant. The defendant also contends that the plaintiff have also registered this award in the Superior Court of Columbia and thereafter on the same day applied to this court. There is the defendant's allegation that the assignment is invalid, void and of no effect because due notice had not given to the defendant.

On the validity of the assignment, I find merit in the argument of the plaintiff that the parties have adopted Florida law as the governing law in the construction of their rights and obligations pertaining thereto. I accept this since this is not one of the points disputed by the defendant.

The only issue that needs to be determined is whether under Malaysian law it is a valid assignment. Under s 4 of the Civil Law Act 1956, for a legal assignment to be valid there is the requirement that there must be express notice in writing given to the debtor. The position is given in 6 *Halsbury's Laws of England* at p 24 which states that the requirement of express notice in writing does not mean that a formal notice is required. In 1 *Chitty on Contracts* (26th Ed) at para 1399, what is required is simply that information relative to the assignment shall be conveyed to the debtor and the debtor has notice of the assignment.

In this case before us, I accept that the defendant had written notice of the assignment. I accept that on the authority cited above, the plaintiff's

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letter of demand for payment dated 2 July 1990 (see exh B2 in the affidavit of Richard A Larsen sworn on 28 July 1992) is in fact and law sufficient to satisfy the requirement of express notice in writing. That is not all of it. The defendant's letter of repudiation dated 9 March 1990 (exh B1 in the affidavit of Richard A Larsen sworn on 28 July 1992) and the letters written subsequently by them to the plaintiff, the plaintiff's attorney in the United States and to the American Arbitration Association all point to the fact of the defendant having knowledge of this assignment.

I also hold there was no merit in the argument that an assignment can only be to a subsidiary of Harris. On a reading of cl 15.6, in the circumstances, there is no such restriction if so sold.

The court makes a finding that at the material time of assignment, there was in existence a debt and the assignment was a valid assignment. I reject the defendant's contention that the assignment is invalid, ineffective and void.

On the allegation that the plaintiff is an Israeli based company and, therefore, it is against public policy to have the award enforced, it is common ground that, in the foreign office declaration produced to this court, if it is so found that the plaintiff is an Israeli based company, it is against public policy to enforce it as trade with Israel is prohibited.

Is the fact so? This court need only refer to exh P7 referred to in the affidavit of Paul Owen Suttie at p 14 that the Malaysian Government's stand vis-a-vis the state of Israel is not applicable and has no relevance in our present case and does not support the defendant's argument. I find merit in the statement of LJ Zito of Harris Adacom, in a letter to the defendant, dated 12 July 1990 (exh A5) in the affidavit of DP Naban, encl (1), that clearly puts the correct position that the plaintiff is a United States corporation. The plaintiff like any other company has a 68% stake in a subsidiary company engaged in development and manufacturing operations in Israel but what is important for our consideration, and to be clear about, and the court is clear on this, that the products covered by the distribution agreement have been and would have continued to be developed, manufactured and supported from the plaintiff's United States operation. For the reason stated above, I reject the defendant's argument that it is against public policy to have this award enforced.

And lastly, as for the contention that the plaintiff is seeking double payment by having the award registered also in the Superior Court of Columbia, I accept counsel's submission it is done only for the protection of the plaintiff's interest, and not for double claim.

The reasons I stated above, I allow this application of the applicant with costs to the applicant.

Application allowed.

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