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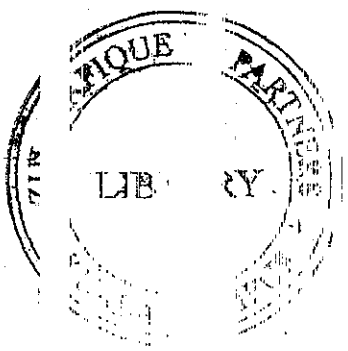

Alami Vegetable Oil Products Sdn Bhd v Lombard Commodities Ltd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–449 OF 2005
ABDUL MALIK ISHAK, JAMES FOONG AND ABDULL HAMID EMBONG JJCA
26 FEBRUARY 2009

Arbitration — Award — Foreign award — Whether English arbitration award could be enforced against appellant in Malaysia — No gazette notification declaring UK as party to New York Convention — Whether interpretation of s 2(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 applied

Civil Procedure — Judicial precedent — Court of Appeal — Whether Supreme Court case of Sri Lanka Cricket [2006] 3 MLJ 117 binding — Whether per incuriam decision

Words and Phrases — 'may' — Whether word 'may' appears in s 2(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 means 'must'

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 ('the Act') commenced an arbitration proceedings to enforce an English arbitration award dated 10 July 2002 against the appellant, a Malaysian incorporated limited company. The appellant claimed that it had no dealings with the respondent and that it could not therefore have entered into any arbitration agreement with the respondent. The appellant argued that the respondent had not produced an original arbitration agreement between the appellant and the respondent or a duly certified copy thereof as was required by s 4(b) of the Act. The High Court gave leave and ordered the enforcement of the English arbitration award. This was the appellant's appeal against that decision. In this appeal the appellant advanced an objection that it had not raised before the High Court. It raised the fact that the award was unenforceable because Yang di-Pertuan Agong had not declared, by way of an order in the *Gazette* that United Kingdom ('UK') is a party to the New York Convention, as required under s 2(2) of the Act. In reply to this objection the

respondent submitted that s 2(2) of the Act merely provided conclusive evidence and not exclusive evidence that any state was a party to the New York Convention and that the *gazette* notification was not a mandatory requirement but a mere directory in terms. It was the respondent's stand that the recognition of any contracting state to the New York Convention was provided in arts VII(2) and XV of the New York Convention itself, and that once the instruments of ratification were deposited with the Secretary-General of the UN that was exclusive evidence in declaring that UK was a contracting state to the New York Convention. Therefore the respondent submitted that the foreign award could be enforced as a convention award by virtue of UK's membership in the New York Convention and that the Yang di-Pertuan Agong's lack of *gazette* notification should not have any bearing on UK's status as a contracting state to the New York Convention. In addition, the respondent sought to challenge the decision of the court in *Sri Lanka Cricket v World Sport Nimbus Pte Ltd* [2006] 3 MLJ 117 (the *Sri Lanka Cricket*'s case) on the grounds that the decision was made per incuriam. The main issues before this court were whether the High Court judge had erred in ordering the enforcement of an English arbitration award when UK had not been gazetted as required under s 2(2) of the Act; and whether the interpretation of s 2(2) of the Act as applied in the *Sri Lanka Cricket*'s case could be applied to the present case.

Held, allowing the appeal with no order as to costs:

(1) Applying the doctrine of stare decisis it was clear that the *Sri Lanka Cricket*'s case had provided an answer to the issues raised in the present appeal. This case decided that in the absence of a *gazette* notification issued by the Yang di-Pertuan Agong declaring any state to be a contracting party to the New York Convention, the award of the arbitration held in that state could not be enforced in Malaysia. This means that the requirement of a *gazette* notification declaring the UK as a party to the New York Convention is a statutory requirement mandated by s 2(2) of the Act. The word 'may' that appears in s 2(2) had been construed in the *Sri Lanka Cricket* case to carry the meaning 'must' and the further qualifying words after 'may' could have the effect of making a prima facie directory statute into a mandatory one. Therefore s 2(2) of the Act is mandatory in nature and the non-gazetting by the Yang di-Pertuan Agong entailed dire legal consequences against the respondent in that the English award could not be enforced under s 3(1) of the Act. It was also clear that the decision in the *Sri Lanka Cricket* case was not made per incuriam and since it was not inconsistent with any later decision of the Federal Court it was binding on this court (see paras 21, 23, 31, 33, 34, 35 & 38).

(2) It is a fundamental principle of arbitration law that arbitration is a consensual form of dispute resolution and it is also a pre-condition that an award must be based on an arbitration agreement. However, the evidence adduced before the High Court showed that there was never an arbitration agreement between the appellant and the respondent but an alleged charter party between the respondent and a company known as Alami Group Sdn Bhd (see paras 39–42).

(3) The High Court judge also failed to consider the failure on the part of the respondent to produce an original arbitration agreement between the appellant and the respondent or a duly certified copy of the same in compliance with s 4(b) of the Act (see para 43).

[Bahasa Malaysia summary

Responden bersandar kepada s 27 Akta Timbang Tara 1952 dan Konvensyen Akta Pengiktirafan dan Penguatkuasaan Award Timbangtara Asing 1985 ('Akta') memulakan proses timbangtara untuk menguatkuasakan award timbangtara Inggeris bertarikh 10 Julai 2002 terhadap perayu, sebuah syarikat berhad yang diperbadankan di Malaysia. Perayu mendakwa bahawa perayu tidak berurusan dengan responden dan oleh itu tidak mungkin beliau memasuki perjanjian timbangtara dengan responden. Perayu menghujah bahawa responden tidak mengemukakan salinan asal perjanjian timbangtara di antara perayu dan responden atau salinan yang disahkan seperti yang diperuntukkan oleh s 4(b) Akta. Mahkamah Tinggi memberikan kebenaran dan mengarahkan penguatkuasaan award timbangtara Inggeris tersebut. Ini merupakan rayuan perayu terhadap keputusan tersebut. Dalam rayuan ini, perayu mengemukakan bantahan yang tidak dibangkitkan di hadapan Mahkamah Tinggi. Perayu membangkitkan fakta bahawa award tersebut tidak boleh dikuatkuasakan kerana Yang di-Pertuan Agong belum lagi mengisytiharkan dengan cara suatu perintah dalam Warta bahawa United Kingdom ('UK') merupakan pihak kepada Konvensyen New York, seperti yang dikehendaki di bawah s 2(2) Akta tersebut. Sebagai balasan kepada bantahan ini pihak responden mengemukakan bahawa s 2(2) Akta cuma memperuntukkan keterangan kukuh dan bukannya bukti yang eksklusif bahawa mana-mana negara merupakan pihak kepada Konvensyen New York dan pemberitahuan secara Warta bukanlah suatu perintah mandatori tetapi cuma merupakan direktori syarat sahaja. Adalah pendirian responden bahawa pengiktirafan mana-mana negara penjanji Konvensyen New York adalah diperuntukkan dalam art V11(2) dan XV Konvensyen New York sendiri, dan sebaik sahaja instrumen ratifikasi telah disimpan dengan Setiausaha Agong Bangsa-Bangsa Bersatu, ia merupakan bukti eksklusif untuk mengisytiharkan bahawa UK merupakan negara penjanji kepada Konvensyen New York. Oleh yang demikian, responden mengemukakan bahawa award asing tersebut boleh dikuatkuasakan sebagai award Konvensyen melalui keahlian UK dalam

Konvensyen New York dan ketiadaan Warta pemberitahuan daripada Yang di-Pertuan Agong tidak harus ada apa-apa kesan terhadap status UK sebagai negara penjanji kepada Konvensyen New York. Tambahan pula, responden telah cuba mempertikaikan keputusan mahkamah di dalam kes *Sri Lanka Cricket v World Sport Nimbus Pte Ltd* [2006] 3 MLJ 117 (kes *Sri Lanka Cricket*) atas alasan bahawa keputusan yang dibuat adalah per incuriam. Isu-isu utama di mahkamah ini ialah sama ada hakim Mahkamah Tinggi telah terkhilaf dalam mengarahkan pelaksanaan award timbangtara Inggeris apabila UK belum lagi diwartakan seperti yang diperuntukkan di bawah s 2(2) Akta tersebut; dan sama ada tafsiran s 2(2) Akta tersebut seperti yang digunakan dalam kes *Sri Lanka Cricket* boleh digunakan di dalam kes ini.

Diputuskan, membenarkan rayuan tanpa perintah terhadap kos:

(1) Mengguna pakai doktrin *stare decisis*, adalah jelas bahawa kes *Sri Lanka Cricket* telah memberikan jawapan kepada soalan yang ditimbulkan di dalam rayuan ini. Kes ini memutuskan bahawa tanpa pemberitahuan Warta yang dikeluarkan oleh Yang di-Pertuan Agong mengisytiharkan mana-mana negara penjanji kepada Konvensyen New York, timbangtara negara tersebut tidak boleh dilaksanakan di Malaysia. Ini bermaksud bahawa syarat untuk suatu pemberitahuan Warta yang mengisytiharkan UK sebagai pihak kepada Konvensyen New York adalah suatu syarat statutori yang disahkan oleh s 2(2) Akta tersebut. Perkataan 'may' yang tertera dalam s 2(2) telah ditafsirkan di dalam kes *Sri Lanka Cricket* untuk membawa maksud 'must' dan perkataan selanjutnya selepas 'may' mempunyai kesan menjadikan statut yang prima facie direktori kepada suatu yang mandatori. Oleh itu, s 2(2) Akta tersebut adalah mandatori dan kegagalan mewartakan oleh Yang di-Pertuan Agong menyebabkan suatu kesan yang buruk dari segi undang-undang terhadap responden di mana award tersebut tidak boleh dilaksanakan di bawah s 3(1) Akta tersebut. Ia juga jelas bahawa keputusan kes *Sri Lanka Cricket* tidak dibuat secara per incuriam dan oleh kerana ia adalah konsisten dengan apa-apa keputusan Mahkamah Persekutuan selepas itu maka mahkamah ini adalah terikat dengan keputusan tersebut (lihat perenggan 21, 23, 31, 33, 34, 35 & 38).

(2) Ia adalah prinsip asasi undang-undang timbangtara bahawa timbangtara adalah suatu bentuk penyelesaian pertikaian secara persetujuan dan ia juga adalah pra-syarat bahawa sesuatu award mestilah berasaskan kepada perjanjian timbangtara. Bagaimanapun, bukti yang dikemukakan di hadapan Mahkamah Tinggi menunjukkan bahawa tidak pernah wujud suatu perjanjian timbangtara di antara perayu dan responden tetapi suatu 'charter party' yang didakwa di

A antara responden dan sebuah syarikat yang dikenali sebagai Alami Group Sdn Bhd (lihat perenggan 39–42).

(3) Hakim Mahkamah Tinggi juga gagal mengambilkira kegagalan pihak responden untuk mengemukakan salinan asal perjanjian timbangtara antara perayu dan responden atau salinan yang diakui sah dokumen tersebut yang mematuhi s 4(b) Akta tersebut (lihat perenggan 43).]

Notes

For cases on Court of Appeal on judicial precedent, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 4291–4300.

For cases on foreign award in arbitration, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1332–1334.

Cases referred to

Ashville Investments Ltd v Elmer Contractors Ltd [1988] 2 All ER 577; [1988] 3 WLR 867 (refd)

Bauer (M) Sdn Bhd v Daewoo Corp [1999] 4 MLJ 545; [1999] 4 CLJ 665, CA (refd)

Cassell & Co Ltd v Broome & Anor [1972] AC 1027, CA (refd)

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1; [1997] 4 CLJ 645, FC (refd)

Duke v Reliance Systems Ltd [1987] 2 WLR 1225, CA (refd)

Frederic Guilder Julius v The Right Rev The Lord Bishop of Oxford; The Rev Thomas Thellusson Carter (1880) 5 App Cas 214 (refd)

Huddersfield Police Authority v Watson [1947] 2 All ER 193, CA (refd)

Minister of Public Works of the Government of the State of Kuwait v Sir Frederick Snow & Partners & Ors [1984] 1 AC 426, HL (refd)

Police Authority for Huddersfield v Watson [1947] 1 KB 842 (refd)

Shuter (No 2), In re [1960] 1 QB 142 (refd)

Sri Lanka Cricket (formerly known as board of control for cricket in Sri Lanka) v World Sport Nimbus Pte Ltd (formerly known as WSG Nimbus Pte Ltd) [2006] 3 MLJ 117; [2006] 2 CLJ 316, CA (folld)

Young v Bristol Aeroplane Co Ltd [1944] 1 KB 718, CA (not folld)

Legislation referred to

Arbitration Act 1952 s 27

Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ss 2(2), 3(1), 4(b), arts VIII(2), XV of Schedule 2

Fugitive Offenders Act 1881 [UK]

Appeal from: Originating Summons No R2–24–04 of 2003 (High Court, Kuala Lumpur)

Firoz Hussein (Puthucheary Firoz & Mai) for the appellant.
M Nagarajah (Edwin Ng with him) (Shook Lin & Bok) for the respondent.

Abdul Malik JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant — Alami Vegetable Oil Products Sdn Bhd, against the decision of the learned High Court judge who gave leave and ordered the enforcement of an English arbitration award dated 10 July 2002 ('award') against the appellant in reliance on s 27 of the Arbitration Act 1952 and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ('Act') on application by the respondent — Lombard Commodities Ltd.

BRIEF FACTS

[2] The appellant is a company incorporated and registered under the laws of Malaysia as a limited company. The appellant has never had any dealings with the respondent and did not enter into any arbitration agreement with the respondent.

[3] The respondent purportedly commenced an arbitration proceedings against a limited company known as the Alami Group Sdn Bhd.

[4] The appellant never participated in any arbitration with the respondent. The respondent has not produced an original arbitration agreement between the appellant and the respondent or a duly certified copy thereof between the appellant and the respondent as is required by s 4(b) of the Act.

[5] His Majesty the Yang di-Pertuan Agong has not declared, by way of an order, in the *gazette* that United Kingdom is a party to the New York Convention.

ANALYSIS

[6] Before us, an objection not taken before the learned High Court judge was advanced for the very first time. It was this. That the award is unenforceable because United Kingdom has not been gazetted under s 2(2) of the Act.

A [7] Section 2(2) of the Act enacts as follows:

> 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
B Convention.

[8] The respondent submits that s 2(2) of the Act merely provides conclusive evidence as opposed to exclusive evidence that any state is a party
C to the New York Convention. The respondent also submits that the provision does not make it mandatory for a *gazette* notification to be issued before a state is declared a party to the New York Convention and that the provision is merely directory in terms.

D [9] Now, in determining whether United Kingdom is a contracting state to the New York Convention, reference should be made to the provisions in the New York Convention itself.

[10] Factually speaking, United Kingdom gave its accession to the New
E York Convention on 24 September 1975 thereby concluding its status as a party to the New York Convention on even date (see p 5 of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 10 June 1958). Flowing from this, the respondent argues that there should be no question of United Kingdom's status as a contracting state to the New York
F Convention merely because the Yang di-Pertuan Agong did not issue a *gazette* notification to that effect.

[11] Unfortunately, a contracting state is not defined in the Act. But art
G VIII(2) of Schedule 2 of the Act is worded in this way:

> This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

H [12] And this means that once ratified, the contracting states shall deposit the instruments of ratification with the Secretary-General of the United Nations.

[13] It is the stand of the respondent that the instruments of ratification
I which are deposited with the Secretary-General of the United Nations provide exclusive evidence in declaring that United Kingdom is a contracting state to the New York Convention. And because of this, the respondent says that the award should be enforced as a Convention Award by virtue of United Kingdom's membership in the New York Convention.

[14] The respondent says that an analogy of the facts of the present appeal can be drawn from the case of the *Minister of Public Works of the Government of the State of Kuwait v Sir Frederick Snow & Partners & Ors* [1984] 1 AC 426, a decision of the House of Lords, and the brief facts of the case may be stated as follows. An arbitration was conducted in Kuwait against an English company and the award was made on 1 September 1973. Publication of the said award took place on 15 September 1973. On 23 March 1979, the originating summons was filed in United Kingdom for the purpose of enforcing the arbitration award. Dispute arose as to whether the award could be enforced as a convention award bearing in mind that Kuwait ratified the New York Convention on 27 July 1978 whereas United Kingdom ratified the New York Convention on 23 December 1975 — well after the arbitration award was made and published. On 12 April 1979, an order in council equivalent to a *gazette* notification was made declaring Kuwait as a party to the New York Convention.

[15] The High Court held that the award was not a convention award by virtue of the fact that Kuwait only became a member of the New York Convention after the award was made. On appeal to the Court of Appeal, the decision of the High Court was reversed. The Court of Appeal was merely concerned with the status of Kuwait as a contracting party to the New York Convention when proceedings to enforce the award commenced.

[16] The House of Lords in the *Kuwait*'s case upheld the decision of the Court of Appeal. In dismissing the appeal, the only issue considered by the House of Lords was in regard to the ambit of the definition of a convention award. And the fact that the order in council which was equivalent to a *gazette* notification was only made after the enforcement proceedings were commenced was not an issue that was considered in either of the appellate courts.

[17] Now, using the *Kuwait*'s case as a leverage, it is the submission of the respondent that the fact that no *gazette* notification was ever issued by the Yang di-Pertuan Agong is a non-issue. It is argued, applying the facts of *Kuwait*, that the fact that United Kingdom was already a party to the New York Convention when proceedings to enforce the said award were initiated ought to be the sole concern of this court.

[18] It is argued by the respondent that the recognition of any contracting state to the New York Convention is clearly stated in the New York Convention itself. If a particular state, for instance, do not comply with arts VII(2) and XV of the New York Convention, which forms part and

parcel of Schedule 2 of the Act, then it is submitted on behalf of the respondent that the Yang di-Pertuan Agong will have no power to *gazette* such states as contracting states.

[19] It seems that the respondent is arguing that the sole factor in determining whether United Kingdom is a contracting state to the New York Convention is hinged solely on United Kingdom's compliance with the New York Convention. What the respondent is saying boils down to this. That the Yang di-Pertuan Agong's lack of *gazette* notification should not have any bearing on United Kingdom's status as a contracting state to the New York Convention.

[20] We are of the view that the learned High Court judge erred in ordering the enforcement of the award because, as a matter of law, the award was unenforceable for the simple reason that United Kingdom has not been gazetted under s 2(2) of the Act. Gopal Sri Ram JCA speaking for this court in *Sri Lanka Cricket (formerly known as Board of Control for Cricket in Sri Lanka) v World Sport Nimbus Pte Ltd (formerly known as WSG Nimbus Pte Ltd)* [2006] 3 MLJ 117; [2006] 2 CLJ 316, after considering *Kuwait*'s case, rightly took the position that the requirement of gazetting was mandatory and was not purely an evidential requirement which could be satisfied in any other way. In a well written judgment, our learned brother Gopal Sri Ram JCA had this to say (see pp 322–324):

> [6] From the general speech made by Mr Thomas of counsel for the plaintiff we were able to discern three submissions on the way in which, he says, s 2(2) is to be interpreted. First, the section is merely permissive or directory and not mandatory, because it uses the expression 'may' in the phrase 'The Yang di-Pertuan Agong may, by order in the *gazette*, declare ...' Therefore it does not matter that there is no *gazette* notification. His second submission is that s 2(2) is merely evidential in nature. In other words, once there is a *gazette* notification then that notification may be produced as conclusive evidence that the country concerned is a party to the convention. Since it is merely a question of proof, it is open to his client to produce any other acceptable evidence to prove that the country in which the award was made is a party to the convention. This method of proof includes producing secondary evidence through publications available on the internet. His third and more general submission is that the Act should be read purposively so as to promote the intention of Parliament to permit the enforcement of foreign arbitral awards in a summary fashion.

[7] With respect, these submissions of Mr Thomas are devoid of any merit and are contrary to common sense. 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.

[8] That the context in which a word appears is of primary importance was emphasised in *Kali Pada Chowdhury v Union of India* AIR 1963 SC 134. Gajendragadkar J (delivering judgment for himself, Sinha CJ, Wanchoo and Shah JJ) said:

> Whether or not the word 'may' means 'may' or it means 'shall' would inevitably depend upon the context in which the said word occurs ...

[9] Further, it is a salutary guide to construction that:

> When certain requirements are prescribed by a statute as preliminary to the acquisition of a right or benefit conferred by the statute, such prescriptions are mandatory for the acquisition of the right or benefit. See, GP Singh's *Principles of Statutory Interpretation* (9th Ed).

[10] Now, apply that here. If the Act was not there, the plaintiff would have had to sue on the award in an action at common law. Or it would have to register the award as a judgment in the Singapore court and then seek to register and enforce that judgment under the Reciprocal Enforcement of Judgments Act 1958. The right to enforce a Convention award pursuant to s 3(1) of the Act is therefore a benefit that the plaintiff would not but for the Act have. Hence, the requirement of Gazetting a country as a party to the Convention must have been intended by Parliament to be mandatory in effect.

[11] In the second place, for the reasons already given, once it is determined that s 2(2) is mandatory in nature, the argument that it is evidential falls to the ground. What sub-s 2 does is to require His Majesty to *gazette* a country as a party to the Convention and once that is done, no further proof of that fact is necessary. All that one has to do is to produce the *gazette* and thereafter no evidence shall be admitted to contradict the contents of the *gazette*. That is the effect of the conclusive evidence limb of s 2(2). See *Re Warren* [1870] 4 SALR 25.

[12] In the third place, while we agree that the modern approach to

A interpretation of written law is to examine the purpose of the particular statute (see *Pepper v Hart* [1993] 1 All ER 42, at p 50 per Lord Griffiths; s 17A of the Consolidated Interpretation Acts 1948 and 1967) we are unable to see how that is of any assistance to the plaintiff. In our judgment the purpose of the Act is to give effect to
B the New York Convention subject to certain reservations. One of the steps that Parliament intended that the executive should take to give the Act efficacy is to issue a *gazette* notification declaring one or more countries as a party or as parties to the Convention. That is the intention to which we are now giving effect. It may be that the
C executive has not acted for ail these years on grounds of comity and reciprocity. Or perhaps it is an oversight. For we notice that although Malaysia has not issued a *gazette* notification pursuant to s 2(2), Singapore has in 1985 included Malaysia in its *gazette* as a
D Convention party. In our judgment the time has come for the Attorney General's Chambers to look into this matter.

[13] As a last ditch effort, counsel for the plaintiff said that his client will be left remediless. That, we think, is quite wrong. There is nothing to prevent the plaintiff from having the award registered as a judgment
E in the Singapore High Court and then to seek registration of that judgment in this country pursuant to the Reciprocal Enforcement of Judgments Act 1958.

F **[21]** The ratio decidendi of *Sri Lanka Cricket* can be summarised in this way. That since no *gazette* notification was issued by the Yang di-Pertuan Agong declaring Singapore as a contracting state to the New York Convention, the award of the arbitration held in Singapore could not be enforced in Malaysia.
G

[22] The respondent, before us, seeks to challenge the decision of *Sri Lanka Cricket* and submits that that decision was made per incuriam. To support that submission, we were referred to the English Court of Appeal case of
H *Young v Bristol Aeroplane Co Ltd* [1944] 1 KB 718, and in particular to a passage in the said judgment delivered by Lord Greene MR where His Lordship observed at p 729 of the report:

I The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute. Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is

bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam.

[23] We beg to disagree and we categorically say that *Sri Lanka Cricket* is binding on this court. It was a decision not made per incuriam. It is ideal to refer to the judgment of Peh Swee Chin FCJ in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; [1997] 4 CLJ 645, in particular to p 13 (MLJ) and p 660 (CLJ), where His Lordship gave a narrow meaning to the words 'per incuriam'. This was what His Lordship said:

A few words need be said about a decision of Court of Appeal made per incuriam as mentioned above. The words 'per incuriam' are to be interpreted narrowly to mean as per Sir Raymond Evershed MR in *Morelle Ltd v Wakeling* [1955] 2 QB 379, 406 as a 'decision given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding in the court concerned so that in such cases, some part of the decision or some step in the reasoning on which it is based, is found on that account to be demonstrably wrong'.

[24] And Francis Bennion, *Statutory Interpretation*, 3rd Ed (1997) at p 115 carried this passage:

The basis of the per incuriam doctrine is that a decision given in the absence of relevant information cannot safely be relied on. This applies whenever it is at least probable that if the information had been known the decision would have been affected by it.

[25] Lord Goddard CJ in *Huddersfield Police Authority v Watson* [1947] 2 All ER 193 (CA) at p 196 had this to say about 'per incuriam':

What is meant by giving a decision per incuriam is giving a decision when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute.

[26] On the same subject matter, Sir John Donaldson MR in *Duke v Reliance Systems Ltd* [1987] 2 WLR 1225 at p 1228 had this to say when he delivered his speech for the Court of Appeal:

I have always understood that the doctrine of per incuriam only applies where another division of this court has reached a decision in the absence of knowledge of a decision binding upon it or a statute, and that in either case it has to be shown that, had the court had this material, it must have reached a contrary decision. That is per incuriam. I do not understand the doctrine to extend to a case where, if different arguments had been placed before it or if different material had been placed before it, it might have reached a different conclusion. That appears to me to be the position at which we have arrived today.

A [27] The principles set out in *Young v Bristol Aeroplane Co Ltd* are these. That the court will generally be bound to follow its own decisions, subject to three exceptions. Firstly, where there are two conflicting decisions, it is obvious that only one of them can be followed. Secondly, a decision must not be followed if it is inconsistent with a later House of Lords' decision, even if B the Lords did not expressly overrule it. Thirdly, a decision which was given per incuriam need not be followed.

[28] To this, I must add the famous passage of Lord Hailsham in *Cassell & Co Ltd v Broome And Another* [1972] AC 1027, particularly at p 1054D–E: C

> The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v Bristol* D *Aeroplane Co Ltd* [1944] KB 718 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom.

[29] But more apt to the occasion and to the present appeal at hand would E be the speech of May LJ in the case of *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 2 All ER 577 at p 582; [1988] 3 WLR 867 at p 873 where he said:

> In my opinion the doctrine of precedent only involves this: that when a case has F been decided in a court it is only the legal principle or principles on which that court has so decided that bind courts of concurrent or lower jurisdictions and require them to follow and adopt them when they are relevant to the decision in later cases before those courts. The ratio decidendi of a prior case, the reason why it was decided as it was, is in my view only to be understood in this somewhat limited sense. G

[30] Now, the Divisional Court in *Police Authority for Huddersfield v Watson* [1947] 1 KB 842, when exercising its appellate jurisdiction, held that the principles laid down in *Young v Bristol Aeroplane Co Ltd*, were equally H applicable to itself. Unfortunately, the Divisional Court in *Huddersfield v Watson* did not give any clear guidance as to whether the *Young* principles would apply equally to judicial review and appeals.

[31] Here, the respondent failed to show to us that the decision in *Sri* I *Lanka Cricket* was inconsistent with a later decision of the Federal Court and should therefore not be followed by us. As it stands now, there is no conflicting decision to that of *Sri Lanka Cricket* by the Federal Court. For these reasons, the decision in *Sri Lanka Cricket* cannot be said to be per incuriam.

[32] Translated loosely, the doctrine of 'ratio decidendi' means 'the reasons for decision'. There is one kernel of truth in the decision which sets out the reasons as to why the judge decided in the way he did. The *Judicial Dictionary* by KJ Aiyar, 13th Ed at p 819 defines the words 'ratio decidendi' in this way:

> It is the rule deducible from the application of law to the facts and circumstances of a case which constitutes its ratio decidendi and not some conclusion based upon facts which may appear to be similar. One additional or different fact can make a world of difference between conclusions in two cases even when the same principles are applied in each case to similar facts (*Regional Manager v Pawan Kumar Dubey* [1976] 3 SCC 334 at p 338; AIR 1976 SC 1766; *Jahangir Khan v State of Bihar* [1998] 1 Pat LJR 912 (Pat)).

[33] There is a doctrine known as the doctrine of stare decisis which states that like cases must be decided alike, and that the ratio decidendi of a particular case will apply to subsequent cases and would provide the 'answer' to the legal question posed by the current case. Taken in this context, *Sri Lanka Cricket* certainly provide the 'answer' to the present appeal.

[34] It cannot be argued that the requirement of a *gazette* notification declaring United Kingdom as a party to the New York Convention is superfluous. It is a statutory requirement mandated by s 2(2) of the Act.

[35] It is manifest that the word 'may' that appears in s 2(2) of the Act as construed by our brother Gopal Sri Ram JCA in *Sri Lanka Cricket* carries the meaning 'must'. It must be borne in mind that the use of further qualifying words after 'may' could have the effect of making a prima facie directory statute into a mandatory one. Thus, in *In re Shuter (No 2)* [1960] 1 QB 142, for instance, the court considered the Fugitive Offenders Act 1881 which provided that, if a fugitive committed to prison awaiting his return abroad was not returned within one month of committal, a superior court 'may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody'. The court reasoned that if 'may' meant 'may', then it would be quite unnecessary to have the words 'unless sufficient cause is shown to the contrary'. Therefore 'may' meant 'shall'. Likewise here, in interpreting the word 'may' that appears in s 2(2) of the Act, one must take into consideration the further qualifying words 'and that order shall, while in force, be conclusive evidence that that State is a party to the said Convention' which appear towards the end of s 2(2) of the Act and in order to give effect to those qualifying words, one would conclude that the word 'may' that is employed in s 2(2) of the Act means 'must'.

A [36] And according to Lord Selborne in *Frederic Guilder Julius v The Right Rev The Lord Bishop of Oxford; The Rev Thomas Thellusson Carter* (1880) 5 App Cas 214 at p 235:

> The question whether a judge, or a public officer, to whom a power is given by
B such words, is bound to use it upon any particular occasion, or in any particular manner, must be solved aliunde, and, in general, it is to be solved from the context, from the particular provisions, or from the general scope and objects, of the enactment conferring the power.

C [37] The 'general scope and objects' of the Act can be seen from its preamble which states that it is:

> 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
D 1958, and to provide for matters connected therewith or ancillary thereto.

[38] And if the award is to be enforced in Malaysia as provided for in s 3(1) of the Act by way of an action, it is mandatory for the Yang di-Pertuan Agong to declare by way of a *gazette* notification that United Kingdom is a party to
E the New York Convention. Here, the Yang di-Pertuan Agong elects not to make an order in the *gazette* that United Kingdom is a party to the New York Convention and this would prevent any enforcement of the award under s 3(1) of the Act. Put differently, it can be said that s 2(2) of the Act is mandatory in nature and the non-gazetting by the Yang di-Pertuan Agong
F entails dire legal consequences against the respondent in that the award cannot be enforced under s 3(1) of the Act.

[39] The award too is unenforceable because there was never an arbitration agreement in existence between the appellant and the respondent. The
G appellant is not the Alami Group Sdn Bhd and, further, it is a fundamental principle of arbitration law that arbitration is a consensual form of dispute resolution and it is also a fundamental pre-condition that an award must be based on an arbitration agreement. Again, our learned brother Gopal Sri Ram JCA in *Bauer (M) Sdn Bhd v Daewoo Corp* [1999] 4 MLJ 545; [1999]
H 4 CLJ 665, speaking for this court, aptly said at p 561 (MLJ) and p 683 (CLJ) about the issue of jurisdiction in this way:

> To begin with, it is important to recognise that the foundation of an arbitrator's jurisdiction is the agreement entered into between the disputants. Absent such an
I agreement, there is no jurisdiction. And as a general rule mere participation in proceedings before an arbitrator does not cure any jurisdictional defect. Accordingly, a party who appears with or without protest and takes part in proceedings before an arbitrator is not precluded from later challenging the award of such arbitrator on the ground of lack of jurisdiction.

[40] It is apparent that the evidence that was adduced before the learned High Court judge clearly showed that there was never an arbitration agreement between the appellant and the respondent. The respondent's evidence alone suggested that there was no such agreement. For this exercise, it would be ideal to refer to the first affidavit of Edward Eurof Lloyd-Lewis that was affirmed on 3 December 2002 as seen at pp 279–280 of the appeal record and at para 4 thereof he deposed as follows:

> There is now produced and shown to me marked 'ELL-L1' a true copy of a Tanker Voyage Charterparty in the 'vegoilvoy' form stamped 'Owners Copy of Original' dated 22 September 2000 between Lombard Commodities Limited and Alami Group Sdn Bhd in respect of the MT Lisboa.

[41] And the Tanker Voyage Charter Party as seen at p 283 of the appeal record is self-explanatory and it reads as follows:

> CHARTER PARTY made as of 22nd September 2000, at London and between Lombard Commodities Ltd as agents to Owners (hereinafter called the 'Owner') of the good Panama flag MT Lisbon (hereinafter called the 'Vessel') and Alami Group SDN BHD charterer (hereinafter called the 'Charterer').

[42] It can be surmised that the purported parties to the alleged charterparty are the respondent and a company known as Alami Group Sdn Bhd and not the appellant. In any event, there is no signature or acceptance whatsoever by the Alami Group Sdn Bhd to the alleged charterparty. Consequently, even if the respondent were to contend that it had an agreement with the Alami Group Sdn Bhd, it can be argued that even the latter entity was not a party to the arbitration agreement.

[43] There is one other matter that has to be highlighted. The learned High Court judge failed to consider the failure on the part of the respondent to produce an original arbitration agreement between the appellant and the respondent or a duly certified copy of the same in compliance with s 4(b) of the Act.

A [44] For the reasons adumbrated above, we unanimously allowed this appeal. Deposit to be returned to the appellant. We set aside the order of the High Court dated 9 March 2005 with no order as to costs since this issue was not raised before the learned High Court judge by the appellant.

B *Appeal allowed with no order as to costs.*

Reported by K Nesan

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