

PRIVATE INTERNATIONAL LAW IN THE MALAYSIA COURTS

by AZMI SHAROM*

There was only one reported Malaysian private international law case heard in 2006 and that was *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)*.¹ The other case examined here, *Prime Credit Leasing Sdn Bhd v Tan Cho Lung Raymond and Tan Henry*,² is a Hong Kong decision but bearing important relevance to Malaysia.

Although not of any real ground-breaking interest, both cases serve to illustrate the problems that can arise if the legislature is slow to react to changing circumstances. The Hong Kong case also puts to rest a rhetorical question raised in the 2005 volume of this Yearbook.³

Sri Lanka Cricket was about the application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (the Act).⁴ This is a Malaysian law that was passed in order to domestically enforce the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention).⁵ As its full name suggests, the New York Convention is about the recognition and enforcement of arbitral awards made by arbitrators in foreign countries. For countries that are party to the treaty, there is a process prescribed by the New York Convention for the recognition and enforcement of such awards which makes it easier for successful plaintiffs to enforce arbitral awards made in foreign countries.

In this case, there was arbitration in Singapore and the Respondent had won. They then tried to use the Act to enforce the decision in Malaysia. At the High Court they won, but the Appellants appealed against the High Court decision on the grounds that the Act could only be applied to countries which had been gazetted by order of the Yang Dipertuan Agong (the King) as a party to the New York Convention.⁶ Singapore, despite being a party to the New York Convention for 20 years was not gazetted. Therefore the Appellants argued that the Act could not apply.

The Respondent's argument was that the requirement for gazetting was only permissive or directory and not mandatory. The section⁷ states that the King *may* order the gazetting of a country. In other words it was not compulsory for a party to the New York Convention to be gazetted. If a country was placed in the gazette it merely amounted to evidence that it was a party, therefore it was sufficient if other evidence is proffered to show that the country where the arbitration was held was indeed a party.

* LL.B (Sheffield), LL.M (Nottingham), PhD (SOAS, London); Associate Professor, Faculty of Law, University of Malaya.

¹ [2006] 3 MLJ 117 Court of Appeal.

² HCMP2744/2004 High Court.

³ See Azmi Sharom, "Private International Law in the Malaysia Courts" (2005) 9 SYBIL at 256 – 267.

⁴ Laws of Malaysia Act 320.

⁵ United Nations Commission on International Trade Law website, online: <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf>, accessed 30 May 2007).

⁶ Section 2(2).

⁷ *Ibid.*

It was held by the Court of Appeal that the requirement for a country to be published in the gazette was compulsory and the word “may”, in the context of the entire section, meant “must”. Furthermore, the Court of Appeal was of the view that the Respondent was not left without any other avenues for enforcing the arbitrators’ decision as they could register it with the Singapore High Court and then seek to get it enforced in Malaysia using the Reciprocal Enforcement of Judgments Act 1958 (REJA).⁸

The question here is why the Malaysian government had not advised the King⁹ to gazette Singapore. Singapore has been a party since 1986 and in their own laws has gazetted Malaysia as a party to the New York Convention for the same amount of time. This oversight meant that in light of the *Sri Lankan Cricket* case, the very thing the New York Convention was designed to do, that is to ease the process of recognition and enforcement of foreign arbitral awards, was not achieved.

A similar problem arose in *Prime Credit Leasing*. In this case the issue was whether the REJA applied to Hong Kong after the handover from Britain to China in July 1997. The REJA laid down a system where foreign judgments are registered in the Malaysian courts and then enforced in Malaysia as though it were a domestic judgment. It is used only for judgments from countries that provide reciprocal treatment to Malaysia and these countries are listed in the First Schedule to the REJA.

Hong Kong was listed as country in the First Schedule of the REJA but upon the handover, the British colony became the Hong Kong Special Administrative Region (HKSAR). This change in status was not promptly duly noted in the REJA. The necessary amendment to the schedule was only made in December 2003, and came into force in January 2004. What then was the status of judicial proceedings decided in the HKSAR between July 1997 and January 2004?

In an earlier article,¹⁰ I had said that unless evidence could be shown that the Malaysian courts continued to enforce HKSAR judgments using the REJA then common law rules are to be used as, applying the golden rule of statutory interpretations, it is quite clear that unless a country is clearly listed in the schedule of REJA, the act does not apply. HKSAR was an entirely new entity and this change in status had to be reflected in the schedule.

In *Prime Credit Leasing* the matter was whether a Malaysian judgment obtained prior to the amendment to the REJA schedule to gazette the HKSAR could be enforced in the HKSAR using their Foreign Judgments (Reciprocal Enforcement) Ordinance 1968 (FJREO).¹¹ The facts of the case were as follows: in May 2003 the judgment creditor obtained a summary judgment for approximately RM7,000,000 against the judgment debtor in the Malaysian High Court. In October 2004 the judgment creditor’s application to register the Malaysian decision using the FJREO was duly allowed.

The judgment debtor appealed on the grounds that according to section 2(A)(2)(b) of the HKSAR Interpretation and General Clauses Ordinance (IGCO)¹² which came into force on July 1 1997, privileges conferred by Hong Kong to other Commonwealth countries would not apply to the HKSAR except for those privileges with reciprocal effect. The argument is that because Malaysia did not amend the REJA schedule on May 2003, what this meant was that at the time there was no reciprocal relationship between Malaysia and HKSAR and therefore the FJREO could not be used to enforce that particular judgment.

Deputy High Court Judge J Poon gave a thorough explanation of the situation where the laws of Hong Kong would continue to apply in the HKSAR and concluded that the FJREO was clearly applicable. With regard to whether Malaysia and the HKSAR enjoyed a reciprocal relationship *vis a vis* the enforcement of each other’s judgments, he held that

⁸ Laws of Malaysia Act 99.

⁹ The King is a constitutional monarch and most of his actions are done upon advice and not on his own discretion.

¹⁰ See Sharom, *supra* note 3.

¹¹ Cap 319.

¹² Cap 1.

it was not necessary to show actual reciprocity existed for the FJREO to apply. It was sufficient if the HKSAR government was of the opinion that reciprocal treatment would be accorded to them.

Based on the evidence (which consisted mainly of correspondence between the HKSAR Department of Justice and the Malaysian government), the judge held that this was the opinion of the government of the HKSAR and, as such, the FJREO could be used to enforce a Malaysian judgment. Furthermore, there were two unreported cases heard in Malaysia between July 1997 and January 2004 where the REJA was used to enforce HKSAR judgments in Malaysia. Reciprocity therefore was not merely a theoretical possibility between the countries; it was a fact.

As with the *Sri Lanka Cricket* case, here we see the problems that could arise if the legislature is slow in reacting to whatever changes that may occur or to whatever international obligations that the country may have. Such slowness ironically causes difficulty and confusion in situations where laws exist to put paid to such problems.

