1997, No. Con 95

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

BETWEEN

NG FUNG HONG LIMITED Plaintiff

and

ABC Defendant

HEADNOTE

An arbitral award made in mainland China is not enforceable in Hong Kong under section 2GG of the Arbitration Ordinance (Cap 341).

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NG FUNG HONG LIMITED Plaintiff

and

ABC Defendant

Before the Hon Mr Justice Findlay, in Chambers

Date of hearing: 15 January 1998
Date of handing down of judgment: 19 January 1998

Ms Teresa Cheng, instructed by Messrs Ford, Kwan & Co, for the plaintiff.

JUDGMENT

This is one of a number of ex parte applications that have come before me recently by which the plaintiffs have sought leave to enforce arbitral awards made in mainland China. I have asked that these matters be argued before me because, of course, since the People's Republic of China resumed sovereignty over Hong Kong on 1 July 1997, Hong Kong and mainland China have ceased to be separate parties to the New York Convention vis-à-vis each other. This matter has been argued by Ms Teresa Cheng, who has great expertise in arbitral law, and I am indebted to her. Because this problem is of general interest, the plaintiff has agreed that this judgment may be published. This being an ex parte application, the defendant has not so agreed. Accordingly, I have not given the defendant’s name in the case heading.

Ms Cheng accepts that this award made by the China International Economic and Trade Commission is not a Convention award. She also accepts that the plaintiff could enforce the award by action on the basis that the award constitutes a debt due by the defendant to the plaintiff. But, Ms Cheng argues, the plaintiff also has the option of seeking an order under section 2GG of the Arbitration Ordinance (Cap.341). There is no other provision in the Ordinance under which this award may be enforced.

Section 2GG reads –

> "An award, order or direction made or given in or in relation to arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award, order or direction."

Certainly, on the unqualified face of this provision, it could apply to an award made other than one made in Hong Kong. Unfortunately, the section appears in Part 1A of the Ordinance, and is qualified by the first section of that part. This is section 2AD, which reads –

> "This Part applies to arbitration proceedings conducted under both domestic arbitration agreements and international arbitration agreements."

By section 2(1) of the Ordinance, "domestic arbitration agreement" means an arbitration agreement that is not an international arbitration agreement, and "international arbitration agreement" means an arbitration agreement pursuant to which an arbitration is, or would if commenced be, an international arbitration agreement within the meaning of article 1(3) of the UNCITRAL Model Law.

Article 1(2) of the UNCITRAL Model Law says that "The provisions of this Law [except irrelevant articles] apply only if the place of arbitration is in the territory of this State". Section 2(4) of the Ordinance says that "In the UNCITRAL Model Law a reference to . . . 'this State' shall be treated as being a reference to Hong Kong". Article 1(3) must, then, apply only if the place of arbitration is Hong Kong. Accordingly, it follows that an international arbitration agreement relating to an arbitration where the place of arbitration is outside Hong Kong is not an international arbitration agreement for the purposes of Part 1A of the Ordinance. In other words, "arbitration proceedings conducted under . . . international arbitration agreements" (section 2AD) cannot be referring to arbitration proceedings conducted outside Hong Kong because, for the purposes of the Ordinance, an "international arbitration agreement" is one only where the place of arbitration is Hong Kong. It also follows that, if Part1A applies only to international arbitration agreement where the place of arbitration is Hong Kong, it applies only to domestic arbitration agreements where the place of arbitration is Hong Kong.

This conclusion, although perhaps inconvenient, is not surprising when one considers section 2GG in the context of the whole of Part 1A.. When one does that, it is clear that every other section of that Part is intended to only

apply to arbitrations taking place in Hong Kong. It would be strange, in that context, if section 2GG was the one and only section in Part 1A that applied also to arbitrations outside Hong Kong.

I must say that I reach this conclusion with some regret. The procedure for the enforcement of awards between Hong Kong and the rest of China was convenient and worked well. Although a party wishing to enforce in Hong Kong an award made in mainland China is not without remedy – in my view, he can proceed by action on the basis of the award – it is a pity that such an award cannot be enforced directly. What is equally important is that there may be difficulties in seeking to enforce a Hong Kong award in mainland China. There seems to be no obvious reason why there should not be a simple mechanism put in place for the mutual enforcement of arbitral awards between mainland China and Hong Kong, and I hope we will see such a system before too long.

In passing, I point out that Order 73 of our Rules of Court is out of date. It does not take account of the amendments to the Ordinance by Ordinance 75 of 1996. Although in practice it may be easy enough to identify the equivalents of the sections mentioned in those rules, perhaps the Rules Committee should consider appropriate amendments.

In the result, I must dismiss the plaintiff's application.

JK FINDLAY
Judge of the High Court
Court of First Instance