hence should be obliged to refund the purchase price, pay compensation and take back the equipment. There is no obligation on the part of the plaintiff to deliver the equipment to the defendant. That being the case, the question of the plaintiff failing its obligation to deliver the equipment to the defendant does not arise. In other words, there is no question of any concurrent obligation which may give rise to a difficulty in enforcement.

In any event, there is nothing in the award which may suggest that the obligation to return the equipment depends on the repayment of the purchase price and/or compensation. In our view, it is a separate obligation. Hence, if we were to hold that the award was enforceable in Hong Kong, we would not withhold the refund of the purchase price or payment of compensation simply because there might be some problem in the return of the equipment.

Conclusion

For the reasons which we have given above, we have come to the conclusion that the appeal must be allowed. However, this implies no criticism of the judge below. The defendant's case before him had been that it was simply the experts appointed by the tribunal who had attended the inspection of the equipment in the absence of the defendant. It had not been suggested that the chief arbitrator had been present as well. As the judge himself noted, 'if ... the experts had whispered what they were told into the ears of the arbitral tribunal, the defendant would have had a legitimate complaint.'

We set aside the leave to enforce the award and the judgment entered pursuant thereto. There would be an order nisi that the defendant should have the costs of the appeal and that the costs order in the court below should stand. Finally we would express our gratitude to all counsel for the assistance which they have provided to this court.

Reported by Robert Morgan

NG FUNG HONG LTD v ABC

COURT OF FIRST INSTANCE CONSTRUCTION LIST NO 95 OF 1997
FINDLAY J
15, 19 JANUARY 1998

Arbitration – Award made in the PRC on or after 1 July 1997 – Whether summarily enforceable in Hong Kong – Arbitration Ordinance (Cap 341) s 2GG

仲裁 - 於1997年7月1日或以後於中華人民共和國作出的判決 - 可否於香港循簡易程序執行 - 《仲裁條例》(第341章)第2GG條

The parties referred a dispute to arbitration in the People's Republic of China before a tribunal appointed by the China International Economic and Trade Arbitration Commission. The plaintiff obtained an award in its favour. The plaintiff made an ex parte application to the Court of First Instance for leave to enforce the award and to enter judgment in terms of the award, pursuant to s 2GG of the Arbitration Ordinance (Cap 341). The application was made after 1 July 1997, the date of the resumption of sovereignty over Hong Kong by the PRC. Although the PRC was a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, the resumption of sovereignty meant that a PRC award was no longer a 'Convention award' for the purpose of its enforcement in Hong Kong. The question therefore arose as to whether the award could be enforced summarily under s 2GG of the Ordinance or was enforceable only through an action on the award as a debt due to the plaintiff.

Held, dismissing the application:

Part 1A of the Arbitration Ordinance (Cap 341), of which s 2GG was a part, applied only to arbitrations (whether domestic or international) conducted in Hong Kong. Having regard to other relevant provisions of the Ordinance, in particular s 2AD, to which it was subject, s 2GG could not apply where the place of arbitration was outside Hong Kong. The award in the present case was not, therefore, enforceable under s 2GG (at 215C-I).

Per curiam

(1) There was 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 (at 216B/C).

(2) Order 73 of the Rules of the High Court should be amended to take account of the changes made by the Arbitration (Amendment) Ordinance (75 of 1996) (at 216C).

Legislation referred to

Arbitration Ordinance (Cap 341) ss 2(1), 2(4), 2AD, 2GG
Arbitration (Amendment) Ordinance 1996 (75 of 1996)
New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (Schedule 3 to Arbitration Ordinance (Cap 341))

UNCITRAL Model Law on International Commercial Arbitration (Schedule 5 to Arbitration Ordinance (Cap 341)) art 1(2), (3)
Rules of the High Court (Cap 4 sub leg) O 73

[*Editorial notes*: (i) Prior to the resumption of sovereignty, when PRC awards were Convention awards, they were enforceable under s 2GG of the Arbitration Ordinance (Cap 341) (before 27 June 1997, s 2H) in the same manner as domestic awards, by virtue of s 42(1) of the Ordinance. Following the resumption of sovereignty, however, s 42(1) no longer applies to such awards and this decision makes clear that there is no other provision of the Ordinance having equivalent effect. An announcement by the Central Authorities of the PRC is awaited on arrangements for the recognition and enforcement of awards as between the Hong Kong Special Administrative Region and the PRC. For discussion, see Robert Morgan *The Arbitration Ordinance of Hong Kong: A Commentary* (1997, Butterworths Asia) at pp 388-391; (ii) the judgment does not state whether the award was made before or after 1 July 1997. It appears, however, that where an award was made before 1 July 1997 but proceedings for leave to enforce were not made until after that date, such an award will not be a Convention award: see *Hebei Import and Export Corp v Polytek Engineering Co Ltd (No 2)* [1998] 1 HKC 192 at 197E-G, per Chan CJHC (obiter).]

Application

This was an ex parte application for leave to enforce an award made in the People's Republic of China and to enter judgment in terms of the award, pursuant to s 2GG of the Arbitration Ordinance (Cap 341). The facts appear sufficiently in the following judgment.

Teresa Cheng (Ford, Kwan & Co) for the plaintiff.

Findlay J: 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 s 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 Pt 1A of the Ordinance, and is qualified by the first section of that part. This is s 2AD, which reads:

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

By s 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 art 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 Pt 1A of the Ordinance. In other words, 'arbitration proceedings conducted under ... international arbitration agreements' (s 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 Pt 1A 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 s 2GG in the context of the whole of Pt 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 s 2GG was the one and only section in Pt 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 O 73 of our Rules of High 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 plaintiffs application.

Reported by Robert Morgan

THE MARGO L

COURT OF FIRST INSTANCE – ADMIRALTY JURISDICTION NO 351 OF 1997
WAUNG J
3, 8 DECEMBER 1997

Maritime law – Sale of arrested ship – Whether by public tender or private sale – Function of Admiralty Court

海事法 – 被拘禁船舶的售賣 – 以公開投標方式抑或以私人合約方式 – 海事法庭的職責

The plaintiff bank, mortgagee of the arrested vessel 'Margo L', applied for judgment in default of acknowledgment of service and for a private sale of the vessel to a named purchaser at a proposed price of US$3.4m. In an attempt to justify departure from the usual course of appraisement and public tender, the bank relied on three brief valuation certificates, the highest of which valued the vessel US$3.2m.

Held, entering judgment for the plaintiff but refusing to order the proposed private sale:

(1) To ensure protection for all admiralty claimants, the court should normally order an appraisement of the vessel so as to determine the minimum selling price (at 218I-219A).

(2) Further, even if valuation was done in the most convincing way, the court would still order a sale by public tender in order to obtain the best price possible for the vessel. Nothing in this case justified departure from this normal procedure (at 219G/H, 220G).

Per curiam

The important function was that the ship was publicly sold at the best possible price and the public sale had been made known to the maritime world (at 218A).

Application

This was the plaintiff's application for judgment in default of acknowledgment of service and for a private sale of the arrested vessel to a proposed buyer at a proposed price. The facts appear sufficiently in the following judgment (at 218C).

Kenneth Ng (Johnson Stokes & Master) for the plaintiff.
Mr Tsang, Chief Bailiff.

Waung J: By the two motions, the plaintiff bank (the bank), applied for judgment in default of acknowledgment of service and for sale of the ship Margo L (the vessel) to the named proposed purchaser Hudson Navigation Inc (Hudson) at the price of HK$26,520,000 or about US$3.4m. I entered default judgment in favour of the bank as there was no doubt that the defendants were in default of the mortgage and that the total amount owing to the bank was as shown in the documents namely some US$12m.