Title: The Enforcement of Mainland Awards before and after the Arbitration (Amendment) Ordinance 2000; 《2000年仲裁（修訂）條例》與內地仲裁裁決的

Author(s): Leung, HF

Citation: Hong Kong Lawyer, 2002, May, p. 52-58; 香港律師, 2002, May, p. 52-58

Issued Date: 2002

URL: http://hdl.handle.net/10722/48406

Rights: This work is licensed under a Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License.
The Enforcement of Mainland Awards before and after the Arbitration (Amendment) Ordinance 2000

In a recent case, the Court of First Instance held that for awards made on the Mainland before 1997, enforcement should have been refused for lack of jurisdiction if the application for leave to enforce the award was made after the change of sovereignty but before the Arbitration (Amendment) Ordinance 2000 came into effect. Leung Hing-fung discusses...

Introduction
The Arbitration Ordinance (Cap 341) (the Ordinance) was amended in 2000 to include new provisions for the enforcement of Mainland awards. The amendment was introduced as a result of the problems created by Hong Kong’s return to China in 1997, after which it lost its position as an independent member vis-a-vis China under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, convened in New York in 1958 (the New York Convention). Because of China’s resumption of sovereignty over Hong Kong, awards made on the Mainland, which used to be enforceable in Hong Kong under the New York Convention, ceased to be enforceable under the Convention after 1997. The effect of the amendment to the Ordinance is to reintroduce the enforcement mechanisms for such awards.

However, from 1 July 1997 to the time when the amendment took effect (the Relevant Period), there are situations in which a party to an arbitration held on the Mainland may intend to enforce, or has in fact applied for the enforcement of, the award. The question then arises: Where an award was made on the Mainland before the change of sovereignty and enforcement was allowed or refused in the Relevant Period, what is its legal position after the amendment of the Ordinance in 2000?

The recent case of Shandong Textile Import and Export Corp v Da Hua Non-Ferrous Metals Co Ltd, HGCT 80/1997 (date of judgment 6 March 2002) may shed some light on this question.

The Shandong Case
In Shandong, the plaintiff was a Mainland company which entered into a contract with the defendant for the purchase of a quantity of US raw cotton. A dispute arose regarding the quality of the cotton and the plaintiff claimed for damages, interest and costs. The dispute was brought before the China International Economic and Trade Arbitration Commission (CIETAC) in Beijing. Hearings took place in September 1995 and March 1996. CIETAC made an award on 6 June 1996 and a supplementary award on 5 July 1996, both in favour of the plaintiff (the Awards).

It must be noted that the Awards were made before the change of sovereignty. In August 1997, the plaintiff sought leave ex parte from the Court of First Instance in Hong Kong to enforce the Awards on the basis that they were Convention awards within the definition in the Ordinance. By an order dated 21 August 1997, Yem J gave leave to enforce the Awards (the Order).

The defendant took out a summons dated 3 October 1997 to apply for setting aside the Order. The application was heard on 28 and 29 January 2002. During the hearing, the plaintiff applied for abridgement of service and was allowed to serve a new summons under s 26G and Part IIIA of the Ordinance for leave to enforce the Awards. The plaintiff also applied for an order that judgment be entered in...
terms of the Awards on the basis that they were Mainland awards within the definition of s 2 of the Ordinance.

The relevant definition in s 2 and Part IIIA were introduced in the amendment to the Ordinance in 2000.

Background of the Relevant Law

After the change of sovereignty, Hong Kong ceased to be an independent member vis-a-vis China under the New York Convention. Without any special provision for awards made on the Mainland, there would have been difficulties in enforcing such awards in Hong Kong. An amendment was therefore made to the Ordinance in 2000. Part IIIA was introduced and new provisions were included for a new category of awards; namely, Mainland awards.

A definition of 'Mainland award' was added to s 2 of the Ordinance: 'Mainland award' means an arbitral award made on the Mainland by a recognised Mainland arbitral authority in accordance with the Arbitration Law of the People's Republic of China.

There are also provisions for Convention awards which fall within the definition of 'Mainland award' and for which enforcement had been refused before the amendment came into effect. Section 40A states:

1. Subject to subsection (2), this Part shall have effect with respect to the enforcement of Mainland awards.

2. Where—

(a) a Mainland award was at any time before 1 July 1997 a Convention award within the meaning of Part IV as then in force; and

(b) the enforcement of that award had been refused at any time before the commencement of section 5 of the Arbitration (Amendment) Ordinance 2000 (2 of 2000) under section 44 as then in force,

then sections 40B to 40E shall have no effect with respect to the enforcement of that award.

The major question in Shandong was: What is the legal position of an award made on the Mainland before 1997 the enforcement of which has been sought in the Relevant Period? A special point in that case is that leave of enforcement was actually granted at that time. Section 40A(2)(b) therefore becomes relevant.

Arguments of the Defendant in Shandong:

In attempting to set aside the Order, the defendant relied on the following arguments:

(i) The arbitration agreement between the parties was not valid under the law where the awards were made, i.e under PRC Mainland law (s 44(2)(b) of the Ordinance).

(ii) The defendant, as the respondent in the arbitration proceedings, was not able to present its case (s 44(2)(c) of the Ordinance).

(iii) It was contrary to public policy to enforce the awards (s 44(3) of the Ordinance).

Ma J in his judgment rejected arguments (i) and (ii). Therefore, only point (iii) will be discussed.
It is clear that only if the defendant had succeeded in setting aside the Order would the summons taken out by the plaintiff have then come into play. The plaintiff would then have to rely on the new summons taken out at the hearing.

The next questions to ask would be:
(i) Are the Awards within the meaning of 'Mainland award' in Part IIIA of the Ordinance?
(ii) If so, can they be enforced under s 40A of the Ordinance?

**The Ground of Public Policy**

The defendant sought to rely on public policy to argue that, as at the time when the application for the Order was heard (ie August 1997), Hong Kong had ceased to be an independent member of the New York Convention with respect to China and that it would therefore be contrary to public policy to uphold the enforcement of any arbitral award made by CIETAC before 1997 based on the Convention. On this point, the defendant relied on the definition of 'Convention award' in the Ordinance as at the time of the Order, as follows:

'Convention award' ... means an award to which Part IV applies, namely, an award made in pursuance of an arbitration agreement in a State or territory, other than Hong Kong, which is a party to the New York Convention.

Counsel for the defendant further submitted that it would be contrary to the Basic Law to regard Hong Kong as a separate territory from the PRC. He argued that the granting of the Order was contrary to public policy, thus invoking s 40A(2)(b).

**Whether the Order should be Set Aside**

Two cases, both of which were heard in the Relevant Period, were referred to. In Ng Fung Hong v ABC [1998] 1 HKC 213, the court considered the granting of leave to enforce a Mainland award made before 1 July 1997. It was conceded that the award was not a Convention award. It was held that a Mainland award cannot be enforced under s 266 of the Ordinance and that the section only applied to awards made pursuant to arbitrations held in Hong Kong.

In Hebei Import & Export Corp v Polytek Engineering Co Ltd (No 2) [1998] 1 HKC 192, Justice Chan CJHC, as he then was, raised a proposition in obiter that such awards were not Convention awards. He further raised the question whether the second sentence in art 1(1) of the New York Convention could be used to apply to awards made on the Mainland so that such awards, even after 1 July 1997, would still be regarded as Convention awards (at 1971-11). Apparently his lordship was of the view that the matter was not free from doubt but suggested that the relevant authorities should consider appropriate amendments to the Ordinance.

On the above obiter, Ma J in Shandong had this to say:

As for the obiter dicta of Mr Justice Chan CJHC regarding the second sentence of Article 1(1) of the New York Convention, I have considerable doubts whether this could justify a conclusion that Mainland Awards after 1 July 1997 could still be regarded as Convention Awards. I say this for two reasons. First, the second sentence does not form part of the statutory definition of Convention Awards in the Ordinance. Its application must therefore be in some doubt anyway. Secondly, in any event, there was no material before the court in Hebei Import & Export Corporation (and none before us) to suggest that a Mainland award could not be considered as a domestic award (in the State of the PRC) where its enforcement was sought. It is to be noted that Hong Kong is not an independent state, but a territory within the PRC (para 49).

Ma J therefore went on to hold that Yam J had no jurisdiction to give leave to enforce the Awards on the basis of their being Convention awards and that the Order should be set aside.

**Whether the Awards could be Enforced as Mainland Awards even though the Order was Set Aside**

The relevant section here is s 44, in particular subsections (1) and (3) of the Ordinance, which state:

(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.

(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

Counsel for the defendant submitted that, even though Yam J did not actually refuse to enforce the Awards, the words 'the
enforcement of that award had been refused in s 40A(2)(b) must be sensibly construed so as to apply to situations where the enforcement should have been refused.

With this submission Ma J agreed. He said in his judgment:

'It could not have been intended that where a court had wrongly given leave to enforce, a party then escapes the prohibition in section 40A(2) even though if the Court had acted correctly, leave to enforce would have been refused under section 44 (para 59).

Counsel for the defendant went on to submit that Yam J should have refused leave to enforce the Awards on the ground that it was contrary to public policy to do so. Since sovereignty over Hong Kong was resumed by the Mainland on 1 July 1997, there was no question of Hong Kong being treated as a state or territory separate from the PRC from that date, as this did not accord with constitutional or political reality. Therefore, as a matter of public policy, the Awards could not and should not be enforced as Convention awards. It therefore followed that Yam J should have refused to enforce the Awards on public policy grounds.

This submission was rejected by Ma J.

First, the grounds on which the enforcement of a Convention award may be refused under section 44 all presuppose that the relevant award is a Convention award in the first place. Note here the words in section 44(2) 'Enforcement of a Convention award may be refused if the person against whom it is invoked proves ...' (author's emphasis). The ground on which the defendant has succeeded in setting aside Yam J’s order was on the basis that the learned judge had no jurisdiction to make the order since the two arbitration Awards were not Convention awards. Accordingly, section 44 was not relevant at all.

Secondly, even if section 44 was somehow relevant as being the basis for the setting aside of Yam J’s order, I cannot see how section 40A(2) could render the awards unenforceable when the whole point of Part IIIA of the Ordinance was to deal with the problem of ‘mischief’ of Mainland awards not being enforceable by reason of the resumption of sovereignty over Hong Kong. Thus, as a matter of construction, it could not have been intended that section 40B would render unenforceable those types of awards in respect of which Part IIIA came into existence in the first place. To decide otherwise would itself be contrary to public policy and indeed a reading of the preamble to the Arrangement would confirm this (paras 71 and 72).

Ma J was thus of the view that the enforcement of the Awards should have been refused based on the court’s lack of jurisdiction, but not on any public policy ground as submitted. Leave for enforcement of the Awards was therefore ‘re-granted’ based on the new provisions introduced in the amendment to the Ordinance in 2000 even though the Order had been set aside.

Conclusion

The sole ground upon which the court in Shandong allowed the Order to be enforced again was that enforcement should have been refused in the Relevant Period when the application for enforcement was heard, based on the court’s having no jurisdiction at that time (instead of on any of the grounds under s 44 of the Ordinance).

The Shandong judgement now makes it clear that awards made on the Mainland before the change of sovereignty could not be enforced during the Relevant Period. The amendment to the Ordinance in 2000 provides these awards with new mechanisms by which they can be enforced after the Relevant Period, unless enforcement has been refused on any of the grounds under the new s 44.

Shandong has clarified the court’s position that in the Relevant Period the court did not have jurisdiction to enforce awards made on the Mainland before 1997. Therefore, it may reasonably be suggested that for these awards, even if enforcement has been refused, and provided that the refusal was not expressly based on any of the grounds set out under s 44, enforcement will be allowed again after the amendment to the Ordinance in 2000.

Leung Hing-lung
Deputy Head and
Associate Professor (Law)
Department of Real Estate and
Construction
The University of Hong Kong
Barrister-at-Law
《2000年仲裁（修订）条例》与内地仲裁裁决的强制执行问题

在《2000年仲裁（修订）条例》生效前提出，法院若依中法系法院的管辖权为理由而拒绝批准该申请。梁庆盈加以剖析

引言

香港於1997年7月1日之后，是1998年《承认及执行外国仲裁裁决公约》（下简称《纽约公约》）下的成员。不过，随著香港回归，香港已失去相对中国独立成员身分，而向可根据《纽约公约》在中国强制执行的中国内地仲裁裁决（以下简称「内地裁决」），亦随著香港回归而不能再根据《纽约公约》予以强制执行。为求解决这些问题，香港政府於2000年通过《2000年仲裁（修订）条例》（2000年第2号）（以下简称《修订条例》），修订《仲裁条例》（第411章）中加入新条文，以重新设立内地裁决的强制执行机制。

虽然如此，一个问题可能出现的情况是，从1997年7月1日（即香港回归之日）至《修订条例》生效的一段时间（以下简称「有关期间」），中国仲裁的其中一方打算（或已正式申请）强制执行仲裁裁决。这种情况产生了以下问题：假若内地裁决於香港回归前作出，而该裁决的强制执行于有关期间曾获批准或遭到拒绝，仍需按《修订条例》生效后，该裁决的法律地位如何？
民共和國仲裁法》在內地作出的仲裁裁決」

對於落在上述定義的範圍，而其強制執行於《 trouvé 条例》生效前曾遭拒絕的公約裁決，< trouvé 条例>亦製定了條文。新增的第 40A 條規定：

(1) 除第 (2) 款另有規定外，【《仲裁條例》第 HLA 部】的規定，對於內地裁決的強制執行具有效力。
(2) 凡一

(a) 某內地裁決在 1997 年 7 月 1 日前的任何時限當時有效的第 IV 部所指的公約裁決；及
(b) 該裁決曾在【《修訂條例》第 5 條生效前的任何時限根據當時有效的第 44 條所指強制執行，則第 40B 至 40E 條並不對該裁決的強制執行具有效力。」

Shandong 一案所涉及的主文問題是：於 1997 年 7 月 1 日前的任何時限當時有效的第 IV 部所指的公約裁決，其法律地位如何？2 案中的特點是，法院確認於有關期間下達的公約裁決。倘若法院確認於有關期間下達的公約裁決，因此，上列第 40A(2)(b) 條便成為了與案有關的考慮因素。

被告人的論據

在 Shandong 一案中，尋求撤銷涉案命令的被告人，提出了下列論據：

(1) 根據涉案裁決決定的國家（即中國）的法律，與該國的仲裁裁決與其強制執行的仲裁裁決。因《仲裁條例》第 44(2)(b) 條。
第 44 條及第 IIIA 部的影響

《仲裁條例》第 44 條包含以下規定：

「(1) 除非屬本條所述的情形，否則不得拒絕強制執行公約裁決。

【…】

(3) 如公約裁決關乎的事項，是不能藉仲裁解決的，或強制執行該裁決會違反公共政策的，則亦可拒絕強制執行該裁決。」

在 Shandong 一案中，被告人的代表大律師認為，即使任選君法官未有確實拒絕准許強制執行涉案裁決，《仲裁條例》第 40(2)(b) 條下的「該裁決會違反公共政策的，則亦可拒絕強制執行該裁決。」

馬法官同意上述論據，並且指出：

【有關於條文的宗旨不可能是，假如法院曾錯誤地給予強制執行的許可，則即使正確行事的法院理應會根據第 44 條而拒絕給予強制執行的許可，有關的講法將能免受第 40(2) 條的範疇。」（見判例第 59 條）

案中被告人的代表大律師又認為，任選君法官理應以強制執行涉案裁決會違反公共政策為理由而拒絕給予強制執行裁決。隨著香港回歸，憲制及政治現實亦不容許香港當作獨立於中國的國家或區域存在。因此，在公共政策的層面上，涉案裁決既不能亦不應作爲公約裁決予以強制執行。這也是說，任選君法官理應根據公共政策理由而拒絕准許強制執行涉案裁決。

但上述辯論不獲馬法官接納。他指出：

「首先，第 44 條所指明的可拒絕強制執行公約裁決的理由，一律預先假定了有關裁決從一開始便是公約裁決。這裡我們要注意，第 44(2) 條的字眼為『如受公約裁決』針對強制執行的人證明有下列情形，則可拒絕強制執行公約裁決 …』（下引為筆者所加）。本案被告人成功申請撤銷任選君法官所頒下的命令，理由是涉案的兩項仲裁裁決不屬於公約裁決，故此任法官沒有司法管轄權去覆核該命令。據此，第 44 條根本與本案無関。」

第二，既然【《仲裁條例》第 IIIA 部的宗旨不外是處理內地裁決以香港主權回歸中國而不能予以強制執行的問題，則即使第 44 條確是撤銷任法官的命令的基礎，從而與本案無有關，我亦不見第 40(2) 條如何能令涉案裁決不能予以強制執行。因此，在法例釋義的層面上，就第 IIIA 部原本為之前實施的一項仲裁決而言，第 40B 條的目的不可能是令該類裁決不能予以強制執行。與此相反的結論，本身將有違公共政策；事實上，只要閱讀有關安排行的介述，便可確認這一點」（見判例第 71 及 72 條）

因此，馬法官認為，拒絕准許強制執行涉案裁決的依據，應是法官缺乏相關的司法管轄權，而不是當方大律師所提出的公共政策理由。

據此，即使涉案裁決已被撤銷，法官仍根據《修訂條例》所引人的新條文，「重新給予」強制執行涉案裁決的許可。

結語

在 Shandong 一案中，法官重新批淮強制執行涉案命令的唯一理由是法院理應拒絕准許強制執行，而這是在法院於有關期間（包括審理強制執行申請之時）缺乏相關的司法管轄權，而不是基於《仲裁條例》第 44 條所列明的任何理由。

Shandong 一案的判決表明，於香港回歸前作出的內地裁決，於有關期間不能予以強制執行。《修訂條例》提供了機制，使該等裁決於有關期間過後得以強制執行，而該機制受制於第 44 條所列的拒絕強制執行的條款。

法院在 Shandong 一案中已屢明，於有關期間，法院沒有司法管轄權下令強制執行 1997 年 7 月 1 日以前所作出的內地裁決。因此，我們可合理地提出，即使這項裁決的強制執行曾遭到拒絕，只要該拒絕並非明確地基於第 44 條所列明的任何理由，上述的強制執行仍可隨著《修訂條例》的生效而重獲批准。

梁慶豐
香港大學法律學院
副院長兼副教授（法律）