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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, Yau 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 22G 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-à-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 IIA 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 –
   1. 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:

1. The arbitration agreement between the parties was not valid under the law where the awards were made, ie under PRC Mainland law (s 44(2)(b) of the Ordinance).
2. The defendant, as the respondent in the arbitration proceedings, was not able to present its case (s 44(2)(c) of the Ordinance).
3. It was contrary to public policy to enforce the awards (s 44(3) of the Ordinance).

Mr J in his judgment rejected arguments (i) and (ii). Therefore, only point (iii) will be discussed.

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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 26G 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 II(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 II(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') whose 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 Yamm 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 Yamm J did not actually refuse to enforce the Awards, the words 'the
enforcement of that award has 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 the court be in a position to set aside an award under s 40A(2) even though it was not given at the hearing. 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, it appears to have been enforceable under Part IIIA of the Ordinance. Accordingly, section 44 was not relevant at all.

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 restored by the Mainland on 1 July 1997, there was no question of the court 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's 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 enforceable when the whole point of Part IIIA of the Ordinance was to deal with the problem of 'mischiefs' 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 of 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 judgment 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.
《2000年仲裁（修订）条例》与内地仲裁裁决的强制执行问题

在最近期内案中，原审法院裁定，就香港主催应回归中国以前在大陆作出的仲裁裁决而言，假如强制执行裁决的申请於回帰後但於2000年仲裁（修订）条例生效前提出，法院理应以缺乏司法管辖权为理由而拒绝批准该申请。梁慶豐加以剖析

引言

香港於1997年7月1日回歸後，中國政府開始為香港的司法制度定下底線。在香港設立的獨立法院必須與中國的法律制度協調，同時又要保有香港的司法特點。

在最近期内案中，原审法院裁定，就香港主催应回歸中國以前在大陸作出的仲裁裁决而言，假如强制执行裁决的申请於回帰後但於2000年仲裁（修订）条例生效前提出，法院理应以缺乏司法管辖权为理由而拒绝批准该申请。梁慶豐加以剖析

一宗近期案

案情

一案中的原审人是一家内地公司，它与原审人签订合約，购买一批原料。双方就该批原料的質量發生爭議，原审人更向原审人申请损害赔偿，利息和訴訟費。該爭議交由北京中國國際貿易仲裁委員會（以下簡稱北京委員會）審理。經過了分別於1995年9月及1996年3月進行的貨訴後，北京委員會裁定原审人勝訴，並於1996年6月6日及7月5日分别作出了仲裁裁决及補充裁决（以下統稱「涉案裁决」）。必須注意，涉案裁决是於香港回帰前作出的。

到了1997年8月，原审人单方将原审人仲裁申请書放在香港主催应回歸後，而该裁决的强制执行于有期間均未获批准或遭到拒绝，则《修订条例》生效後，该裁决的法律地位如何？
民同仲裁裁決法在內地作出
的仲裁裁決」

對於落於上述定義的範圍，而且
強制執行於《修訂條例》生效前曾
遭拒絕的公約裁決，《修訂條例》
亦制定了條文。新增的第 40A 條規
定：

「(1) 除第 (2) 款另有規定
外，【《仲裁條例》第
HIA 部】的规定，對於
內地裁決的強制執行具
有有效性。
(2) 凡 —

(a) 某內地裁決在 1997
年 7 月 1 日前的任
何時候屬當時有效
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
生效前的任何時候
根據當時有效的第
44 條規定強制執行，
則第 40B 至 40E 條並不對該
裁決的強制執行具有效力。」

Shandong 案的要點

Shandong 案的主要問題
是：於 1997 年 以前在中國大陸作
出，並曾於有關期間尋求予以強制
執行的仲裁裁決，其法律地位如
何？案中的特點是，法院確曾於有
關期間下令准許原被告強制執行涉
案裁決，因此，上述第 40A(2b) 條
便成為了與案有關的考慮因素。

被告人的論據

在 Shandong 案中，尋求撤銷涉
案命令的被告人，提出了下列論
據：

一、根據作出涉案裁決的國家（即
中國）的法律，與雙方的仲
裁協議不屬有效（見《仲裁條
例》第 44(2b) 條）。

二、被告人身為仲裁程序中的答
辯人，未能提出其案（見《仲裁
條例》第 44(2c) 條）。

三、強制執行涉案裁決必違反公
共政策（見《仲裁條例》第
44(c) 條）。

負責審理 Shandong 案的原訟
法庭法官馬俊達，在判詞中已拒絕
接納上述第一及第二項論據，因此
下文將只討論第三項論據。

清楚的是，只有當被告人成功申請
撤銷涉案命令之時，原被告所發
出的傳票才會起作用。被告也必
須在達時前側佐該傳票。接著需要
考慮的問題包括：

一、涉案裁決是否屬於《仲裁條
例》第 HIA 部所指的「內地裁
決」？

二、假如涉案裁決屬於「內地裁
決」，它們可否根據《仲裁條
例》第 40A 條予以強制執行？

公共政策的論據

被告人在提出的公共政策論據是：
法院聆訊涉案命令的申請之時（即
1997 年 8 月），香港相對於中國已
不再是《紐約公約》下的獨立成
員，因此，根據《紐約公約》可容
許或支持強制執行任何由北京委員
會所作的仲裁裁決，均會違反公共
政策。就以上，被告人倚賴涉案
命令作出之時有效的「公約裁決」
法定定義：

「【《公約裁決》】指第 IV
部適用的裁決，即依據仲裁協
議在某一國家或領土（香港除
外）所作出的裁決，而該國家
或領土乃【《紐約公約》】的
締約方」（見《仲裁條例》第
2(1) 條）。

被告人的代表律師亦認為，把
香港視作獨立於中國的領土，將違
反《基本法》。被告人辯稱，頗發
涉案命令有違公共政策，因此《仲
裁條例》第 40A(2b) 條適用。

涉案命令應否予以撤銷？

Shandong 案曾提問由當局有關期間
公訟的案例。第一案是 Ng Fung
Hong v. IRC [1998] 1 HKC 213，案
中法院需要決定是否頒發狀備強制執
行於 1997 年 7 月 1 日前所作的內地
裁決。申請許可的一方同意該裁決必
屬於「公約裁決」。法院裁定，該裁
決不能根據《仲裁條例》第 26(2) 條
面予以強制執行，理由是該條文只適用
於依據本地仲裁而作出的裁決。

第二案是 Belco Import &
Export Corp v Polytek Engineering
Co Ltd (No 2) [1998] 1 HKC 192，
該案由當時的高等法院首席法官陳
兆綸聯同另外兩位法官審理。陳法
官在判詞中曾表達其意見，指該
等仲裁裁決不屬於公約裁決。法院
否認《紐約公約》第 1 條第 1 條第二
句可被適用到內地裁決之上，從
而以該該裁決於 1997 年 7 月 1 日後
仍無被視為公約裁決（見前案第
197 页第 D 至 H 段）。陳法官看來
認為上述問題有待清楚明確的答
案，並建議有關當局考慮對《仲裁
條例》作出適當的修訂。

對於上述附帶意見，審理
Shandong 案的馬俊達法官這樣說：
「由於高等法院首席法官陳兆
綸在《紐約公約》第 1 條第 1 條
第二句方面的附帶意見，我無
疑懼是否能支持指
1997 年 7 月 1 日後的內地裁
決仍可視為公約裁決。」結
論是，促使我這樣說的理由有兩
個。首先，上述第二句並不是
【《仲裁條例》】下『公約裁
決』的定義的一部分。因此，
該第二句的適用性也必會有
值得商榷之處。第二，不管如
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。
2. 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
   是會違反公共政策的，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，即使主審法官未
有確實拒絕公約強制執行涉案裁決，《仲裁條例》第 40A(2)(b) 條的
其中「越權仲裁裁決」一句便予強制執行，主審法官未
有指明公約裁決的用途，所根據的理據源自該條
文的推論。因此，第 44 條
文便於上述當面，並且
指出：

在 Shandong 一案中，法官重
新批
准強制執行涉案裁決的唯一理由
是法院認為有關強制執行裁
決，從基於公約裁決的立場來
看，是符合公共政策的，因此
主審法官沒有司法管轄
權的批準裁決。根據
此，第 44 條
文便於上述當面，並且
指出：