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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, HCC 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, Yum 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 2GG 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 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, ie 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.

* Surveillance
* Asset Search

* Background Enquiries
* Insurance Investigations

* Intellectual Property Investigations
* Locating of Subjects

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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 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 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 PRG (para 49).

Ma J therefore went on to hold that Yan 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 Yan 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 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 ‘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 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.
《2000 年仲裁（修訂）條例》與內地仲裁裁決的強制執行問題

在宗近期案例中，原訟法庭裁定，就香港主權回歸中國以前在中國大陸作出的仲裁裁決而言，假如強制執行裁決的申請於回歸後但於《2000 年仲裁（修訂）條例》生效前提出，則法院理應以缺乏司法管轄權為理由而拒絕批准該申請。梁慶豐加以剖析

引言

香港於主權回歸中國 （以下簡稱「香港回歸」）之前，是 1958 年《承認及執行外國仲裁裁決公约》（下稱《紐約公约》）下的成員。不過，隨著香港回歸，香港已失去相對中國的獨立成員身份；而從可根據《紐約公约》在香港強制執行的中國內地仲裁裁決（以下簡稱「內地裁決」），亦隨著香港回歸而不能再根據《紐約公约》予以強制執行。為求解決這個問題，香港政府於 2000 年通過《2000 年仲裁（修訂）條例》（2000 年第 2 號） （以下簡稱「修訂條例」），修訂《仲裁條例》（第 90 章）和加入條文，以重新設立內地裁決的強制執行機制。

雖然如此，一個可能出現的情況是，從 1997 年 7 月 1 日（即香港回歸之日）直至《修訂條例》生效的段時間（以下簡稱「有關期間」），內地仲裁的其中一方打算 （甚或已正式申請）強制執行仲裁裁決。這種情況產生了以下問題：假如內地裁決於香港回歸前作出，而該裁決的強制執行於有關期間曾獲批准或遭到拒絕，則《修訂條例》生效後，該裁決的法律地位如何？

宗近期案例 Shandong Textile Import and Export Corp v Da Hua Non-Ferrous Metals Co Ltd（高院建築及仲裁訴訟 1997 年第 80 號）（判決日期為本年 3 月 6 日），對上述問題提供了一些解釋。

Shandong 一案的案情

Shandong 一案中的原告人是一家內地公司，它與被告方簽訂合同，購買一批美國棉鈸。雙方就該批原棉的質量發生爭拗，原告人更向被告方申請賠償、利息和訴費。該爭拗交由北京中國國際經貿仲裁委員會（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 月進行的聆訊後，北京委員會裁定原告人勝訴，並於 1996 年 6 月 6 日及 7 月 5 日分別作出了仲裁裁決及補充裁決（以下統稱「涉案裁決」）。必須注意，涉案裁決是於香港回歸前作出的。

到了 1997 年 8 月，原告人單方向原訟法院申請可在香港強制執行涉案裁決，理由是涉案裁決屬於《仲裁條例》所指的「公約裁決」。負責審理該申請的原訟法院法官批准，於 1997 年 8 月 21 日下令准許原告人在香港強制執行涉案裁決（以下簡稱「涉案命令」）。

被告方於 1997 年 10 月 3 日左右發作出備，申請撤銷涉案命令。該申請的聆訊於本年 1 月 28 及 29 日進行，聆訊期間，原告人申請送達傳票，以按照《仲裁條例》第 26G 條及第 IIIA 部申請強制執行涉案裁決，並獲准審理該傳票的送達程序。原告人亦要求法院下令按涉案裁決而登記判決，理由是涉案裁決屬於《仲裁條例》第 2 條所指的內地裁決。上述第 IIIA 部及第 2 條下關於「內地裁決」的條文，均是通過《修訂條例》而引入的。

有關法律規定

相對於中國，回歸後的香港已不再是《紐約公約》下的獨立成員。在欠缺專為內地裁決而設的條文下，在香港尋求強制執行該等裁決的人自然要遇上不少困難。有見及此，香港政府於 2000 年通過了《修訂條例》，特別為內地裁決制定條文，包括第 IIIA 部。

《修訂條例》將以下定義加入《仲裁條例》第 2 條：「內地裁決」[[...]] 指由認可內地仲裁當局按照《中華人
三、強制執行程序

發案命令應否予以撤銷？

Shandong 一案曾提出由南於有期間

40A 條有公共政策，因此《申

2(1) 條，撤

民共和國仲裁法》在內地作出

的仲裁裁決。

對於在上述定義的範圍內，而

強制執行於《仲裁條例》生效前後

地裁決程序中的答覆

人，未能提出其案（見《仲

據不屬於《仲裁條例》第

5(3) 條）。

負責審理 Shandong 一案的原

法庭法官是馬士立，在判詞中已強

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，只有當案件當人成功申

請撤銷案件命令之時，原案件所發

出的傳票才會起作用，致使原案件

人須在訴論時作該傳票。根據需要

考慮的問題包括：

一、案件裁決是否屬於《仲裁條

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三、強制執行程序裁決將違反公

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例》第 43(3) 條）。
第41條及第311A部的影響

《仲裁條例》第44條包含以下規定：

（1）為本條所述的情形，否則不得拒絕強制執行公約裁決。

【…】

（3）如公約裁決開除的事項，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，則亦得拒絕強制執行該裁決。】

在Shandong一案中，被告人未在系統中證明【第44條第2款（b）條款】的裁決未予執行。本條執行公約裁決，因而違反公共政策的，則亦得拒絕強制執行該裁決。【…】

【有關條文的宗旨不外是處理內地裁決及香港裁決的關係。】

馬法官在Shandong一案中表示，於有關期間，法院未有作出有關決定。本條執行公約裁決，因而違反公共政策的，則亦得拒絕強制執行該裁決。【…】

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