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*, HCCT 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, Yam 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 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, 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. ➤

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 2GG 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 I(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 197D-H). 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 I(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 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.

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《2000年仲裁（修訂）條例》與內地仲裁裁決的強制執行問題

在一宗近期案例中，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」）以前，是1958年《承認及執行外國仲裁裁決公約》（下稱《紐約公約》）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分；而向來可根據《紐約公約》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《紐約公約》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341章）和加入條文，以重新設立內地裁決的強制執行機制。

縱然如此，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》生效的一段時間（以下簡稱「有關期間」），國內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？

一宗近期案例 *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闡釋。

Shandong 一案的案情

Shandong 一案中的原告人是一家內地公司，它與被告人簽訂合約，購買一批美國原棉。雙方就該批原棉的質量發生爭拗，原告人更向被告人申索損害賠償、利息和訟費。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，原告人單方面向原訟法庭申請許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庭法官任懿君，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」）。

被告人於1997年10月3日左右發出傳票，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2GG條及第IIIA部申請准許強制執行涉案裁決，並獲准省略該傳票的送達程序。原告人亦要求法院下令按涉案裁決而登錄判決，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，均是透過《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遇上了不少困難。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

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《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 IIIA 部】的規定，對於內地裁決的強制執行具有效力。

(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 條遭拒絕強制執行，

則第 40B 至 40E 條並不對該裁決的強制執行具有效力。」

Shandong 一案所牽涉的主要問題是：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告人強制執行涉案裁決，因此，上述第 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：

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

三、 強制執行涉案裁決將違反公共政策（見《仲裁條例》第 44(3) 條）。

負責審理 *Shandong* 一案的原訟法庭法官馬道立，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，原告人所發出的傳票才會起作用，致使原告人須在聆訊時倚杖該傳票。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 IIIA 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？

公共政策的理據

被告人所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》而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。就此而言，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）

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

涉案命令應否予以撤銷？

Shandong 一案曾提述兩宗於有關期間審理的案例。第一宗是 *Ng Fung Hong v ABC* [1998] 1 HKC 213，案中法院需要決定是否頒令准許強制執行於 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不屬於「公約裁決」。法院裁定，該裁決不能根據《仲裁條例》第 2GG 條而予以強制執行，理由是該條文只適用於依據本地仲裁而作出的裁決。

第二宗案例是 *Hebei 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愷聯同另外兩位法官審理。陳法官在判詞中曾發表附帶意見，指該等仲裁裁決不屬於公約裁決，並質疑《紐約公約》第 1 條第 1 段第二句可否被運用到內地裁決之上，從而令該等裁決於 1997 年 7 月 1 日後仍會被視為公約裁決（見彙報第 197 頁第 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* 一案的馬道立法官這樣說：

「至於高等法院首席法官陳兆愷在《紐約公約》第 1 條第 1 段第二句方面的附帶意見，我頗為懷疑這是否能支持指 1997 年 7 月 1 日後的內地裁決仍可被視為公約裁決的結論。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，該第二句的適用性怎也必會有值得商榷之處。第二，不管如 ➤

何，在 *Hebei Import & Export Corporation* 一案以及在本案中，均沒有任何證據顯示內地裁決不能在尋求予以強制執行之地被視為（中華人民共和國的）本土裁決。要注意，香港不是獨立的國家，而是中華人民共和國的領土」（見判詞第49段）

馬法官接而裁定，任懿君法官沒有司法管轄權以涉案裁決屬於公約裁決為理由而下令准許強制執行涉案裁決，因此涉案命令應予以撤銷。

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，即使任懿君法官未有確實拒絕准許強制執行涉案裁決，《仲裁條例》第40A(2)(b)條下的「該裁決曾 … 遭拒絕強制執行」一句必須予以明智的解釋，以令該條文適用於強制執行理應遭到拒絕的情況。

馬道立法官同意上述辯據，並且指出：

「【有關條文的】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，有關的與訟方將能免受第40A(2)條的禁制」（見判詞第59段）

案中被告人的代表大律師又認為，任懿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許可。隨著香港回歸，憲制和政治現實俱不容許將香港當作獨立於中國的國家或區域看待。因此，在公共政策的層面上，涉案裁決既不能亦不應作為公約裁決予以強制執行。這也是說，任懿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。

但上述辯據不獲馬法官接納。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，一一律預先假定了有關裁決從一開始便已是公約裁決。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以下情形，則可拒絕強制執行公約裁決 …』（下劃線為筆者所加）。本案被告人成功申請撤銷任懿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頒發該命令。據此，第44條根本與本案無關。

第二，既然【《仲裁條例》】第IIIA部的宗旨不外是處理內地裁決因香港主權回歸中國而不能予以強制執行的『禍患』，則即使第44條確是撤銷任法官的命令的基礎，從而與本案稍有關連，我亦看不見第40A(2)條如何能令涉案仲裁裁決不能予以強制執行。因此，在法例詮釋的層面上，就第IIIA部原本為之而實施的一類仲裁裁決而言，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，只要閱讀有關安排的弁言，便可確認這一點」（見判詞第71及72段）

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，而不是辯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》所引入的新條文，「重新給予」強制執行涉案裁決的許可。

結語

在 *Shandong* 一案中，法官重新批准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，而這是基於法院於有關期間（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，但該機制受制於第44條所列的拒絕強制執行的理據。

法院在 *Shandong* 一案中已闡明，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，即使這類裁決的強制執行曾遭到拒絕，只要該拒絕並非明確地建基於第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。

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