最高人民法院2020年11月27日新闻发布会材料（二）

内地与香港特别行政区
发布相互执行仲裁裁决的典型案例

《关于内地与香港特别行政区相互执行仲裁裁决的安排》生效施行 20 年以来，取得了丰硕的司法协助与合作成果。11 月 27 日，在最高人民法院与香港特别行政区政府律政司签署《关于内地与香港特别行政区相互执行仲裁裁决的补充安排》的同时，双方以中英文双语形式发布相互执行仲裁裁决的10起典型案例。

此系两地首次发布民商事司法协助典型案例，为进一步完善两地司法协助体系、回应民众司法需求探索出了行之有效的新举措新路径。典型案例的表述保持两地各自语言习惯。

案例简介如下：

内地人民法院案例目录

一、华夏航运（新加坡）有限公司申请执行香港仲裁裁决案

案号：（2018）粤 72 认港 1 号之一号、（2019）粤 72 认港 1 号

（一）基本案情

2012 年 2 月 1 日，华夏航运（新加坡）有限公司（以下简称华夏公司）与东海运输有限公司（以下简称东海公司）签订包运合同，约定由东海公司运载华夏公司货物，因该包运合同产生的所有争议提交香港仲裁，适用英国法。同年 4 月 21 日，华夏公司向东海公司发送电子邮件，确认双方在前述包运合同的基础上达成补充合同，约定新增一批货物运输，其他条款和条件适用包运合同。后双方就补充合同的履行发生争议，华夏公司于 2016 年 2 月 16 日在香港提起仲裁。香港仲裁庭分别作出首次终局裁决和费用终局裁决，裁决东海公司支付相应赔偿款项及相关仲裁费用。

仲裁裁决生效后，华夏公司向广州海事法院申请认可和执行上述两份仲裁裁决。东海公司答辩认为，华夏公司提交的仲裁协议未经公证认证，也未提交经过正式证明的中文译本；涉案货物运输系补充合同约定内容，补充合同是当事人双方通过电话形式口头达成的，未约定仲裁条款或者仲裁协议，东海公司亦从未认可仲裁庭具有管辖权；执行仲裁裁决

将违反内地仲裁法关于仲裁协议必须明示的要求以及民法总则关于意思表示的有关规定，违反社会公共利益。

（二）裁判结果

广州海事法院认为，第一，华夏公司申请认可和执行仲裁裁决的文书符合《最高人民法院关于内地与香港特别行政区相互执行仲裁裁决的安排》（以下简称《安排》）关于形式要件的要求。第二，仲裁协议成立与否属于对仲裁协议效力的审查范围，并且，因双方当事人未对确认仲裁协议效力的准据法作出约定，根据《安排》第七条第（一）项，应依据仲裁地法律即香港法律对涉案仲裁协议是否成立进行审查。而依据香港法律有关规定，涉案电子邮件记载的合同并入条款构成有效成立的仲裁协议。第三，违反内地法律有关规定，并不能等同于违反内地社会公共利益，除非认可和执行仲裁裁决将造成严重损害内地法律基本原则的后果。内地仲裁法对仲裁协议的明示要求和民法总则对意思表示的要求，不属于内地法律的基本原则范围。基于以上理由，裁定认可和执行涉案两份仲裁裁决。另，根据华夏公司的申请，广州海事法院于作出认可和执行仲裁裁决的裁定前，对东海公司在招商银行深圳分行的存款予以冻结。

（三）典型意义

第一，明确仲裁协议成立与否属于仲裁协议效力审查范围。仲裁协议是当事人申请认可和执行仲裁裁决时必须提交

的文书，其直接关系到仲裁庭是否具有管辖权。对仲裁协议效力的审查，是认可和执行仲裁裁决需要解决的先决问题。为此，《安排》第七条第（一）项明确规定仲裁协议无效的，裁定不予执行。但是，仲裁协议无效作广义理解还是狭义理解，是否包括仲裁协议不成立的情形，在实践中存在争议。本案没有局限于字面意思，而是从条文本意出发，认为仲裁协议是否成立是仲裁协议是否有效的前提，属于仲裁协议效力的审查范畴。仲裁协议无效应包括仲裁协议不成立的情形。

第二，在作出认可和执行裁定前，依申请采取保全措施。法院在受理认可和执行仲裁裁决申请之前或者之后，可否对被申请人的财产采取保全措施，《安排》并未明确规定，实践中理解也不一致。本案参照《关于内地与澳门特别行政区相互认可和执行仲裁裁决的安排》，并根据《中华人民共和国民事诉讼法》及其司法解释有关规定，依当事人申请，分别在当事人申请认可和执行仲裁裁决前，采取诉前保全措施；在当事人申请认可和执行仲裁裁决后、法院作出认可和执行裁定之前，采取诉中保全措施。审理法院通过预防性救济措施促进裁决顺利执行，有利于保护当事人合法权益。

二、美国意艾德建筑师事务所申请执行香港仲裁裁决案

案号：（2016）苏 01 认港 1 号

（一）基本案情

2013 年 3 月 29 日、5 月 15 日，美国意艾德建筑师事务所（以下简称意艾德事务所）与富力南京地产开发有限公司（以下简称富力公司）签订有关地块设计合同，并约定了仲裁条款，将争议提交中国国际经济贸易仲裁委员会，按照申请仲裁时该仲裁委员会现行有效的仲裁规则进行仲裁，仲裁地点为香港特区。因合同履行发生争议，2015 年 2 月，意艾德事务所向中国国际经济贸易仲裁委员会香港仲裁中心（以下简称贸仲香港中心）申请仲裁，请求裁决富力公司支付所欠设计费并承担违约责任等。

贸仲香港中心根据自 2015 年 1 月 1 日起施行的《中国国际经济贸易仲裁委员会仲裁规则》受理本案，并于 2015 年 11 月 28 日作出（2015）中国贸仲港裁字第 0003 号仲裁裁决。2016 年 6 月 7 日，意艾德事务所向江苏省南京市中级人民法院申请执行该仲裁裁决第 3 项，即支付利息部分。富力公司未提出异议。

（二）裁判结果

江苏省南京市中级人民法院经审查认为，富力公司对涉案仲裁裁决无异议，并已经履行仲裁裁决所确定的设计费本金部分，仅对第 3 项逾期利息部分未予支付。涉案仲裁裁决亦不存在违反内地社会公共利益的情形。故依据《最高人民法院关于内地与香港特别行政区相互执行仲裁裁决的安排》（以下简称《安排》）第一条、第七条的规定，裁定执行该仲

裁裁决第 3 项。

（三）典型意义

该案是内地仲裁机构在香港设立的分支机构以香港为仲裁地作出的仲裁裁决获得内地法院执行的首案，具有里程碑意义。该案明确，确认仲裁裁决籍属的标准为仲裁地，并据此认定涉案仲裁裁决系香港仲裁裁决，符合《安排》的适用条件。

内地法律对不同类型仲裁裁决规定了不同审查标准，且一般以仲裁机构所在地确定仲裁裁决的籍属。《最高人民法院关于香港仲裁裁决在内地执行的有关问题的通知》（以下简称《通知》）规定，对于在香港作出的临时仲裁裁决，以及国外仲裁机构在香港作出的仲裁裁决，人民法院应当按照《安排》的规定进行审查。这实际上明确了以仲裁地而非仲裁机构所在地作为判断仲裁裁决籍属的标准。但是,《通知》并未明确规定内地仲裁机构以香港为仲裁地作出的仲裁裁决是否属于香港仲裁裁决的问题。本案依仲裁地认定内地仲裁机构在香港设立的分支机构作出仲裁裁决的籍属，符合《通知》精神，也符合国际通行标准。

三、大卫戴恩咨询有限公司、布拉姆利有限公司申请执行香港仲裁裁决案

案号：（2016）苏 01 认港 1 号

（一）基本案情

大卫戴恩咨询有限公司（DAVID DEIN CONSULTANCY LIMITED）（以下简称大卫戴恩公司）、布拉姆利有限公司（BRAMLEY CORPORATION LTD）（以下简称布拉姆利公司）分别与北京中赫国安足球俱乐部有限责任公司（以下简称国安俱乐部）于2018年8月24日签署了相同的《顾问协议》各一份，约定将争议提交至香港国际仲裁中心以仲裁方式解决，准据法为英格兰法律。2018年11月21日，国安俱乐部据此向香港国际仲裁中心提交仲裁通知。后大卫戴恩公司、布拉姆利公司提出反请求。香港国际仲裁中心就此于2020年3月5日作出了案号为HKIAC/A18211的裁决：国安俱乐部对《顾问协议》构成了毁约性违约；国安俱乐部应向大卫戴恩公司、布拉姆利公司支付相关费用及利息。

仲裁裁决生效后，大卫戴恩公司、布拉姆利公司依据《最高人民法院关于内地与香港特别行政区相互执行仲裁裁决的安排》（以下简称《安排》）向北京市第四中级人民法院申请认可和执行该仲裁裁决。被申请人国安俱乐部答辩称，人民法院应裁定不予认可和执行该仲裁裁决，并提出涉案仲裁协议无效、仲裁庭的组成与当事人之间的协议以及香港特别行政区法律不符、仲裁庭程序与当事人之间的协议不符、违反社会公共利益、金额不予认可等理由。

（二）裁判结果

北京市第四中级人民法院经审查认为，第一，本案当事人仅约定合同的准据法为英格兰实体法，未明确确认涉外仲裁协议效力应适用的法律，因仲裁机构所在地和仲裁地均在香港，故应适用香港《仲裁条例》进行审查，依规定该协议有效。第二，依据仲裁时香港国际仲裁中心有效的2018年版港仲规则，仲裁庭的组成并不违反该规则。仲裁员与二公司的董事均在英国足协任职，并不必然表明仲裁员与二公司之间具有利益关系或者利害关系。仲裁庭的公开事项当事人已知情，并不需要披露和认定程序违法。第三，申请人提供的部分仲裁文书抄送、账单费用支出并不证明存在仲裁程序与协议不符，上述情况属于在仲裁程序中公开事项，并不违反保密条款。第四，社会公共利益应是关系到全体社会成员的利益，为社会公众所享有，不同于合同当事人的利益，虽然国安俱乐部的部分资产属于国有资产，但不能将与其有关的所有事项均认定为社会公共利益。故裁定认可和执行香港特别行政区香港国际仲裁中心HKIAC/AC18211号仲裁裁决。

（三）典型意义

1.本案明确了当事人援引《安排》第七条中“仲裁庭的组成或者仲裁庭程序与当事人之间的协议不符”条款，提出仲裁员存在披露、回避等程序问题时，法院应依据仲裁规则，结合社会生活经验合理判断，以是否足以影响仲裁的公正性和独立性为原则进行审查。本案中，仲裁员因工作、生活、

学习等社会活动需要而与人接触、交往，以及在同一组织任职等情况并不一定构成回避规则中规定的利害关系或其他影响公正仲裁的关系，对于与仲裁员独立性以及与公正仲裁无关的内容，可以不予披露。

2.本案对社会公共利益进行了阐释，具有一定参考意义。社会公共利益应是关系到全体社会成员的利益，为社会公众所享有，为整个社会发展存在所需要，具有公共性和社会性，不同于合同当事人的利益。涉案仲裁处理的争议为平等民事主体间的合同争议，处理结果仅影响合同当事人，不涉及社会公共利益。虽然本案被申请人国安俱乐部的部分资产属于国有资产，但不能将与其有关的所有事项均认定为社会公共利益。

四、莱佛士国际有限公司申请执行香港仲裁裁决案

案号：（2016）津01认港1号

（一）基本案情

2007年1月15日，莱佛士国际有限公司（以下简称莱佛士公司）与海航天津中心发展有限公司（以下简称海航公司）就“莱佛士”标志和商标使用事宜达成《许可合同》。同日，莱佛士酒店管理（北京）有限公司（系莱佛士公司的关联公司，以下简称莱佛士北京）与海航公司就酒店管理运营合作事宜签订《酒店管理合同》。《许可合同》约定由该合同

产生的或与该合同有关的任何争议、争论或纠纷应提交香港国际仲裁中心根据申请仲裁时仲裁庭当时有效的仲裁规则最终仲裁解决，仲裁地点为香港，同时约定，如果《酒店管理合同》或任何其他交易合同因任何原因终止，该合同立即终止。《酒店管理合同》约定有关争议提交中国国际经济贸易仲裁委员会上海分会（以下简称上海贸仲）裁决。

2012 年 1 月 20 日，莱佛士公司向香港国际仲裁中心申请就《许可合同》所涉争议进行仲裁。2012 年 1 月 29 日，莱佛士北京向上海贸仲申请就《酒店管理合同》所涉争议进行仲裁。此后，香港国际仲裁中心作出仲裁裁决（案件编号 HKIAC/A12016），裁决海航公司向莱佛士公司支付相应款项及利息。莱佛士公司向天津市第一中级人民法院申请执行仲裁裁决。被申请人海航公司以裁决所处理的争议不在仲裁协议条款之内等理由认为其违反《最高人民法院关于内地与香港特别行政区相互执行仲裁裁决的安排》（以下简称《安排》第七条的规定，应不予执行。

（二）裁判结果

天津市第一中级人民法院经层报天津市高级人民法院、最高人民法院审查认为：第一，香港国际仲裁中心的裁决涉及《酒店管理合同》的情形不构成超裁，不属于《安排》第七条第一款第（三）项的情形。第二，仲裁庭对管辖问题的处理并未违反当事人的协议及香港特别行政区法律，不属于

《安排》第七条第一款第（四）项的情形。第三，海航公司所提出的质疑，不属于对仲裁员公正性或独立性的质疑，而是对管辖权的质疑，仲裁庭有权予以决定，无需由仲裁中心理事会决定，故不属于《仲裁裁决执行安排》第七条第一款第（四）项的情形。综上，天津市第一中级人民法院依照《安排》第一条、第六条、第七条之规定，裁定执行香港国际仲裁中心于2014年11月19日、2015年3月19日作出的编号为HKIAC/A12016的部分裁决和终局裁决。

（三）典型意义

本案在仲裁裁决是否属于《安排》第七条第一款第（三）项所规定的“超裁”情形方面，明确了以下规则：仲裁庭仅在裁决理由的事实认定和说理部分对非属其管辖的争议进行评判，并未在裁决主文中涉及其他合同争议的，不构成“超裁”。

本案中，莱佛士公司提请香港国际仲裁中心仲裁的事项是有关《许可合同》履行的相关争议。因《许可合同》和《酒店管理合同》关系密切，故仲裁裁决在查明事实和说理部分涉及了《酒店管理合同》的有关情况。该分析认定是仲裁庭审理《许可合同》纠纷所无法避免的。仲裁庭最终仅围绕仲裁请求就《许可合同》所涉争议作出了相应的裁决结果，并未对《酒店管理合同》所涉争议作出具体的裁决项。有关争议属于当事人在仲裁协议中约定交付仲裁的范围，涉案仲裁

裁决不存在《安排》第七条第一款第（三）项所规定的“超裁”情形。

五、宾士奈设计集团国际咨询有限公司申请执行香港仲裁裁决案

案号：（2019）川 01 认港 1 号

（一）基本案情

2013 年 11 月 13 日，宾士奈设计集团国际咨询有限公司（以下简称宾士奈公司）与成都门里望江置地有限公司（以下简称门里公司）、成都晨川实业有限公司（以下简称晨川公司）签订《中国成都文华东方酒店景观设计服务协议》（以下简称《服务协议》）。《服务协议》约定，由本合同或本合同违约、终止或无效引起的或与之相关的任何争议、争论或权利主张应根据届时有效的《联合国国际贸易法委员会仲裁规则》（以下简称《仲裁规则》）在香港通过仲裁解决。因合同履行过程中发生争议，2018 年 3 月 5 日，宾士奈公司向香港国际仲裁中心申请仲裁。2019 年 5 月 5 日，仲裁庭作出《最终裁决》，支持了宾士奈公司所有仲裁请求。2019 年 6 月 4 日，仲裁庭作出《最终裁决之更正》，对《最终裁决》进行了更正和更新。后宾士奈公司向四川省成都市中级人民法院申请执行上述仲裁裁决。

门里公司、晨川公司共同答辩认为：第一，仲裁员的选

任未依据《仲裁规则》第8条的规定采取名单法先行征求各方当事人意见，而是径行指定独任仲裁员，属于《最高人民法院关于内地与香港特别行政区相互执行仲裁裁决的安排》（以下简称《安排》）第七条第（四）项规定情形。第二，仲裁员未按司法部令第69号《中国委托公证人（香港）管理办法》规定向被申请人送达相关仲裁文书，属于《安排》第七条第（二）项规定情形。故请求驳回申请。

（二）裁判结果

四川省成都市中级人民法院经审查认为，第一，关于涉案仲裁庭的组成。双方在《服务协议》中约定适用《仲裁规则》。案涉仲裁程序中，香港国际仲裁中心行使裁量权指定独任仲裁员符合以上规定。第二，关于仲裁庭是否以适当方式向被申请人送达。涉案仲裁程序中仲裁员按照双方《服务协议》约定的地址送达相关文书，且被申请人也表明确实收到，符合《仲裁规则》第二条关于送达的规定，不存在仲裁员未适当通知被申请人的问题。被申请人主张应按《中国委托公证人（香港）管理办法》规定向被申请人送达相关仲裁文书，与《仲裁规则》规定不符，对该意见不予采纳。

（三）典型意义

本案明确，判断送达是否成功的依据应当是仲裁程序适用的仲裁规则。“未经依法送达”，是被申请人较常提出的不予执行香港仲裁裁决的理由。判断是否依法有效送达，首先

应当明确送达程序所依据的规定。本案中，双方在合同中约定，由本合同或本合同违约、终止或无效引起的或与之相关的任何争议、争论或权利主张应根据届时有效的《仲裁规则》解决。据此，本案充分尊重当事人的选择，依据《仲裁规则》有关规定，并按照双方《服务协议》约定的地址送达相关文书，且被申请人也表明确实收到，不存在仲裁员未适当通知被申请人的问题。被申请人主张应按《中国委托公证人（香港）管理办法》规定向被申请人送达相关仲裁文书，与《仲裁规则》规定不符。

香港特区法院案例目录

一、CL 诉 SCG 案

[2019] 2 HKLRD 144

HCCT 9/2018

I. 基本案情

这是答辩人提出的作为一个初步问题的聆讯。聆讯涉及的问题是关于针对答辩人强制执行仲裁裁决的申请是否受到香港法例第 347 章《时效条例》（“《时效条例》”）第 4（1）（c）条的限制而丧失时效。

申请人与答辩人进行香港某仲裁中心管理之仲裁，申请人获胜诉，裁决命令答辩人需立即向申请人支付美金 2,173,000 元、利息及因仲裁而产生之费用。

2011 年 3 月，申请人向答辩人先后就仲裁裁决确定所需付的款项及仲裁所产生之费用作出追讨，但并不成功。申请人遂于 2011 年 7 月 7 日向内地某人民法院申请强制执行该仲裁裁决，但被该法院驳回。申请人随后向上一级人民法院上诉及作出从审申请，2016 年 3 月 1 日被驳回。

2018 年 2 月 6 日，申请人根据香港法例第 341 章《仲裁条例》(已废除) (“《仲裁条例》”) 第 2GG 条单方面向香港法庭提交有关强制执行该仲裁裁决的许可申请并成功取得该许可及有关之法庭命令 (“命令”)。在 2018 年 6 月 6 日，答辩人申请双方面聆讯以搁置仲裁裁决，并以多项理据支持其

申请。所提出的理据包括在《时效条例》第4(1)(c)条下，申请人就强制执行仲裁裁决的申请已丧失时效。在2018年7月24日，法庭命令审讯有关丧失时效的初步争议。

Ⅱ.争议

1. 有关强制执行仲裁裁决的诉讼因由从何时累算？（“争议1”）

2. 鉴于《关于内地与香港特别行政区相互执行仲裁裁决的安排》（“《安排》”）的第二条，从申请人于2011年7月7日向内地某人民法院申请强制执行仲裁裁决至2016年3月1日上一级人民法院驳回其强制执行仲裁裁决的申请期间，诉讼因由及《时效条例》第4（1）（c）条下的时效作用是否暂停?（“争议2”）

Ⅲ.分析

争议1

答辩人认为,时效期限是由仲裁裁决颁发之日起3个月，即2011年5月17日开始。此日期被辩称为答辩人支付和履行裁决的合理时间，这意味着时效期限应于2017年5月18日到期。另外，答辩人辩称诉讼因由的替代开始累算时间最迟为2011年7月8日，即申请人向内地某人民法院申请强制执行该裁决之日。从此日推算出来的时效期限于2017年7月9日结束。

另一方面，申请人认为，时效期限仅始于答辩人提交陈

词反对申请人在内地某人民法院提出的申请的日期，即2012年3月11日。申请人辩称，尽管答辩人未有按申请人在2011年3月向答辩人提出付款的要求付款，从这行为的基础上无法推论出答辩人是否就仲裁裁决提出争议。申请人表示，答辩人仅在提出前述反对陈词时展示了其清楚明确不受裁决约束的意图。因此，申请人认为，诉讼因由在2012年3月11日才开始累算。

鉴于法庭在*International Bulk Shipping and Services Ltd*诉*Minerals and Metals Trading Corp of India*[1996] 1 All ER 1017一案里拒绝接受类近于前述有关诉讼因由的累算和意图的论点，法庭不接受诉讼因由仅在一方展示了其清楚明确不受裁决约束的意图才开始累算。法庭解释，接受这论点意味着允许仲裁裁决债务人可以无限期延迟和押后裁决债权人因诉讼因由而产生的累算，从而拖延其强制执行裁决下的权利。随法庭在*International Bulk Shipping and Services Ltd*诉*Minerals and Metals Trading Corp of India*[1996] 1 All ER 1017一案及*AgrometMotoimport Ltd*诉*Moulden Engineering Ltd*[1985] 1 WLR 762一案里的判决，法庭认为当“答辩人未能在被追讨时履行仲裁裁决中的承诺”，诉讼因由就开始累算。因此，时效期限在履行裁决的隐含承诺被违反时开始。

法庭进一步指出，当答辩人在公布仲裁裁决及展开追讨

后的合理时间内未能付款时，诉讼因由便产生。何为“合理的时间”则取决于裁决的条款及案情。在本案中，由于答辩人被命令“立即”向申请人支付仲裁裁决下的款项，本案的最迟合理付款时间为 2011 年 4 月 8 日，即申请人要求付款后的 21 天。因此，时效期限于 2017 年 4 月 8 日结束。

<u>争议 2</u>

申请人辩称,其诉讼因由累算在 2011 年 7 月 7 日至 2016 年 3 月 1 日期间暂停，即申请人向内地某人民法院申请强制执行仲裁裁决的日期至该申请最终被上一级人民法院驳回之日。申请人提及《安排》的第 2 条和仲裁条例的 40C 条，该条例禁止在内地和香港同时提出强制执行仲裁裁决的申请，并指出该限制的目标是堵塞双重强制执行和双重追讨的漏洞(*Shenzhen Kai Loong Investment and Development Co Ltd 诉 CEC Electrical Manufacturing (International) Co. Ltd* [2001-2003] HKCLRT 649)。因此，申请人认为法庭不应仅因为其曾试图在内地申请强制执行仲裁裁决，在《时效条例》第 4（1）（c）条下被禁止在香港申请强制执行该裁决。

可是，法庭认为，纵使“不能同时执行规则”可能造成不公平的后果，在《安排》或《仲裁条例》均没有明文规定的情况下,即使在内地的强制执行申请程序在进行中,《时效条例》第 4（1）（c）条下的时效累算不应暂停。因此，法庭

拒绝接受申请人有关诉讼因由的累算应该在内地的强制执行申请程序的进行期间暂停的论点。

基于上述有关争议 1 和争议 2 的分析，法庭认为，在《时效条例》第 4（1）（c）条下，于 2018 年 2 月 6 日在香港提起的强制执行仲裁裁决许可的申请程序应该被禁止。

Ⅳ. 裁决

答辩人撤销命令的申请予以允许。

Ⅴ. 典型意义

（a）诉讼时效于违反履行仲裁裁决的隐含承诺的那日开始。此日为裁决债务人未能于颁下裁决及被追讨后的合理时限内履行裁决。裁决中合理的付款和履行时间取决于裁决的条款以及案件的事实和情况。

（b）此案显示，纵使《安排》的第二条规定仲裁裁决债权人必须在一地法院获得的偿还不足够的情况下，才能于另一地法院就不足部分寻求强制执行仲裁裁决，《时效条例》的时效会在仲裁裁决债权人在另一地寻求强制执行裁决期间继续累算。这所可能导致的不公平情况，例如本案申请人所面对的困苦，突出了原《安排》的缺陷及针对其第二条禁止于两地同时进行强制执行仲裁裁决的改革的必要性。

二、高海燕诉建毅控股有限公司及其他案

[2012] 1 HKLRD 627

CACV 79/2011

I.基本案情

申请人通过股份转让协议及补充股份转让协议（“该协议”），将一家香港公司的股份转让给答辩人。该香港公司在一家位于中国内地的合资企业煤生意中拥有实质权益。该协议受中国内地法律管辖并规定在内地某仲裁委进行仲裁。

根据该仲裁委《仲裁规则》第 37 条，调解-仲裁应由仲裁庭或首席仲裁员进行，或在仲裁双方同意下，由任何第三方进行。仲裁庭进行了两次会议。第一次聆讯后，仲裁庭主动向仲裁双方建议，由答辩人向申请人支付人民币 2.5 亿元以解决此案。

在第二次聆讯前，在答辩人委任的仲裁员和首席仲裁员都不在场的情况下，申请人委任的仲裁员及答辩人的关系人在该仲裁委秘书长的邀请下出席了非正式会议，该会议被声称为调解仲裁的会议。该仲裁委秘书长不是由双方协议任命的。据称，他是主持非正式会议的人，并要求答辩人的关系人说服答辩人接受仲裁庭的建议。

仲裁双方最终未能达成和解。仲裁庭颁下了对申请人有利的裁决。该裁决建议（但并不是要求）赔偿额人民币 5,000 万元。答辩人从来没有就仲裁庭的举止投诉过，因为担心这样做会与仲裁庭产生对抗。答辩人遂向该仲裁委所在地中级人民法院提出诉讼，并指称该仲裁委秘书长操纵了仲裁结果，

因而违反了法律和仲裁规则。结果，被驳回。

后来，申请人根据香港法例第 341 章《仲裁条例》（已废除）第 2GG 条和第 40B 条，获得许可在香港强制执行仲裁裁决。答辩人在申请搁置该许可时辩称，由于裁决受到偏颇或表面偏颇的影响，强制执行裁决会与公共政策相抵触。答辩人辩称，申请人委任的仲裁员 、仲裁委秘书长和答辩人的关系人企图透过他们之间晚饭期间举行的一次非正式会议向答辩人施加压力，使答辩人向申请人支付人民币 2.5 亿元，以换取一个对答辩人有利的裁决。原讼庭法官裁定该仲裁裁决受到表面偏颇的影响。该法官亦裁定，答辩人在所谓的非正式会议事件后继续进行第二次聆讯并不代表放弃了对偏颇提出申诉的权利。申请人遂提出上诉。

Ⅱ. 争议

1. 适用于强制执行公约仲裁裁决的公共政策理据是否适用于内地仲裁裁决？有关门槛有多高？（“争议 1”）

2. 答辩人是否放弃了就违反仲裁委规则的情况进行申诉的权利？（“争议 2”）

3. 表面偏颇（相对于实际偏颇）是否足以构成拒绝强制执行仲裁裁决的公共政策理据？（“争议 3”）

4. 基于案件的事实情况，所指称的表面偏颇是否构成拒绝强制执行仲裁裁决的公共政策理据？（“争议 4”）

Ⅲ. 分析

争议 1

法庭裁定，基于公共政策理据拒绝强制执行公约仲裁裁决的法律哲学亦适用于内地仲裁裁决。相关的门槛很高，理由是国际礼节原则必须被“编织”到公共政策的概念中，亦因此必须在涉及外地（包括内地）的仲裁裁决的情况下予以实施。在这一点上，法庭援引了 Hebei Import & Export Corp 诉 Polytek Engineering Co Ltd（1999）2 HKCFAR 111 一案的判词。法庭在该案指出，为使国际礼节原则予以实施，除非强制执行外地仲裁裁决会与香港的道德和公正的基本概念相抵触，否则法庭不会拒绝强制执行；而得出这结论需要非常充分的理由。

争议 2

法庭裁定如果仲裁一方希望以违反仲裁规则的情况作为依据，其应即时提出相关依据；不应等待并得悉其申索的结果为如何后，才决定作出申诉；亦不应犹如没有违规情况般让仲裁继续进行。因此，答辩人不应在非正式会议事件后仅向仲裁庭提交补充意见，亦不应在没有作出申诉的情况下出席第二次仲裁聆讯。法庭还指出，答辩人对申请人的诚信作出的攻击并不能替代对仲裁庭或仲裁委秘书长有关其任何偏颇或不当行为所作出的申诉。基于上述原因，答辩人在法律上被视为放弃了就偏颇情况进行申诉。

法庭解释，如果当初作出了有关申诉，仲裁庭或仲裁委

所在地人民法院可能已经采取了补救措施；而两者都更有能力就案件的事实裁定偏颇是否存在。法庭认为，尽管仲裁委所在地人民法院拒绝以偏颇为由搁置仲裁裁决的决定对香港法庭没有约束力，亦即使不容反悔原则并没有因为前述法院的决定而在本案适用，香港法庭有权在决定是否强制执行仲裁裁决时，慎重考虑仲裁委所在地人民法院的决定。

争议 3

经对 *Hebei Import & Export Corp* 诉 *Polytek Engineering Co Ltd* 一案中所表达的观点进行仔细诠释后，法庭认为法庭可以仅因为表面偏颇而拒绝强制执行仲裁裁决。可是，如果仲裁一方希望以表面偏颇作为依据，它要达到的门槛比以实际偏颇作为依据时所适用的门槛高，而法庭在行使有关的酌情权应该审慎。

争议 4

法庭按其对相关事实的评估，认为不存在“客观持平的观察者”恐怕表面偏颇的情况。法院裁定，虽然一般人可能会与原讼庭法官一样对调解进行的方式感到不安，因为香港的调解通常以不同的方式进行，但是否会引起表面的偏见可能取决于对调解地点通常如何进行调解的理解。有关这方面，法庭表示必须充分考虑仲裁委所在地人民法院拒绝搁置仲裁裁决的决定。

法庭重申，法庭只会在强制执行仲裁裁决会与执行地

（在本案里为香港）的道德和公正的基本概念相抵触的情况下拒绝强制执行裁决。因此，法庭不应仅因为非正式会议的形式在香港可能会引起看似表面偏颇而拒绝在香港强制执行该仲裁裁决。

Ⅳ.裁决

上诉得直。

Ⅴ.典型意义

如果仲裁一方希望以违反仲裁规则的情况作为依据，其应即时提出相关依据；不应等待并得悉其申索的结果为如何后，才决定作出申诉；亦不应犹如没有违规情况般让仲裁继续进行。

法庭只会在强制执行仲裁裁决会与执行地的道德和公正的基本概念相抵触的情况下拒绝强制执行裁决。法庭尊重在进行调解地惯常的调解形式，不会仅因形式和本地不一样而轻易引用违反公共政策。

三、厦门新景地集团有限公司诉裕景兴业有限公司案

[2009] 4 HKLRD 353;

CACV 106/2008 & CACV 197/2008

Ⅰ.基本案情

第一和第二上诉人是两家香港公司，亦是利景兴业(香港)有限公司(“香港利景”)的唯一股东，同时是裕景集团的

成员之一。香港利景全资拥有一家内地公司，该公司在厦门拥有一块土地（“该物业”）。

申请人（一家内地公司）同意向上诉人支付 1.2 亿元人民币，以获取开发、经营该物业的权利并从中获得利润。上诉人亦同意将其在香港利景中的股份转让给申请人，并将该物业交付给申请人(“该协议”)。该协议包含一项仲裁条款。

上诉人没有将该物业交付给申请人，并以履行该协议违反中国内地法律为由宣称终止该协议。因此，申请人于北京展开仲裁程序（ “第一次仲裁”)，并获得了对其有利的裁决(“该裁决”)，当中命令上诉人要继续履行该协议。申请人随后在香港单方面获得了强制执行该裁决的命令（“ 该命令”)。

上诉人申请了搁置该命令，认为根据香港法例第 341 章《仲裁条例》(“《仲裁条例》》”)，强制执行该命令应该因为无法履行该协议致使强制执行该命令会与公共政策相抵触为理由被拒绝，其中原因包括：(a）有关该物业的施工已经展开；(b）裕景集团的重组已于第一次仲裁期间落实，而香港利景股份已在过程中被摊薄，当中部份已被转让了给其母公司。法官拒绝搁置该命令。

同时，上诉人向仲裁委寻求就该协议双方在协议下的责任是否已被解除的问题做出裁定(“第二次仲裁”)。仲裁委裁定上诉人败诉。

在本次聆讯以处理上诉人提出的有关法官拒绝搁置该

命令的上诉之时，该物业的开发已经完成，而当中 99% 落成的单位亦已出售给第三方。上诉人认为，由于无法履行该协议，因此申请人实际上是申请“更进一步”的补救措施，例如损害赔偿或交出所得利润，而不是有关该物业本身的任何权益。上诉人亦承诺他们将展开下一轮的仲裁委仲裁，让仲裁庭决定采取什么替代补救措施(“该承诺”)。此外，上诉人提出法庭亦可以将此案发还仲裁委，以便得到其指示，或将上诉押后至仲裁委颁下其指示后。

Ⅱ.争议

1.上诉人是否无法履行该协议？（“争议 1”）

2.鉴于争议 1，是否有充分理由按公共政策理据拒绝强制执行该裁决？（“争议 2”）

3.法庭是否有司法管辖权把案件发还仲裁委？（“争议 3”）

Ⅲ.分析

争议 1

法庭指出，上诉人有充分机会向仲裁委直接提出无法履行该协议的问题，但上诉人并没有这样做。因此，法庭认为该承诺毫无意义。由于有关的做法没有合理解释，法庭因此认为此做法很明显是上诉人刻意的决定。法庭拒绝接受上诉人以下论点：即该物业的施工已经展开；因裕景集团的重组导致香港利景股份在过程中被摊薄；以及大部分该物业的单

位亦已出售给第三方，致使其无法履行该协议。法庭认为这都是上诉人计算过的风险，并且是其一手造成的，因此上诉人须承担后果。法庭亦指出，由于该命令没有规定任何强制执行时间，而且真正无法执行该命令的人不会干犯蔑视法庭罪，因此，因蔑视法庭而被判监禁的风险全属虚构。

争议 2

法庭指出，法庭在考虑是否按公共政策理据拒绝强制执行该裁决时，不会考虑案件的是非曲直或案情所建基于的交易。法庭的角色仅限于决定是否存在因违反公共政策而拒绝强制执行裁决的理据。法庭在处理此问题的角色应尽可能为机械式。因此，法庭认为在注册该裁决的阶段，是否无法履行该协议并非有关的因素，亦并不是作为在公共政策理据上拒绝强制执行该裁决的充分理由。

争议 3

法庭裁定法庭没有司法管辖权把案件发还仲裁委。根据《仲裁条例》，法庭有权强制执行该裁决(或拒绝这样做)，但没有司法管辖权发还案件。

Ⅳ. 裁决

上诉被驳回。

Ⅴ. 典型意义

法庭在考虑是否拒绝强制执行该裁决时，不会考虑案件的是非曲直或有关案情的交易。法庭的角色仅限于就拒绝强

制执行该裁决的理据是否存在着问题作出判断。在此基础上，法庭裁定无法履行协议在强制执行仲裁裁决的注册或认可阶段并非有关的考虑因素。因此，它并不构成基于违反公共政策的理据而拒绝强制执行仲裁裁决的充分理由。

四、山东红日阿康化工股份有限公司诉中国石油国际事业（香港）有限公司案

[2011] 4 HKLRD 604

CACV 31/2011

Ⅰ.基本案情

作为买方的上诉人跟作为供应商的答辩人订立了合同，以获得 3,937.448 吨硫的供应,并以购买价 3,051,522.20 美元为交换条件。

上诉人拒绝接收 3,810,578 吨硫，原因是所提供的硫的规格不正确。 因此，上诉人要求就该批硫退还一共为 2,953,198 美元购买价余额。

双方就争议进行了由内地某仲裁委在内地的一个仲裁庭审理的仲裁。仲裁庭作出了对上诉人有利的裁决，当中裁定：

（a）上诉人须向答辩人退还 3,810.578 吨的硫；

（b）答辩人须向上诉人退还 2,953,198 美元（即就交易已收取的支付款项）；

（c）答辩人须向上诉人支付赔偿，杂项费用及上诉人的成本支出，加上利息（如有逾期支付情况）；

答辩人对裁决的诠释则是，根据上述第(b)及(c)项，退还已收取之交易支付款项余额和支付其他款项的先决条件是，上诉人必须先退还拒绝接收的硫，且退还的硫的品质须要相等于供应予上诉人时的“状况和质量”。

为回应答辩人的书面申请和询问，仲裁委发出了 3 封信函（“仲裁委信函”）。前两封信函由仲裁委确认答辩人对裁决的诠释。第 3 封信函陈述了仲裁庭认为前述的两封信函是对裁决的“补充说明”，并构成该裁决的一部分观点。

答辩人发出的有关要求澄清以至颁发补充仲裁裁决的信函，以及仲裁委信函中的两封所载的回复都没有被抄送给上诉人。上诉人不同意答辩人对裁决的诠释，并申请了许可在香港强制执行裁决第(b)及(c)项。答辩人反对其申请，并申请了许可强制执行裁决的第(a)项。法庭裁定答辩人胜诉。随后，上诉人向上诉庭提出上诉。

Ⅱ.争议

1.鉴于香港法例第 341 章《仲裁条例》（已废除）（“《仲裁条例》”）第 2GG（1）条，法庭应否“按仲裁裁决、命令或指示的条款而作出法庭判决”。（“争议 1”）

2. 鉴于仲裁裁决的措辞和强制执行法庭的义务，上述仲裁裁决第(b)及(c)项所提及的义务是否取决于上述仲裁裁决的第(a)项？（“争议 2”）

3. 基于归还原则适用的情况，上述仲裁裁决第(a)项下的义务是否独立于其第(b)项下的义务？（“争议 3”）

4. 根据《中华人民共和国仲裁法》（“仲裁法”）第 56 条及/或内地某仲裁委员会仲裁规则有关条款，仲裁委信函是否构成补充或附加仲裁裁决，即构成裁决的一部分？（“争议 4”）

5. 有关仲裁委信函的有效性应否由内地有关法院，而不是香港的强制执行法庭处理？（“争议 5”）

Ⅲ. 分析

争议 1

法庭援引了权威判决，指出仲裁裁决的强制执行应“几乎是行政程序的事宜”；而基于重要的政策因素，法庭需要确保仲裁裁决能被有效且迅速地强制执行。法庭认为，法庭应该尊重仲裁裁决背后的清晰意图，而无权摸索裁决背后的理由或猜测其意图。根据《仲裁条例》第 2GG（1）条，法庭应在裁决的认受阶段“按仲裁裁决的条款”登录法庭判决。

争议 2

法庭认为，撇开仲裁委信函的事宜，该仲裁裁决明显地没有指出上述裁决第(b)及(c)项下的付款义务取决于第(a)

项。因此，在根据仲裁裁决作出的法庭判决以强制执行第(b)至 (c)项的情况下，不应施加条件。否则，仲裁裁决将会被改变而不是被强制执行。按这道理，法庭没有理由对硫的状态和质量施加进一步的条件。

争议 3

基于 3 个原因，法庭拒绝接纳答辩人有关上述仲裁裁决第(a)和第(b)项下的义务因为归还原则适用的情况而不会彼此独立的论点：首先，法庭不应猜测裁决背后的意图；此外，归还原则在不同的司法管辖区有所不同，有关的法律应该由仲裁庭应用；其次，即使假设仲裁裁决有关退还已付款项和退还货品的义务并不是彼此独立，法庭亦不能因此而断定有关的裁决必须取决于彼此。归还法下的权利和义务，不可以与为了对这些权利和义务给予实效所作的裁决和命令相混淆。

争议 4

根据仲裁法第 56 条及/或 内地某仲裁委仲裁规则相关条款，仲裁委信函并不构成补充或附加裁决。因此，在香港的强制执行程序中，仲裁庭或仲裁委信函所表达的观点不可被接纳。

争议 5

基于 3 个理由，法庭拒绝接纳答辩人有关应该由内地有关法院，而不是香港的强制执行法庭来处理仲裁委信函作为

补充或附加裁决的有效性的论点：首先，如果法庭发现在所谓的仲裁裁决或补充裁决与相关法律或规则下的仲裁裁决或补充裁决之间的要求存在明显差异，强制执行法庭无须接受被描述为仲裁裁决或补充裁决的所有文件；此外，强制执行法庭有权考虑其有关强制执行外国或内地仲裁裁决的公共政策。在本案里，仲裁委信函其中的第 2 和第 3 封的事宜涉及到公共政策中的自然公义规则。

Ⅳ.裁决

上诉得直。

Ⅴ.典型意义

强制执行仲裁裁决应“几乎是机械式的程序”。强制执行法庭无权亦无须摸索有关仲裁裁决背后的理由或猜测其意图。作为强制执行法庭，香港法庭有权判断一份文件是否仲裁裁决或补充仲裁裁决，或其中的一部分。法庭亦有权按其有关强制执行外国或内地仲裁裁决的公共政策决定是否拒绝强制执行仲裁裁决。自然公义规则是否被恪守的问题（此乃本案的仲裁委信函涉及到的事宜）会被法庭纳入其考虑当中。

五、郭顺开诉永成化工有限公司案

[2013] 3 HKLRD 484

HCCT 35/2012

Ⅰ. 基本案情

根据申请人与答辩人在内地某仲裁委员会管理的仲裁，仲裁庭作出了裁决，裁定答辩人败诉（“该裁决”）。该裁决要求答辩人向申请人支付：（1）人民币 29,195,470.58 元的经济损失赔偿及相关利息人民币 12,293,716.33 元；（2）人民币 500,000 元的法律费用；及 （3）人民币 675,473 元的仲裁程序费用，以及人民币 134,574 元的仲裁员费用。

随后，申请人获得法庭发出的命令及许可，容许该裁决在香港予以强制执行（“该命令”）。

答辩人以该裁决超出了交付仲裁的范围，及仲裁程序与法律相抵触为理由，向内地某人民法院申请了搁置或撤销该裁决。香港法庭认为此申请的性质并非以案件所建基的争议的是非曲直为由提出上诉。

随后，答辩人根据香港法例第 4A 章《高等法院规则》第 73 号命令第 10（6）条规则（“高院规则”）的规定，发出传票（“该传票”）以搁置或更改该命令。这正是本案中法庭要解决的问题。

Ⅱ.争议

1.有关强制执行内地仲裁裁决的案件，法庭是否有司法管辖权押后程序？（“争议 1”）

2.法庭在押后有关申请搁置或更改该命令的聆讯时，一方申请保证时应考虑哪些因素？（“争议 2”）

Ⅲ. 分析

争议 1

法庭指出，即使《仲裁条例》在强制执行内地仲裁裁决程序的部分并没有提及有关押后程序的条文，即等同于押后有关强制执行普通仲裁裁决或公约仲裁裁决程序的条文，并不代表法庭没有司法管辖权押后有关强制执行内地仲裁裁决程序。法庭认为其有一般及固有权力去管制其程序，包括押后程序；此权力已隐含在高院规则第 73 号命令第 10A 条规则当中。

争议 2

法庭引述并参考了英国法庭在 *SolehBoneh International Ltd* 诉 *Government of the Republic of Uganda* [1993] 2 LLR 208 一案中所列出的原则。在该案中，英国法庭决定押后聆讯，同时要求与讼的有关方提供相当于仲裁裁决金额的保证以待瑞典法庭裁定仲裁裁决是否具约束力。在该案上诉的程序中，法庭考虑了两项因素 – 经法庭简短审议，有关仲裁裁决无效的论点的可取性，以及强制执行仲裁裁决的难易程度，以及如果执行有延误，执行会否因为资产转移或不经意的交易而变得困难。有关仲裁裁决无效的论点越有力，或强制执行的困难程度会因为执行被延误而提升的情况越明显，法庭越有可能会命令与讼的有关方提供保证。

根据上述原则，法庭考虑了一系列与本案有关的因素，包括答辩人未有提供任何文件以列明它向内地某人民法院所提出的有关搁置或撤销该裁决的申请的是非曲直，从而支持它有关该裁决是“明显无效”的论点；答辩人更改了其注册办事处，答辩人出售了其工业物业，答辩人的财政状况在变差，而且答辩人公司股份（被形容为过时资产）被母公司于该裁决被颁下后的短时间内出售；还有，已公布的总资产（约 4,504 万港元)及未经审计的净负债(约 1.435 亿港元)。

Ⅳ. 裁决

基于上述因素，及在没有有关特定保证金额会超出答辩人能力范围的陈词的情况下，法庭押后该传票聆讯以待内地某人民法院裁定该裁决应否被搁置或撤销，及命令答辩人提供 2,000 万港元作为保证金，以保障该裁决在聆讯被押后的情况下能在香港成功予以强制执行的机会。

Ⅴ. 典型意义

香港特区高等法院有权押后有关强制执行内地仲裁裁决程序的聆讯并要求答辩人提供保证金。

关于应否命令答辩人提供保证以履行裁决，法院的考虑因素主要有两点。首先是裁决无效的论点。如果裁决明显无效，则应押后聆讯并不应发出命令要求提供保证；但是，如果该裁决明显有效，则应该立即发出强制执行命令或发出命令要求提供大量保证。其次，法院应考虑执行的难易程度以

及任何延迟执行的影响，例如透过资产的转移或不经意的交易。

Cases of the people's courts of Mainland

CASE No.1： Application of Farenco Shipping Pte. Ltd. for Enforcement of Arbitration Awards made in Hong Kong

(2018)Yue 72 Ren Gang No. 1 of No. 1, (2019) Yue 72 Ren Gang No. 1

I. Basic facts

On 1 February 2012, Farenco Shipping Pte. Ltd. ("Farenco") of Singapore signed a contract of affreightment("COA") with Eastern Ocean Transportation Co., Ltd. ("Eastern Ocean"), agreeing that Eastern Ocean would transport the goods of Farenco, and all disputes arising from the COA would be submitted to arbitration in Hong Kong SAR with the application of the law of the United Kingdom ("UK law"). On 21 April of the same year, Farencosent an e-mail to Eastern Ocean to confirm that both parties had entered into a supplementary contract on the basis of the aforementioned COA, agreeing to add an additional lot of cargo to be transported, and that other terms and conditions of the COA would apply. Subsequently, a dispute over the performance of the supplementary contract arose between the parties, followed by its submission to arbitration in Hong Kong SAR by Farencoon 16 February 2016. According to the first final award and the final award on costs it handed down, the arbitral tribunal in Hong Kong SAR ruled that Eastern Ocean was to pay the corresponding damages and related arbitration fees.

After the arbitration awards came into effect, Farencoapplied to the Guangzhou Maritime Court for recognition and enforcement of the two arbitration awards. Eastern Ocean responded that the arbitration agreement submitted by Farenco had not been notarised and certified, nor had an officially certified Chinese translation been submitted. The freight in question was the subject matter of the supplementary contract, which was reached orally by both parties over the phone without having any arbitration clauses agreed on or any arbitration agreement concluded. Besides, Eastern Ocean had never recognised the jurisdiction of the arbitral tribunal. For these reasons, the enforcement of the arbitration awards would contravene the requirements under the *Arbitration Law of the Mainland* that arbitration agreement must be express and the relevant provisions of the *General Rules of the Civil Law* on the expression of intention, and would be contrary to the public interests.

II. Rulings

The Guangzhou Maritime Court held that: First, the instruments Farenco submitted in its application for recognition and enforcement of the arbitration awards conform to the requirements on the necessary documents under the *Supreme People's Court's Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* ("the *Arrangement*"). Second, whether an arbitration agreement is tenable falls within the scope of its validity review and, in view of the lack of an agreement between the two parties on the applicable law for ascertaining the validity of the arbitration agreement, pursuant to Article 7(1) of the *Arrangement*, whether an arbitration agreement in question is tenable should be decided in

accordance with the law of the place of arbitration, i.e. the law of Hong Kong SAR. According to the law of Hong Kong SAR, the incorporation terms set out in the subject email constitutes a valid arbitration agreement. Third, violation of relevant provisions of the law of the Mainland is not equivalent to breach of the public interests of the Mainland unless the recognition and enforcement of the arbitration awards will seriously damage the basic principles of the law of the Mainland. The requirements for express arbitration agreement under the *Arbitration Law* of the Mainland and expression of intention under the *General Rules of the Civil Law* are outside the ambit of the basic principles of the law of the Mainland. In view of the above reasons, it was held that the two arbitration awards should be recognised and enforced. Besides, in response to Farenco's application, the Guangzhou Maritime Court had frozen Eastern Ocean's deposit at the China Merchants Bank (Shenzhen Branch) before handing down a ruling on the case.

III. Significance

First, the case has clarified that whether an arbitration agreement is tenable falls within the scope of validity review. An arbitration agreement is an essential instrument for the application by a party for recognition and enforcement of an arbitration award. It has a direct implication on the jurisdiction of the relevant arbitral tribunal. A review of the validity of an arbitration agreement is obligatory prior to the recognition and enforcement of a relevant arbitration award. In this connection, Article 7(1) of the *Arrangement* stipulates that the court may refuse to enforce an arbitral award if the arbitration agreement was invalid. In practice, however, there is controversy over whether a broad or strict interpretation should be adopted for invalid arbitration agreements and whether the case of failing to prove the existence of an arbitration agreement should be included. In this case, the court looked beyond the literal meaning for the intent of the provision of the Agreement and ruled that the proof of existence of the arbitration agreement was a prerequisite for it to be valid, which falls within the scope of review of its validity. Agreements that are invalid should cover those cases where their existence cannot be proved.

Secondly, interim measures are granted upon application before an arbitration award is recognised and enforced. The *Arrangement* is silent on whether the court can, before or after handling an application for recognition and enforcement of an arbitration award, grant interim measures against the property of the party against whom the application is filed. Besides, there is inconsistent interpretations of the *Arrangement* when it comes to implementation. By reference to the *Arrangement Concerning Mutual Recognition and Enforcement of Arbitral Awards between the Mainland and the Macao Special Administrative Region*, and according to the provisions of the *Civil Procedure Law of the People's Republic of China* and its relevant judicial interpretations, it was held that in the present case upon application by the party concerned, pre-trial interim measures could be granted before the party concerned applied for recognition and enforcement of the arbitration awards and that after such application was filed, the court could, before recognising and enforcing the awards, grant preventive remedies to facilitate the smooth enforcement of the awards for the better protection of the legitimate rights and interests of the party concerned.

CASE No.2：Application for Enforcement of a Hong Kong Arbitration Awardby the Applicant Ennead Architects International LLP of the United States
(2016) Su 01 Ren Gang No. 1

I. Basic facts

On 29 March and 15 May 2013, Ennead Architects International LLP (hereinafter referred to as "Ennead") of the United States and R&F Nanjing Real Estate Development Co. Ltd. (hereinafter referred to as "R&F") signed a land lot design contract and agreed on the arbitration clauses stipulating that any disputes shall be submitted to the China International Economic and Trade Arbitration Commission (hereinafter referred to as "CIETAC") for arbitration in accordance with its prevailing arbitration rules at the time of application for arbitration, and that the place of arbitration shall be the Hong Kong Special Administrative Region. In the wake of a dispute over contract performance, Ennead applied to the CIETAC Hong Kong Arbitration Center for arbitration, seeking an arbitration award ordering R&Fto, among others, pay the outstanding design fees and bear the liability for breach of contract.

The CIETAC Hong Kong Arbitration Center accepted the case pursuant to the CIETAC Arbitration Rules, which came into effect on 1 January 2015, and made the arbitration award (2015) ZhongGuo Mao Zhong Gang CaiZi No. 0003 on 28 November 2015.On 7 June 2016, Enneadapplied to the Intermediate People's Court of Nanjing City, Jiangsu Province for enforcement of Item 3 of the arbitration award, i.e. the part on payment of interest. R&F did not raise any objection.

II. Rulings

The Intermediate People's Court of Nanjing City, Jiangsu Province held upon examination that R&Fhad raised no objection to the arbitration award concerning the present case and had performed the part of the award on the principal amount of design fees as determined, failing only the part on payment of overdue interest under Item 3. The arbitration award in the case also would not be contrary to the public interests of the Mainland. Therefore, pursuant to Articles 1 and 7of the*Supreme People's Court'sArrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* (hereinafter referred to as "the *Arrangement*"), it was held that Item 3 of the arbitration award should be enforced.

III. Significance

This case marks the first time an arbitration award made by a Hong Kong branch of a Mainland arbitration institution in an arbitration seated in Hong Kong SAR has been enforced by a Mainland court. The case clarifies and confirms that the criterion for determining the origin of an arbitration award is the place of arbitration, and accordingly holds that the arbitration award involved in the case is a Hong Kong arbitration award, meeting the applicable conditions of the *Arrangement*.

Mainland laws impose different examination standards for different types of arbitration awards, and generally use the location of the arbitration institution as the basis for determining the origin of an arbitration award. According to *the Notice of the Supreme People's Court on Issues Relating to the Enforcement of Hong Kong Arbitration Awards in the Mainland* (hereinafter referred to as "the *Notice*"), any *ad hoc* arbitration awards made in Hong Kong SAR or any arbitration awards made by foreign arbitration institutions in Hong Kong SAR should be examined by the people's court in accordance with the provisions of the *Arrangement*. In effect, this clarifies that the criterion fordetermining the origin of an arbitration award should be the place of arbitration rather than the location of the arbitration institution. Nevertheless, the *Notice* has no express provision on whether an arbitration award made by a Mainland arbitration institution in an arbitration seated in Hong Kong SAR is a Hong Kong arbitration award. The determination in the present case of the origin of an arbitration award made by a Hong Kong branch of a Mainland arbitration institution according to the place of arbitration is in line with both the spirit of the *Notice* and prevailing international standards.

CASE No.3：Application for Recognition and Enforcement of a Hong Kong Arbitration Award by the Applicants David Dein Consultancy Limited and Bramley Corporation Ltd
(2020) Jing 04 Ren Gang No. 5 (1)

I. Basic facts

On 24 August 2018, David Dein Consultancy Limited (hereinafter referred to as "David Dein) and Bramley Corporation Ltd (hereinafter referred to as "Bramley") each signed with Beijing SinoboGuoan Football Club (hereinafter referred to as "Guoan") a copy of the same Consultancy Agreement agreeing that any disputes should be submitted to the Hong Kong International Arbitration Centre (hereinafter referred to as "HKIAC") for settlement by arbitration, with English law as the applicable law. Accordingly, Guoan submitted a notice of arbitration to the HKIAC on 21 November 2018. Subsequently, David Dein and Bramley filed a counterclaim. On 5 March 2020, the HKIAC made an award (case number: HKIAC/A18211) ruling that Guoan had committed a repudiatory breach of the Consultancy Agreement and should pay the relevant fees and interest to David Dein and Bramley.

After the arbitration award had taken effect, David Dein and Bramley applied to the Beijing Fourth Intermediate People's Court for recognition and enforcement of the award. The respondent Guoan contended that the People's Court should rule against recognition and enforcement of the arbitration award. The reasons stated included invalidity of the arbitration agreement involved, composition of the arbitral tribunal being contrary to the agreement between the parties and the law of the Hong Kong Special Administrative Region, arbitral proceedings not being in accordance with the agreement between the parties, violation of social and public interests, and that recognition of the amount awarded should be refused.

II. Rulings

The Beijing Fourth Intermediate People's Court held upon examination that first, the parties in the present case agreed only on the application of substantive English law as the governing law of the agreement, without stating explicitly the law to be applied in confirming the validity of the foreign-related arbitration agreement. As both the location of the arbitration institution and the seat of arbitration were in Hong Kong SAR, the Arbitration Ordinance of Hong Kong should apply in the conduct of the examination, and the agreement was valid under the relevant provisions. Second, according to the 2018 HKIAC Administered Arbitration Rules in force during the arbitration, the composition of the arbitral tribunal was not in breach of the rules. The fact that the arbitrator and the directors of the two companies held office in the English Football Association did not necessarily mean that the arbitrator had conflict of interest with the two companies. As the parties had knowledge of the public information held by the arbitral tribunal, no disclosure was needed and no procedural impunity was involved. Third, some copies of the arbitration documents produced by the applicant and the amount of expenses in his bill did not serve to prove that the arbitral proceedings were inconsistent with the agreement. Such information was public information of the arbitral proceedings and was not in breach of the confidentiality clause. Fourth, public interests, which concerned the interests of the entire community, should be

enjoyed by the general public and were different from the interests of the contract parties. Although part of Guoan's assets were state-owned, it did not follow that all matters relating to those assets should be deemed as public interests. In light of the above, it was held that the arbitration award HKIAC/AC18211 made by the HKIAC of the Hong Kong Special Administrative Region should be recognised and enforced.

III. Significance

1. The present case clarifies that where a party relies on the clause "[t]he composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement between the parties" in Article 7 of the Arrangement to contend that there are procedural issues of disclosure and withdrawal on the part of an arbitrator, the Court should make a reasonable judgment on the basis of both the arbitration rules and life experience in examining whether the issues are sufficient to affect the impartiality and independence of the arbitration. In the present case, the arbitrator's connection and interaction with others for the purposes of work, daily living, study and other social activities, and his holding of office in the same organisation with the people concerned did not necessarily constitute any conflict of interest affecting the impartiality of the arbitration procedure under the withdrawal rules. Arbitrators may choose not to disclose matters not relating to their independence or the impartiality of the arbitration.

2. Elaborating on the issue of public interests, the present case is of considerable reference value. Public interests, which concern the interests of the entire community, should be enjoyed by the general public and are essential for the development and survival of the society as a whole, thus having a public and social nature and are different from the interests of the contract parties. The arbitration involved in this case dealt with a contractual dispute between civil subjects of equal status. The outcome would only affect the contract parties and have nothing to do with public interests. Although part of the assets of the respondent, Guoan, were state-owned, it did not follow that all matters relating to those assets should be deemed as public interests.

CASE No.4： Applicant Raffles International LimitedApplication for the Enforcement of a Hong Kong International Arbitration Centre Arbitral Award by Applicant Raffles International Limited
(2016) Jin 01 Ren Gang no.1

I. Basic facts

On 15 January 2007, Raffles International Limited（hereinafter "Raffles"）and Haihang Tianjin Center Development Co., Ltd.（hereinafter "Haihang"） entered into a Licence Agreement on the use of logo "Raffles" and trade mark "Raffles". On the same day, Raffles Hotel Management (Beijing) Company Limited (a connected company of the Raffles conglomerate) (hereinafter "Raffles -Beijing"andHaihang entered into a Hotel Management Agreement on the collaboration on hotel management and operation. The Licence Agreement provides that any disputes, issues or controversies arising from or in connection with the contract shall be submitted to arbitration before the Hong Kong International Arbitration Centre (hereinafter"HKIAC") for final resolution pursuant to the arbitration rules valid at the time of making the application for arbitration. The seat of the arbitration is Hong Kong SAR. The Licence Agreement also provides that, if the Hotel Management Agreement or any other transaction agreements are terminated for any reasons, the Licence Agreement shall be terminated immediately. The Hotel Management Agreement stipulates that relevant disputes shall be submitted to arbitration before the China International Economic and Trade Arbitration Commission Shanghai Sub-Commission (hereinafter "CIETAC Shanghai").

On 20 January 2012, Raffles applied to HKIAC for arbitration of the disputes relating to the Licence Agreement. On 29 January 2012, Raffles -Beijing applied to CIETAC Shanghai for arbitration of disputes relating to the Hotel Management Agreement. Thereafter, the HKIAC made an award (Case No.: HKIAC/A12016) ordering that Haihang pay Raffles the corresponding sum with interest. Raffles applied to The First Intermediate People's Court of Tianjin for enforcement of the award. Haihang, the Respondent, resisted the enforcement on the grounds, inter alia, that the award dealt with a dispute not falling within the ambit of the arbitration clause, in breach of Article 7 of the Supreme People's Court's Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administrative Region (hereinafter "Arrangement").

II. Rulings

Having reported to the Higher People's Court of Tianjin and the Supreme People's Court, The First Intermediate People's Court of Tianjin held that: first, the fact that HKIAC award involved the Hotel Management Agreement did not constitute decisions on matters beyond the scope of the submission to arbitration, and therefore did not fall within the circumstances prescribed by Article 7(1)(3) of the Arrangement; second, the tribunal's handling of the issue of jurisdiction did not breach parties' agreement and the laws of the Hong Kong Special Administrative Region, and therefore did not fall within the circumstances prescribed by Article 7(1)(4) of the Arrangement; third, the challenge raised by Haihangwas not in relation to the impartiality or the independence of the arbitrators, but the jurisdiction of the tribunal and, as such the tribunal had the power to

decide the issue without the need to resort to the Council of the Arbitration Centre for a determination. Therefore, the subject matter of the challenge raised did not fall within the circumstances prescribed by Article 7(1)(4) of the Arrangement. To sum up, The First Intermediate People's Court of Tianjin held that the partial award and final award (Case No.:HKIAC/A12016) made by the HKIAC on 19 November 2014 and 19 March 2015 respectively could be enforced in accordance with Article 1, 6 and 7 of the Arrangement.

III. Significance

In respect of whether an award contains decisions on matters beyond the scope of submission to arbitration prescribed by Article 7(1)(3) of the Arrangement, the following rules are clarified: Where the tribunal's adjudication is confined to the fact-finding and reasoning sections of the award in respect of disputes beyond the scope of the tribunal's jurisdiction, and the dispositive section of the award does not concern other agreement-related disputes, the award did not contain matters beyond the scope of submission to arbitration. In the present case, the matters Raffles submitted to arbitration before HKIAC were matters relating to the performance of the Licence Agreement. As the Licence Agreement and the Hotel Management Agreement are closely connected, the award touched on the Hotel Management Agreement in its section on fact-finding and reasoning. This analysis and determination could not be avoided in the course of dealing with a controversy arising from the Licence Agreement. The tribunal eventually merely made the award on issues arising from the Licence Agreement mentioned in the Request for Arbitration without making specific award decisions on issues arising from the Hotel Management Agreement. The relevant disputes fell within the scope of parties' submission to arbitration pursuant to the arbitration clause. Therefore, the award in the present case did not give rise to the circumstances prescribed by Article 7(1)(3) of the Arrangement, where matters beyond the scope of the submission to arbitration were decided by the award.

CASE No.5：Application for enforcement of an arbitral award made bythe Hong Kong International Arbitration Centre byBensley Design Group International Consulting Co., Ltd.
(2019) Chuan 01 Ren Gang No. 1

I. Basic facts

On 13 November 2013, Bensley Design Group International Consulting Co., Ltd. (hereinafter referred to as "Bensley Co.") signed a Service *Agreement on Landscape Design for Mandarin Oriental, Chengdu, China* (hereinafter referred to as "*Service Agreement*") with Chengdu Mind River Land Co., Ltd. (hereinafter referred to as "Mind Co.") and Chengdu Chenchuan Industrial Co., Ltd. (hereinafter referred to as "Chenchuan Co."). Under the Service Agreement, any disputes, controversies or claims arising from or related to this contract or the breach, termination or invalidity of this contract shall be, in accordance with the then effective *Arbitration Rules of the United Nations Commission on International Trade Law* (hereinafter referred to as "*Arbitration Rules*"), resolved by arbitration in Hong Kong SAR. Due to a dispute arising in the course of the performance of the contract, Bensley Co. applied to the Hong Kong International Arbitration Centre (hereinafter referred to as "HKIAC") for arbitration on 5 March 2018. On 5 May 2019, the arbitral tribunal made the *Final Award*, which was in support of all arbitration requests of Bensley Co. On 4 June 2019, the arbitral tribunal issued the *Correction of the Final Award*, where corrections and updates were made to the *Final Award*. Subsequently, Bensley Co. applied to the Chengdu Intermediate People's Court in Sichuan Province for enforcement of the above arbitral award.

In their joint defence, Mind Co. and Chenchuan Co. stated that firstly, the selection of arbitrator by direct appointment of a sole arbitrator contravened Article 8 of the *Arbitration Rules* which required that the views of all parties shall be sought before using the list-procedure, thus falling within the situation stipulated in Article 7(4) of the *Supreme People's Court's Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region* (hereinafter referred to as "the *Arrangement*"). Secondly, the arbitrator failed to deliver relevant documents relating to the arbitration to the Respondents in accordance with the *Measures for the Administration of China Appointed Attesting Officers (Hong Kong)* (Order No. 69 of the Ministry of Justice)(hereinafter referred to as "the *Measures*"), which was a situation stipulated in Article 7(2) of the *Arrangement*. It has therefore requested that the application be rejected.

II. Rulings

Firstly, regarding the composition of the arbitral tribunal in the present case, the Chengdu Intermediate People's Court in Sichuan Province held, upon examination, that

the HKIAC's exercise of discretion to appoint a sole arbitrator during the arbitral proceedings in question was in compliance with the Arbitration Rules, to which both parties to the Service Agreement had agreed to adopt. Secondly, regarding whether the arbitral tribunal had delivered notice to the Respondents in an appropriate manner, since in the course of the arbitral proceedings the arbitrator had arranged for delivery of relevant documents to the addresses designated by both parties in the Service Agreement and the Respondents had also expressly acknowledged receipt of the same, it was held that the delivery requirements set out in Article 2 of the Arbitration Rules had been complied with and that there was no question of the arbitrator failing to deliver notice to the Respondents in an appropriate manner. The Respondents' contention that documents relating to the arbitration should be delivered to the Respondents in accordance with the Measures was held incompatible with the Arbitration Rules and was not accepted.

III. significance

It is established in the present case that the arbitration rules applicable to the arbitral proceedings in question should be the basis on which to determine whether a notice has been successfully delivered. Given that "non-delivery of notice pursuant to the law" is a ground commonly used by respondents for refusing the enforcement of arbitral awards made in Hong Kong SAR, it is necessary to first establish the legal basis of the delivery procedure in order to determine whether a notice has been delivered successfully pursuant to the law. In the present case, both parties agreed in the contract that any disputes, controversies or claims arising from or related to this contract or the breach, termination or invalidity of this contract shall be resolved in accordance with the then effective *Arbitration Rules*. Due respect has therefore been given to the choice of the parties concerned in this case. Relevant documents have been delivered to the addresses designated by both parties in the Service Agreement pursuant to the relevant requirements of the *Arbitration Rules* and the Respondents have also expressly acknowledged receipt of the same. There is no question of the arbitrator failing to deliver notice to the Respondents in an appropriate manner. The Respondents' contention that documents relating to the arbitration should be delivered to the Respondents in accordance with the *Measures* was held incompatible with the *Arbitration Rules*.

Cases of the courts of the Hong Kong Special Administrative Region

CASE No.1：CL v SCG
[2019] 2 HKLRD 144
HCCT 9/2018

I. Brief Facts

This was a hearing of an application by the Respondent on, as a preliminary issue, whether the enforcement of an arbitral award against the Respondent is time-barred under s. 4(1)(c) of the Limitation Ordinance (Cap. 347) ("**Limitation Ordinance**").

The Applicant proceeded with arbitration administered by an arbitral centre in Hong Kong against the Respondent and obtained an award on 17 February 2011 in its favour, ordering the Respondent to forthwith pay the Applicant the sum of USD 2,173,000 with interests and costs of the arbitration.

In March 2011, the Applicant demanded payment from the Respondent of the sums due under the award and subsequently costs of the tribunal, yet to no avail. On 7 July 2011, the Applicant commenced proceedings to enforce the award in the People's Court on the Mainland, which was rejected by that Court. Later, the Applicant appealed the decision to the Higher People's Court and made an application for a retrial which, however, was rejected by the Higher People's Court on 1 March 2016.

On 6 February 2018, the Applicant made an *ex parte* application and successfully obtained leave and an order to enforce the award under s. 2GG of the Arbitration Ordinance (Cap. 341) (repealed) ("**Arbitration Ordinance**") in Hong Kong ("**Order**"). On 6 June 2018, the Respondent applied for an *inter partes* hearing to set aside the Order on various bases including that the application was time-barred by s. 4(1)(c) of the Limitation Ordinance. On 24 July 2018, the question of limitation was ordered to be tried as a preliminary issue.

II. Issues

1. When did the cause of action to enforce the award in this case begin to accrue? ("**Issue 1**")

2. Whether the cause of action, and hence the effects of time limitation under s. 4(1)(c) of the Limitation Ordinance, was suspended from the time when the Applicant applied to the People's Court in the Mainland for enforcement on 7 July 2011 to 1 March 2016, when its application was rejected by the Higher People's Court, in view of Article 2 of the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region ("**Arrangement**")? ("**Issue 2**")

III. Analysis

Issue 1

The Respondent submitted that the limitation period commenced from 17 May 2011, 3 months from the date of the award, which was argued to be a reasonable time for the Respondent to pay and honour the award, meaning that the limitation period would have expired on 18 May 2017. Alternatively, the Respondent argued that the latest time from which the cause of action would have accrued was 8 July 2011, i.e. when the Applicant applied to the People's Court in the Mainland for enforcement of the award. This places the expiry of the limitation period on 9 July 2017.

On the other hand, the Applicant contended that the limitation period only commenced on the date on which the Respondent filed its submission in opposition to the Applicant's application in the People's Court in the Mainland, i.e. 11 March 2012. The Applicant argued that despite that no payment was made by the Respondent after the payment demands made by the Applicant in March 2011, no inferences can be drawn from the Respondent's lack of response as to whether it was disputing the award. The Applicant stated that the Respondent only demonstrated its clear and unequivocal intention not to be bound by the award when it filed its submissions in opposition. Thus, the Applicant argued that only on 11 March 2012 did the cause of action for enforcement accrue.

The court did not accept that the cause of action only accrues when a clear and unequivocal intention not to be bound by the award is demonstrated, noting a similar argument was rejected by *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All ER 1017. The court explained that accepting the argument means allowing the award debtor to indefinitely defer and postpone the accrual of its creditor's cause of action and delaying its right to enforce the debt due under the award. Following *International Bulk Shipping and Services Ltd v Minerals and Metals Trading Corp of India* [1996] 1 All ER 1017 and *Agromet Motoimport Ltd v Moulden Engineering Ltd*[1985] 1 WLR 762, the court held that the cause of action on the award accrued "from the breach occasioned by the defendants' failure to honour the award when called upon to do so". Hence, limitation begins on the date on which the implied promise to perform the award is broken.

The court further noted that the cause of action arose when the Respondent failed to make payment within a reasonable time of the publication of the award and demand being made. The court noted that what a reasonable time was depended on the terms of the award as well as the facts and circumstances of the case. In the present case, since the Respondent was ordered under the award to pay the Applicant "forthwith", a reasonable time for payment was held to lapse at the latest by 8 April 2011, i.e. 21 days after the Applicant's demand for payment, and therefore the limitation period expired on 8 April 2017.

Issue 2

The Applicant argued that its accrual of the cause of action was suspended from 7 July 2011 to 1 March 2016, meaning the date on which the Applicant applied to the People's Court in the Mainland for enforcement to the date when the application was finally rejected by the Higher People's Court.

The Applicant referred to Article 2 of the Arrangement and s. 40C of the Arbitration Ordinance, which prohibits concurrent filing of applications for enforcement of an arbitral award in the Mainland and Hong Kong, and pointed out that the prohibition targets the mischief of double enforcement and double recovery(*Shenzhen Kai Loong Investment and Development Co Ltd v CEC Electrical Manufacturing (International) Co. Ltd* [2001-2003] HKCLRT 649) and, as such, the Applicant should not be barred from enforcing its award in Hong Kong by operation of s. 4(1)(c) of the Limitation Ordinance simply because it had attempted enforcement in the Mainland.

Nonetheless, the court held that however unfair the consequence of the "no concurrent enforcement rule" may be, absent an express provision in the Arbitration Ordinance or the Arrangement providing otherwise, time under s. 4(1)(c) of the Limitation Ordinance should not stop running, even during the course of the enforcement proceedings in the Mainland. Therefore, the Applicant's contention that the accrual of cause of action was suspended during the time of enforcement proceedings in the Mainland was rejected.

For reasons set out above, the court held that enforcement of the award was barred by s.4(1)(c) of the Limitation Ordinance when proceedings for leave for enforcement in Hong Kong were instituted on 6 February 2018.

IV. Decisions

Respondent's application for setting aside the Order granted.

V. Significance

(a) Time limitation begins on the date when the implied promise to perform the award is broken, which is when the award debtor fails to perform the award within a reasonable time of the publication of the award and demand being made. What is a reasonable time for performing the award depends on the terms of the award as well as the facts and circumstances of the case.

(b) This case shows that time under the Limitation Ordinance still runs despite the fact that an award creditor must have failed to recover the total amount due under an award in one place before seeking enforcement in respect of outstanding liabilities in another, as provided for under Article 2 of the Arrangement. The unfair consequences that this may give rise to, such as the hardship the Applicant in the present case faces, highlights the defects in the original Arrangement and the necessity of reform with respect to the prohibition against concurrent enforcement in both places under Article 2 of the Arrangement.

CASE No.2：Gao Haiyan & Anor v. Keeneye Holdings Ltd &Anor

[2012] 1 HKLRD 627
CACV 79/2011

I. Brief Facts

By way of a share transfer agreement and a supplemental share transfer agreement ("**the Agreements**"), the Applicants transferred the shares in a Hong Kong company to the Respondents, which held beneficial interest in a joint venture coal business in Mainland China. The Agreements were governed by PRC law and provided for arbitration of disputes at an arbitral body in the Mainland.

Pursuant to Article 37 of the Arbitration Rules of the arbitral body, mediation-arbitration is to be conducted either by the tribunal or presiding arbitrator, or provided that the parties agree, by any third party. The tribunal held two sittings. After the first sitting, the tribunal on its own initiative suggested to the parties that the Respondents pay the Applicants RMB 250 million to settle the case.

Before the second sitting, in the absence of the Respondents' appointee and the Chief Arbitrator, the Applicants' appointed arbitrator, and a person related to the Respondents upon the invitation of the Secretary General of the arbitral body, attended a purported mediation-arbitration in the form of a private meeting. The Secretary General of the arbitral body who was not appointed by the parties' was alleged to be the host of the private meeting. It was alleged that the Secretary General of the arbitral body asked the person related to the Respondents to persuade the Respondents into accepting the suggestion put forward by the tribunal.

The parties could not settle. The tribunal found in favour of the Applicants and recommended (yet did not require) a compensation of RMB 50 million. At no point did the Respondents complain about the tribunal's conduct, fearing that to do so might antagonise the tribunal. The Respondents appealed against the award of the tribunal to the Intermediate People's Court where the arbitral body situates contending that the Secretary General of the arbitral body had manipulated the outcome of the arbitration in contravention of the law and the arbitration rules. The appeal was dismissed.

Subsequently, pursuant to sections 2GG and 40B of the Arbitration Ordinance (Cap. 341) (repealed) ("**Arbitration Ordinance**"), the Applicants obtained leave to enforce the award. The Respondents, in applying to set aside the leave, contended that it would be contrary to public policy to enforce the award because it was tainted by bias or apparent bias. The Respondents argued that the private meeting over dinner among the Applicants' appointed arbitrator, the Secretary General of the arbitral body and the person related to the Respondents, was an attempt to pressurise the Respondents to pay RMB 250 million to the Applicants in return for a decision in the Respondents' favour. The first instance judge held that the award was tainted by apparent bias. He further held that the Respondents did not waive their entitlement to complain about bias in proceeding with a second sitting after the private meeting. The Applicants appealed.

II. Issues

1. Whether the public policy ground applicable to the enforcement of a Convention award are applicable to a Mainland award and how high is the relevant threshold? ("**Issue 1**")

2. Whether the Respondents waived their rights to complain about the non-compliance with the Arbitration Rules of the arbitral body? ("**Issue 2**")

3. Whether apparent bias (as opposed to actual bias) may be sufficient to constitute the public policy ground for refusing enforcement of the award? ("**Issue 3**")

4. Whether, on facts, the alleged apparent bias constituted the public policy ground for refusing enforcement of the award? ("**Issue 4**")

III. Analysis

Issue 1

It was held that the jurisprudence on refusal to enforce an award on the public policy ground applicable to a Convention award is also applicable to a Mainland award. The relevant threshold is a very high one, since comity, which was held to be "woven" into the concept of public policy, has to be given effect where a foreign (including a Mainland) award is concerned. On this point, the court cited *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, in which the court remarked that, to give effect to comity, enforcement of foreign awards would not be refused unless such enforcement would be contrary to the fundamental concepts of morality and justice of Hong Kong, of which conclusion would take a very strong case to reach.

Issue 2

The court held that a party to an arbitration relying on breach of arbitration rules should do so promptly; it should not wait and see how its claims turn out before pursuing his complaint; nor should it proceed with the arbitration as if there had been compliance. As such, the Respondents should not have only submitted to the tribunal a supplemental submission after the private meeting, or attended a second hearing before the tribunal without making a complaint. The court also held that the attack by the Respondents against the Applicants' integrity was not a substitute for a complaint about bias of any sort or impropriety against the tribunal or the Secretary General of the arbitral body. For these reasons, the Respondents are deemed to have waived their rights to complain about bias.

The court pointed out that, had the complaint been raised, action might have been taken by the tribunal or the People's Court where the arbitral body situates to remedy the situation, both of which would have been in a much better position to ascertain facts todecide on the issue of bias. The court ruled that although the refusal by the People's Court where the arbitral body situates to set aside the award for bias was not binding on Hong Kong court, and despite no estoppel resulted from the

aforementioned Court's decision, Hong Kong court was entitled to give serious consideration to the aforementioned Court's decision in deciding whether to enforce the award.

Issue 3

On a careful interpretation of the views expressed in *Hebei Import & Export Corp v Polytek Engineering Co Ltd*, the court was of the view that apparent bias alone may be sufficient to justify refusal to enforce an award, though a party seeking to resist enforcement on this ground has to reach a higher threshold than the one for doing so on actual bias, and the court should be slow to exercise such discretion.

Issue 4

The court assessed the relevant facts and found that there was no apprehension of apparent bias based on the "fair-minded observer". The court held that although one might share the learned Judge's unease about the way in which the mediation was conducted because mediation is normally conducted differently in Hong Kong, whether that would give rise to an apprehension of apparent bias, may depend also on an understanding of how mediation is normally conducted in the place where it was conducted. In this context, due weight must be given to the decision of the People's Court where the arbitral body situates refusing to set aside the award.

The court reiterated that enforcement of an award should only be refused if to enforce it would be contrary to the fundamental conceptions of morality and justice of the forum, which is Hong Kong in the present case. Accordingly, the court should not refuse to enforce an award in Hong Kong solely because mediation-arbitration in the form of a private meeting might give rise to an appearance of apparent bias in Hong Kong.

IV. Decision

Appeal allowed.

V. Significance

The court held that a party to an arbitration relying on breach of the arbitration rules should do so promptly; it should not wait and see how its claims turns out before pursuing his complaint, or proceed with the arbitration as if there had been compliance.

Enforcement of an award would only be refused if enforcement would be "contrary to the fundamental conceptions of morality and justice" of the forum. The court respects the usual way of conducting mediation in the forum where the mediation takes place and would not invoke the public policy grounds lightly solely because it is conducted differently from the way it is conducted locally.

CASE No.3：Xiamen Xinjingdi Group Ltd v. Eton Properties Ltd & another
[2009] 4 HKLRD 353;
CACV 106/2008 & CACV 197/2008

I. Brief Facts

The 1st and 2nd Appellants, two Hong Kong companies, were the sole shareholders of Legend Properties (Hong Kong) Co Ltd ("**Hong Kong Legend**"), and part of the Eton Group. Hong Kong Legend wholly owned a Mainland company which owned land in Xiamen (the "**Property**").

The Applicant, a Mainland company, agreed to pay RMB 120 million to the Appellants for the right to develop, operate and to receive profits from the Property; and the Appellants agreed to transfer to the Applicant their shares in Hong Kong Legend and to deliver the Property to the Applicant (the "**Agreement**"). The Agreement also contained an arbitration clause.

The Appellants did not deliver the Property to the Applicant and purported to terminate the Agreement on the basis that performance would be contrary to PRC law. Consequently, the Applicant commenced arbitration proceedings in Beijing (the "**First Arbitration**") and an award (the "**Award**") was made in its favour ordering the Appellants to, *inter alia*, "continue to perform the agreement". The Applicant then obtained an *ex parte* enforcement order of the Award in Hong Kong (the "**Order**").

The Appellants applied to set aside the Order, arguing that enforcement should be refused as being contrary to public policy under the Arbitration Ordinance (Cap.341) ("**Arbitration Ordinance**") on the basis that performance was impossible because: (a) construction on the Property had commenced; and (b) a restructuring of the Eton Group, which was implemented during the course of the First Arbitration, had diluted and transferred their shares in Hong Kong Legend to their parent company. The judge refused to set aside the Order.

In the meantime, the Appellants sought from the arbitral body a determination (the "**Second Arbitration**") on whether the parties had been discharged from the Agreement. The arbitral body ruled against the Appellants on this.

By the time of the present hearing to deal with the Appellants' appeal against the judge's refusal to set aside the Order, the development of the Property had been completed and 99% of the units had been sold to third parties. The Appellants submitted that as performance was impossible, the Applicant was really looking at "further stages" remedies such as damages in lieu of or an account of profits rather than any rights in the Property itself; and offered an undertaking that they would commence further arbitration before the arbitral body for a determination of such alternative remedies (the "**Undertaking**"). Alternatively, it was said that the court could remit the matter to the

arbitral body so that directions could be obtained or adjourn the appeal pending such directions.

II. Issues

1. Whether it was impossible for the Appellants to perform the Agreement? ("**Issue 1**")

2. Whether, in light of issue 1, refusal to enforce the Award on public policy grounds can be justified? ("**Issue 2**")

3. Whether the court had jurisdiction to remit the matter to the arbitral body? ("**Issue 3**")

III. Analysis

Issue 1

The court reckoned the Undertaking was simply meaningless, given that the Appellants had had ample opportunity to raise squarely before the arbitral body the issue of impossibility of performance. The court was of the view that there was no rational explanation for their failure to do so except the very obvious one that the omission was intentional. The court rejected the Appellants' arguments that the construction on the Property having been commenced; that the dilution of shares as a result of the restructuring of the Eton Group and that most units of the Property having been transferred to third parties barred the Appellants from performing the Agreement. The court further found that they were calculated risks and self-inflicted, of which consequences the Appellants must bear. The court also remarked that the risk of imprisonment for contempt, which the Appellants raised, was entirely fanciful, since the Order did not specify any time for performance and a person who genuinely is unable to carry out the Order cannot be made liable for the contempt.

Issue 2

The court held that, in considering whether or not to refuse the enforcement of the Award on public policy grounds, the court does not look into the merits or at the underlying transaction. Its role is confined to determining whether such grounds existed for refusing to enforce the award because it would be contrary to public policy. The court's role should be as mechanistic as possible. Accordingly, the court ruled that impossibility of performance was not relevant at the registration stage of the Award and was not a sufficient reason to justify a refusal of enforcement under public policy grounds.

Issue 3

It was held that the court could not remit the matter to the arbitral body. Under Arbitration Ordinance, the court may enforce the Award or refuse to enforce it but there is no jurisdiction to remit.

IV. Decision

Appeal dismissed.

V. Significance

In considering whether to refuse the enforcement of the Award, the court does not look into the merits or at the underlying transaction. The court's role is confined to determining whether grounds for refusal of enforcement existed. On this basis, it was held that impossibility of performance is not a relevant factor at the registration/recognition stage of enforcement and, accordingly, it would not be a sufficient reason to justify refusal of enforcement on the grounds that enforcement would be contrary to public policy.

CASE No.4：Shandong Hongri Acron Chemical Joint Stock Company Limited v. PetroChina International (Hong Kong) Corporation Limited
[2011] 4 HKLRD 604
CACV 31/2011

I. Brief Facts

The Appellant as the buyer and the Respondent as the supplier contracted for the supply of a total of 3,937.448 tonnes of sulphur in exchange for purchase price of US$ 3,051,522.20.

The Appellant rejected 3,810,578 tonnes of the sulphur for incorrect specification of the same supplied. It claimed the return of the balance of the purchase price in the sum of US$ 2,953,198 in respect of the rejected sulphur.

Parties submitted their dispute before a tribunal of an arbitral body in the Mainland. The tribunal made a final award in favour of the Appellant, ordering that:

(a) The Appellant shall return 3,810.578 tonnes of sulphur to the Respondent;

(b) The Respondent shall return US$ 2,953,198 (being the transaction payment received) to the Appellant;

(c) The Respondent shall pay damages as well as miscellaneous fees and costs incurred by the Applicant, plus interest (for late payment, if applicable);

The Respondent's position was that repayment of the balance of the purchase price and payment of the other sums under items (b) and (c) above were conditional upon the return of the rejected sulphur to the Respondent "in the same status and quality" as and when the same was delivered to the Appellant.

In response to the Respondent's written application and enquiries, the arbitral body issued three letters ("**the Arbitral Body's Letters**"), the first two being the arbitral body's confirmation of the Respondent's interpretation of the award, with the third stating the tribunal's view that the first two were "supplementary explanations" of the award and formed part of it.

Neither the Respondent's letters requesting clarification with a view to the production of a supplemental award nor the arbitral body's responses contained in the second and third of the Arbitral Body's Letters were copied to the Appellant. The Appellant disagreed with the Respondent's interpretation of the award and sought leave to enforce items (b) and (c) of the award in Hong Kong. This was opposed by the Respondent who also applied for leave to enforce item (a) of the award. The judge in the Court of First Instance ruled in favour of the Respondent. Then, the Appellant appealed to the Court

of Appeal.

II. Issues

1. Whether, as a matter of award recognition, the court should "enter judgment in terms of the award, order or direction", having regard to s. 2GG(1) of the Arbitration Ordinance (Cap.341) (repealed) ("**Arbitration Ordinance**")? ("**Issue 1**")

2. Whether the obligations stated in items (b) and (c) above be conditional or dependent on item (a), in light of the wording of the award and the obligation of the enforcing court? ("**Issue 2**")

3. Whether the obligations under item (a) were independent of those under item (b) under the law of restitution? ("**Issue 3**")

4. Whether the Arbitral Body's Letters constituted a supplemental or additional award pursuant to Article 56 of the Arbitration Law of the PRC ("**Arbitration Law**") and / or the relevant provision of the Arbitration Rules of the arbitral body in the Mainland?("**Issue 4**")

5. Whether the questions about the validity of the Arbitral Body's Letters should have been dealt with by the relevant court in the Mainland, not the enforcement court in Hong Kong?("**Issue 5**")

III. Analysis

Issue 1

Citing authorities holding that award enforcement should be "almost as a matter of administrative procedure" and that there is an important policy interest in ensuring the effective and speedy enforcement of arbitration award, the court held that it should respect the plain intent of the award in question and the court is not entitled to go behind the award by exploring the reasoning of the tribunal or second-guessing its intention. Therefore, under s.2GG(1) Arbitration Ordinance, an award entered as a judgment had to be entered "in terms of the award" at the award recognition stage.

Issue 2

The court was of the view that, the Arbitral Body's Letters aside, it was plain that the award did not say that payment obligations under items (b) and (c) were conditional or dependent on those under item (a). Thus, in the context of enforcing items (b) and (c) by means of entering a judgment "in terms of the award", no such condition should be imposed. To do otherwise would be to alter, rather than to enforce, the award. By the

same token, there was no justification for imposing the further condition as to the status and quality of the sulphur.

Issue 3

The court rejected the Respondent's submissions that the obligations under items (a) and (b) were not independent ones since they dealt with a restitution situation for these reasons: first, the court should not second-guess the intention of the tribunal; second, the law of restitution may vary from one jurisdiction to another, and it is for the tribunal seized of the arbitration to apply the applicable law; third, even if one were to assume that return of the goods and repayment of the price already paid are not mutually independent of each other, it did not follow that the respective awards must be conditional on each other. The rights and obligations under the law of restitution must not be confused with awards and orders as means to give effect to those substantive rights and obligations.

Issue 4

The Arbitral Body's Letters did not constitute a supplemental or additional award pursuant to Article 56 of the Arbitration Law and / or the relevant provision of the Arbitration Rules of the arbitral body in the Mainland. Thus, the views expressed by the tribunal or in the Arbitral Body's Letters were simply inadmissible in the enforcement proceedings in Hong Kong.

Issue 5

The court rejected the Respondent's submissions that all questions about the validity of the Arbitral Body's Letters as supplemental awards should have been dealt with by the relevant court in the Mainland, not the enforcement court in Hong Kong for these reasons: first, the enforcement court did not have to accept every piece of paper placed before it that was said to be an award or supplemental award as such, despite glaring discrepancies between the description of what amounted to an award or supplemental award in the relevant law or rules and what the court found on the face of the so-called award or supplemental award; second, the enforcement court is entitled to look at its own public policy relating to enforcement of foreign or Mainland awards. In the present case, public policy in terms of the rules of natural justice were at issue so far as the second and third of the Arbitral Body's Letters were concerned.

IV. Decision

Appeal allowed.

V. Significance

Enforcement of arbitral awards should be "as mechanistic as possible". The enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitral tribunal or second-guess its intention. Hong Kong court as the enforcement court is entitled to determine whether a document constituted an award or a supplemental award, or a part thereof. The court is also entitled to decide whether or not to refuse enforcement of an award on the basis of its own public policy relating to enforcement of foreign or Mainland awards. Observance of the rules of natural justice, which the Arbitral Body's Letters in the present case concerned, is to be taken into account by the court.

CASE No.5：Guo Shun Kai v. Wing Shing Chemical Co Ltd
[2013] 3 HKLRD 484
HCCT 35/2012

I. Brief Facts

Pursuant to an arbitration between the Applicant and the Respondent administered by an arbitral body in the Mainland, an award was made against the Respondent (the "**Award**"). The Award required the Respondent to pay the Applicant: (1) compensation for economic loss in the amount of RMB 29,195,470.58 and interest thereon in the amount of RMB 12,293,716.33; (2) legal costs in the amount of RMB 500,000; and (3) costs of the arbitration proceedings in the amount of RMB 675,473 and costs of the arbitrators in the amount of RMB 134,574.

Thereafter, the Applicant obtained an order granting leave to enforce the Award in Hong Kong (the "**Order**").

The Respondent applied to the People's Court in the Mainland to set aside or dismiss the Award on the grounds that the Award exceeded the scope of the arbitration and the procedures of the arbitration were contrary to law. The Hong Kong court was of the view that the application was not an appeal on the merits of the underlying dispute.

Subsequently, the Respondent took out a summons (the "**Summons**") to set aside or vary the Order granting leave pursuant to Order 73 rule 10(6) of the Rules of the High Court (Cap. 4A) ("**RHC**"), which was the matter before the court in the present case.

II. Issues

1. Whether the court has jurisdiction to adjourn proceedings relating to the enforcement of a Mainland award? ("**Issue 1**")

2. What factors should a court take into account in considering the application for security upon adjournment of the Summons dealing with an application to set aside or vary the Order? ("**Issue 2**")

III. Analysis

Issue 1

In respect of the adjournment of proceedings, the court pointed out that the absence of provisions specifically on adjournment in relation to the enforcementof a Mainland award, of which equivalent provisions in relation to the enforcement of an ordinary award or a convention award are present in the Arbitration Ordinance, does not mean the court has no jurisdiction to adjourn enforcement proceedings on a Mainland award.

The court held that it had general and inherent power to regulate its own proceedings including adjournment, which power is presupposed in Order 73 rule 10A of the RHC

Issue 2

The court referred to principles set out in *Soleh Boneh International Ltd v Government of the Republic of Uganda* [1993] 2 LLR 208, where the English court decided to adjourn hearings and require the provision of security in the entire amount of the award pending the Swedish court's determination of whether the award was binding. On appeal of that case, the court considered two factors – the strength of the argument that the award is invalid, on a brief consideration by the court, as well as the ease or difficulty of enforcement of the award and whether enforcement would be made more difficult by movement of assets or by improvident trading if enforcement was delayed. The stronger the argument for invalidity of award, or the stronger the case for difficulty of enforcement as a result of delay in enforcement, the more likely the provision of security is ordered.

In light of the above principles, the court considered a number of aspects of the present case, including the fact the Respondent had not produced any documents stating grounds or merits of its application to the People's Court in the Mainland to set aside or dismiss the Award in support of its contention that it was "manifestly invalid"; the fact that the Respondent had changed its registered office; the fact that the Respondent had sold its industrial property, the fact that the Respondent's financial performance was deteriorating and shares in the Respondent company (described as obsolete asset) were sold by its parent company shortly after the Award was made; as well as the publicly announced total assets (approximately HK$45.04 million) and unaudited net liabilities (approximately HK$143.50 million).

IV. Decision

On the basis of the foregoing factors, and the fact that no submission on the specific amount of security that would be beyond the capacity of the Respondent was made, the court ordered adjournment of the Summons pending resolution of the application to the People's Court in the Mainland to set aside or dismiss the Award, and security in the sum of HK$20 million to be provided to protect against any deterioration of the prospects of successfully enforcing the Award in Hong Kong as a result of the adjournment.

V. Significance

The High Court of the HKSAR has the jurisdiction to adjourn hearings relating to the enforcement of a Mainland award and order provision of security by the Respondent.

As to whether the Respondent should be ordered to provide security to satisfy the award,

the court should consider two factors, first, the strength of the argument that the award was invalid. If the award was manifestly invalid, there should be an adjournment and no order for security; but if it was manifestly valid, there should either be an order for immediate enforcement or an order for substantial security. Second, the Court should consider the ease or difficulty of enforcement and the effect of any delay in enforcement, for example by the movement of assets or improvident trading.