

# Arbitral award set aside in rare Hong Kong judgment

The Hong Kong Court of First Instance has set aside a Hong Kong seated HKIAC arbitral award on the basis that the Respondent was not given proper notice or able to present his case.

While this may seem a departure from the usual pro-enforcement stance of the Hong Kong courts, it was given in exceptional circumstances where the Respondent had been arrested and detained incommunicado for the duration of the arbitration and did not participate in it in any way. Nonetheless, it does draw attention to the need to ensure that special care is given to the delivery of a Notice of Arbitration.

**The dispute in *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd* [2016] HKEC 2128 arose out of an arbitral award issued in March 2007 (the Award).**

Under the Award, the Respondent, Sun, was ordered to pay the Claimant (Gas), a wholly owned subsidiary of a Hong Kong listed company, damages in excess of HK\$4 million in respect of a failed joint venture. The Award also contained a declaration that Gas was entitled to withhold payment of more than HK\$29 million which it had withheld citing accounting irregularities.

Sun had been arrested in Shenzhen on 11 August 2005 and remained in custody until 6 March 2012, when all criminal charges against him were withdrawn. Sun was thereafter able to return to Hong Kong.

In 18 November 2005, at the time Sun was in detention, Gas commenced an arbitration against him without his knowledge. The arbitration proceeded in his absence. Sun said he only received the Award in May 2015 and

in October 2015 commenced proceedings to set aside the Award, on the grounds that he was not given proper notice of the arbitration and was unable to present his case. Sun also sought an extension of time to apply for the setting aside of the award.

## Proper notice

Gas's attempts to deliver the Notice of Arbitration (Notice) to Sun at three different addresses proved unsuccessful. The first address was apparently found not to exist. The Notice to the second was returned, indicating that Sun no longer worked there. The third address was that of Du, a colleague of Sun, whom Gas alleged had the authority to accept service of proceedings on behalf of Sun. The Court held that Sun had not given Du such an authority (see below).

Gas relied on Article 3(1) of the Model Law and Article 2 of the UNCITRAL Rules (Rules) to assert that the Notice should have been deemed to have been received.

## Key issues

- The judgment represents a rare departure from the pro-enforcement stance of Hong Kong's courts.
- The Court set aside the award as the Respondent in the arbitral proceedings had been unable to present his case.
- The Court could not agree that the Model Law was intended to derogate from principles of natural justice and fairness.
- The Court also granted the Respondent's application to make the set aside application out of time.

Article 2 of the Rules provides that *"any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at his habitual*

*residence, place of business or mailing address, or, if none of these can be found after making reasonable enquiry, then at the addressee's last known residence or place of business."*

The Court took the view that these "deeming provisions" were rebuttable presumptions that did not prevent a party from adducing sufficient and credible evidence to show that it had not in fact received the communication. The Court held that it "would offend fundamental rules of natural justice if a party is shut out entirely from presenting the evidence which can establish that he was never given actual notice of the arbitration".

Sun alleged that the authorisation given to Du had been forged. The Court found that there was a real prospect that it was forged but even if it was not, the explicit wording of the authorisation did not give Du sufficient authority to accept service of arbitral proceedings.

### Inability to present case

The Court ruled that even if Sun had received the Notice or any other documents, it was "hardly realistic to expect" that he would have been able to give instructions as to the conduct of the arbitration in Hong Kong from his place of detention in the PRC.

The error and conduct which had deprived Sun of the fair opportunity to consider the evidence and present his case was sufficiently serious and egregious to allow the Court to find that grounds to set aside had been established.

Mimmie Chan J also noted in her ruling that "fundamental principles of natural justice require a fair opportunity to be given to a person against whom claims are made, to answer and properly present his case against such claims". To do otherwise

would "be shocking to the court's conscience and our fundamental conceptions of justice."

Further, the Court saw "no just basis to exercise the court's residual discretion to recognise and enforce the award" since the lack of due process and the making of the Award was "repugnant to the court's notions of conscience".

### Out of time?

A critical issue was whether Sun's application to set aside the award should be time-barred.

Under Article 34(3) of the Model Law, an application for setting aside "may not be made after 3 months have elapsed from the date on which the party making that application had received the award".

Counsel for Gas argued that, on Sun's own evidence, the award had been received by him at the latest in May 2015 (when Sun's lawyer retrieved the Award from the files in a PRC court and sent it to Sun), yet the application was only made in October 2015, outside the three month period.

The Court found that on the proper construction of Article 34(3), the three month period was not mandatory and the Court has discretion to grant an extension of time for the application to be made to set aside the award. According to the Court, as a general rule this three month period should not be extended unless the applicant can establish good reasons to do so. The Court considered this case to be exceptional and granted Sun's application even though it was out of time.

### A rare case of setting aside

It is rare that Hong Kong courts set aside arbitral awards, especially on

the ground of a party's inability to present its case.

The traditional stance of the Hong Kong courts is exemplified by the Court of Appeal's decision in *Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* (in Liq) (No 1) [2012] 4 HKLRD1.

In that case, the Court of First Instance set aside an award on the ground that the applicant had been unable to present his case. The Court of Appeal, however, reinstated the tribunal's award, noting the wide case management powers of arbitral tribunals.

More recently, the Court of Appeal in *Tronic International Pte Ltd (Singapore) v Topco Scientific Co Ltd (Taiwan)* [2016] HKCU 1948, rejected a challenge to the award on the ground of inability to present one's case. The Court agreed with the first instance judge that, when considering an application to set aside an award under Article 34, the Court was not concerned with the correctness of the decisions reached by the tribunal, but rather by the fairness of the arbitral process.

These cases are far removed from *Sun Tian Gang*, in which the respondent in the arbitration had no proper notice that an arbitration had been commenced against him and, because of his detention, was not able to participate in any part of the arbitral process. It is not often that such circumstances arise in arbitration.

Despite the exceptional nature of the case, *Sun Tian Gang* draws attention to the need to ensure that special care is given to serving a Notice of Arbitration. It may not always be the case that provisions in arbitral rules deeming the receipt of written communications will prevail.

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