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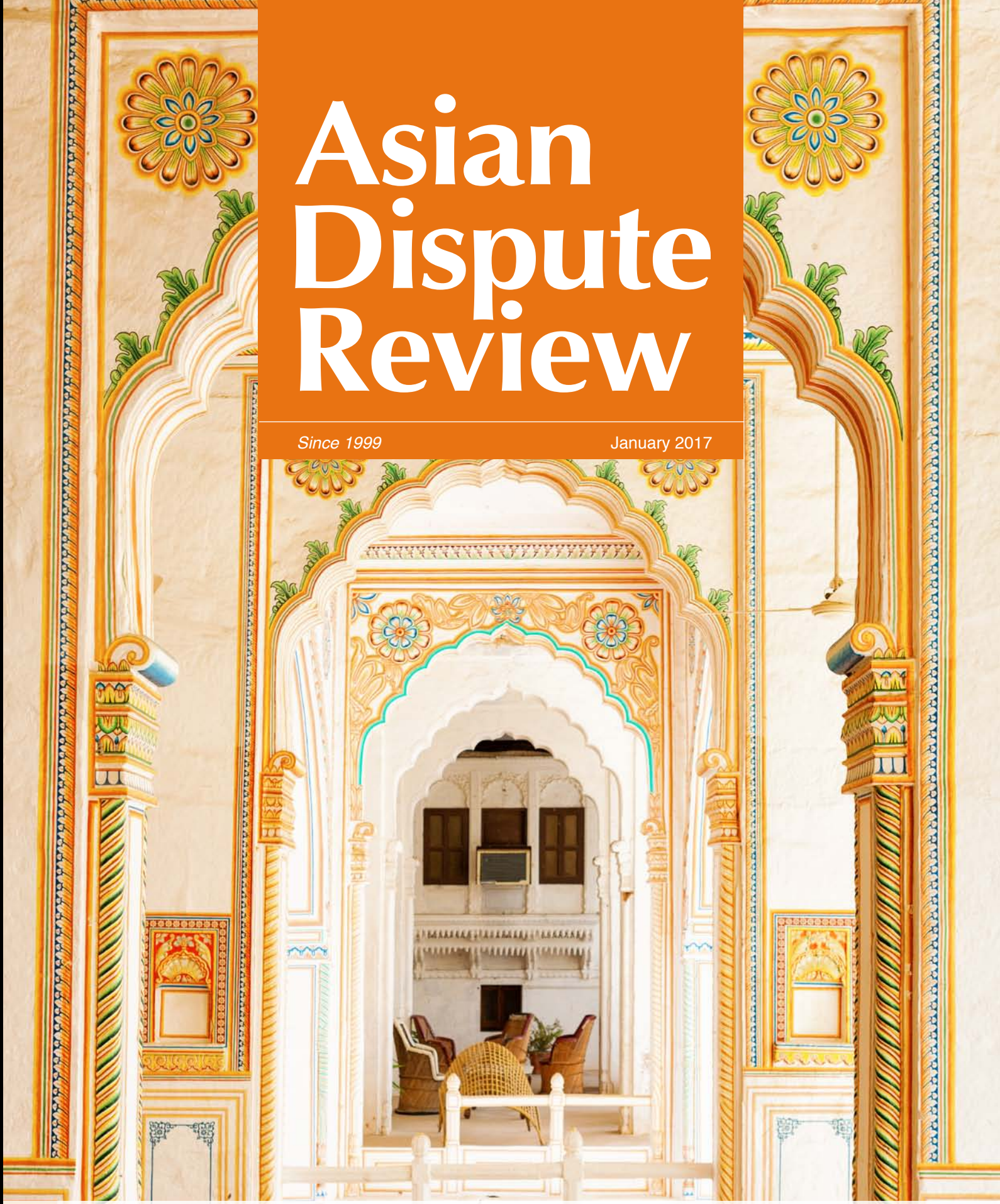

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EDITORIAL

2016 was a year of change for *Asian Dispute Review*. Our newly created Supervisory and Editorial Advisory Boards have strengthened the range and depth of content in the journal, as has our new Jurisdiction Focus section. In another first, the journal is now available online at Kluwer Arbitration.

This issue commences with an article in which **Jonathan Lee QC** considers how to manage expert evidence in arbitration, from the perspective of tribunals and parties. This is followed by an article by **Robert Pé** which reviews Myanmar's progress to date in reforming its international commercial and investment arbitration regimes. **John Fellas** and **Rebeca Mosquera** then explore practical considerations for Chinese parties when notifying respondents as to the commencement of an arbitration, before **Eric Ng** weighs up the recent debate on whether international arbitration hinders the development of commercial law. Our 'In-House Counsel Focus' article by **Ernest Yang** and **Valerie Li** considers Hong Kong's position on winding-up companies pursuant to arbitral awards.

Recent arbitration developments in South Korea are summarised by **Ben Hughes** in the Jurisdiction Focus section. Finally, **Robert Morgan** reviews a new edition of a text on Singapore's arbitration legislation.

We take this opportunity to wish our readers all the very best for 2017.

General Editors

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Pitfalls that Chinese Parties Should Avoid in Arbitration Against Non-Chinese Parties

John Fellas & Rebeca Mosquera

This article discusses and gives guidance to successful Chinese claimants in arbitrations against non-Chinese parties on avoiding pitfalls in arbitration proceedings that could lead to victory in those proceedings being denied by an overseas court at the enforcement stage or by a court of the seat of the arbitration in *vacatur* (setting aside) proceedings.

Introduction

In three recent cases from two different jurisdictions (the United States and Hong Kong), all of which involved Chinese parties, the courts either refused to confirm or vacated (set aside) arbitral awards rendered in favour of those parties, on the grounds that the losing party either (i) had failed to receive proper notice of the arbitration proceeding, or (ii) did not have a fair opportunity to present its case. In all three cases, the defects that the courts found to have undermined the awards would have been avoidable if the successful parties had taken appropriate steps at the outset.

The United States and the People's Republic of China (PRC) are both signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).[1]

(1) In the United States, the New York Convention was incorporated into federal law by the Federal Arbitration Act 1925, as amended.

(2) In the PRC, the New York Convention was incorporated by virtue of the Decision of the 18th Session of the Standing Committee of the 6th National People's Congress (NPC) of the PRC on China Joining the Convention on the Recognition and Enforcement of Foreign Awards, dated 2 December 1986.[2]

(3) Following the resumption of sovereignty over Hong Kong by the PRC on 1 July 1997, the PRC declared that the New York Convention would continue to apply to Hong Kong with regard to the enforcement of foreign arbitral awards. The New York Convention system currently applies by virtue of the Hong Kong Arbitration Ordinance (Cap 609) (the Ordinance).

The New York Convention requires courts to enforce international arbitral agreements and awards. Article V provides an exclusive set of narrow grounds pursuant to which the courts may refuse to enforce international arbitral awards. The grounds that are germane to this article are that:

(1) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or was otherwise unable to present its case (art V.1(b)); or
(2) the composition of the arbitral authority or arbitral procedure was not in accordance with the agreement between the parties or, failing such agreement, the law of the country in which the arbitration took place (art V.1(d)).

The UNCITRAL Model Law on International Commercial Arbitration (the Model Law),[3] which has not been adopted by the PRC, currently applies in Hong Kong by virtue of s 4 of the Ordinance. Article 34 of the Model Law provides that parties may file an application to set aside an award before a designated court in the forum State (in the case of Hong Kong, the High Court). For the purposes of this article, the relevant grounds are:

(1) lack of notice of appointment of an arbitrator or of the arbitral proceedings or the inability of a party to present its case (art 34(2)(a)(ii)); or
(2) the composition of the arbitral tribunal or the conduct of the arbitral proceedings are contrary to the effective agreement of the parties or, failing such agreement, the Model Law (art 34(2)(a)(iv)).

All three of the recent cases discussed in this article involved challenges relating to lack of proper notice of arbitration and the right of a party to present its case. Two of them (which involved Mainland China-seated arbitrations) were based on art V.1(b) and (d) of the New York Convention, while the third (which involved a Hong Kong-seated arbitration) was based on art 34(2)(a)(ii) and (iv) of the Model Law.

Commencing an arbitration: issuance of proper notice

By virtue of art V.1(b) of the New York Convention and art 34(2)(a)(ii) of the UNCITRAL Model Law, failure to provide proper notice is a ground for, respectively, refusal to enforce an arbitral award or vacate it (set it aside). To begin with, arbitration counsel should look at the arbitration clause or arbitration agreement as the starting point for drafting the Request for Arbitration. Some arbitration clauses or agreements will, however, be silent about the way in which notice should be given, though the issue may be addressed in the pertinent arbitration rules.

For example, art 21 of the Model Law states that:

> "[u]nless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute *commence on the date on which a request for that dispute . . . is received by the respondent*."[4] (Emphasis added)

Article 3 of the UNCITRAL Arbitration Rules (the UNCITRAL Rules) states that:

> "[t]he party or parties initiating recourse to arbitration . . . shall communicate to the other party or parties . . . a notice of arbitration . . . [and] [a]rbitral proceedings *shall be deemed to commence on the date on which the notice of arbitration is received by the respondent*."[5] (Emphasis added)

Similarly, art 11 of the China International Economic and Trade Arbitration Commission (CIETAC) Arbitration Rules (CIETAC Rules) deems that an arbitration commences "on the day on which the Arbitration Court *receives a Request for Arbitration*"[6] (emphasis added). Once CIETAC receives a Request for Arbitration, it will notify the respondent that an arbitration has been commenced against it.

(1) CEEG v Lumos: When we don't speak the same language

Background

In *CEEG (Shanghai) Solar Science & Technology Co Ltd v Lumos LLC* (*CEEG v Lumos*), the US District Court for the District of Colorado refused to confirm an arbitral award rendered in Beijing in favour of CEEG pursuant to the grounds set forth in art V.1(b) and (d) of the New York Convention. Specifically, the court held that the Chinese-language notice of arbitration sent by CEEG was not reasonably calculated to notify Lumos of the arbitral proceedings.

> "… [E]ven though the notice of arbitration [in *CEEG v Lumos*] technically complied with the CIETAC Rules, the US court declined to enforce the arbitral award."

The parties had entered into agreements for the sale and purchase of solar energy products. The co-branding agreement (Co-branding Agreement) between the parties contained provisions requiring that all documents exchanged by the parties be in the English language, and that any disputes would be subject to arbitration by CIETAC.[7] The parties also entered into a sales contract (the Sales Contract). The Sales Contract, which also provided for arbitration under the CIETAC Rules, did not contain a choice of language provision, though it did provide that its English version would govern the parties' relationship.[8] A dispute arose out of the Sales Contract and CEEG filed for arbitration with CIETAC,[9] which delivered the notice of arbitration to respondent Lumos. Although all prior communications between CEEG and Lumos had been in English, the notice of arbitration sent to Lumos was in Chinese.[10]

As previously stated, the Sales Contract did not have a choice of language provision. Article 81.1 of the CIETAC Rules provides:

> "[w]here the parties have agreed on the language of arbitration, their agreement shall prevail, [but] in the absence of such agreement, *the language of arbitration to be used in the proceedings shall be Chinese*."[11] (Emphasis added)

Thus, even though the notice of arbitration technically complied with the CIETAC Rules, the US court declined to enforce the arbitral award.

The court held that the Co-branding Agreement was the governing agreement between Lumos and CEEG[12] and, because the notice of arbitration was sent to Lumos in the Chinese language, CEEG did not give Lumos proper notice of the Chinese arbitration which resulted in Lumos being deprived of the opportunity to participate meaningfully in the selection of arbitrators on the panel."[13] The court therefore held that the CIETAC arbitral award could not be enforced, under both art V.1(b) and (d) of the New York Convention.[14] On appeal, the US Court of Appeals for the Tenth Circuit confirmed the US District Court's decision.[15]

Lessons learned and recommendations

CEEG v Lumos cautions Chinese parties conducting business with US counterparts that may later seek enforcement of an arbitral award in the United States. CEEG could have avoided the improper notice issue simply by sending an English translation of the notice of arbitration.

> "CEEG could have avoided the improper notice issue simply by sending an English translation of the notice of arbitration."

(2) Sun Tian Gang v Hong Kong and China Gas: Respondent imprisoned while arbitration proceedings were under way; sufficient grounds to hold that 'deeming provisions' cannot derogate from the fundamental principles of natural justice

Background

In *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd (Sun Tian Gang)*,[16] the Hong Kong Court of First Instance set aside an arbitral award on the grounds set forth in art 34(2)(a)(ii) of the Model Law.[17] The court held that respondent Sun was not given proper notice of the arbitral proceedings and was unable to present his case. Mimmie Chan J cautioned:

> " … [T]he primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitration agreements and awards[.] ... This, however, should not in any way be seen to undermine the importance of due and fair process, and the fundamental safeguards which must be observed, to ensure that no injustice arises out of the arbitral process or the award."[18]

"… [T]he primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitration agreements and awards[.] ... This, however, should not in any way be seen to undermine the importance of due and fair process, and the fundamental safeguards which must be observed, to ensure that no injustice arises out of the arbitral process or the award." (*Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd*, per Mimmie Chan J at [1])

In the *Sun Tian Gang* case, the dispute stemmed from an agreement (the Agreement) under which Sun sold his shares in Sky Global Ltd to a British Virgin Islands subsidiary of Hong Kong and China Gas International Ltd (HK and China Gas). The Agreement was governed by Hong Kong law and

the arbitration clause provided that all disputes in connection with the Agreement were to be resolved by arbitration in Hong Kong by the Hong Kong International Arbitration Centre (HKIAC). HK and China Gas brought a claim against Sun and sent the notice of arbitration to him at three different addresses. While all of the three attempts at delivery were made, Sun never received the notice of arbitration because he had been arrested in Shenzhen, in the Guangdong Province of the PRC. He was later transferred to Jilin, another city in the Mainland.

Under art 3(1)(a) of the Model Law, unless the parties otherwise agree,

> "any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address. …"[19]

If a respondent is not found at his place of business or other specified mailing address,

> "a written communication is deemed to have been received if it is sent to the addressee's *last-known place of business*, habitual residence or mailing address. …"[20] (Emphasis added)

In both instances,

> "the communication is deemed to have been received on the day it is *so delivered*."[21] (Emphasis added)

HK and China Gas sent the notice of arbitration to Sun's communication address specified in the Agreement. Because it was unable to effect service using that address, it then sent the notice to the respondent's last-known business address, only to learn that Sun no longer worked there.[22] Under the Model Law, these attempts could be viewed as a reasonable effort by HK and China Gas to try to effect notice of arbitration on Sun by means that provided a "record of the attempt to deliver it."[23] Mimmie Chan J held, however, that neither of these notices of arbitration had been effectively delivered.

> "*Sun Tian Gang* is an example of how effective service of a notice of arbitration on a respondent and assurance that the parties can present their case before the tribunal are paramount requisites to avoiding grounds for setting aside (or denying enforcement) of an arbitral award."

On a third attempt, HK and China Gas delivered the notice of arbitration to one Mr Du who, it argued, was Sun's agent. The judge rejected that argument, however, because the letter purportedly authorising Mr Du to be Sun's agent was allegedly signed by both gentlemen days after Sun had been imprisoned. The record indicated that Sun could not have signed that letter while in jail because he apparently did not have contact with anyone. The record further demonstrated that HK and China Gas may have been aware that Sun was in jail in Jilin,[24] but concealed this information from the arbitral tribunal,[25] letting it proceed with the arbitration.[26]

Lessons learned and recommendations

Sun Tian Gang is an example of how effective service of a notice of arbitration on a respondent and assurance that the parties can present their case before the tribunal are paramount requisites to avoiding grounds for setting aside (or denying enforcement) of an arbitral award.

(3) Ji'An Group v WestRock: Concealed arbitral proceedings?

Background

In *Ji'An Group Co Ltd v Rock-Tenn CP LLC (Ji'An v WestRock)*,[27] the US District Court for the Northern District of Georgia refused to enforce an award under art V.1(b) and (d) of the New York Convention because it found that WestRock had not been given proper notice of the arbitral proceedings.

Disputes arose in 2011 out of four supply contracts (the Supply Contracts) entered into by the parties. The Supply Contracts contained an arbitration clause providing for arbitration under the CIETAC Rules. As previously noted, under the CIETAC Rules, arbitration proceedings are commenced "on the day on which the Arbitration Court receives a Request for Arbitration",[28] following which the institution then sends the notice of arbitration notifying the respondent that arbitration has been commenced against it.

In this case, the Supply Contracts did not contain a choice of language provision. The issue was not so much the language, however, as the fact that respondent WestRock had proved that it never received any notice of arbitration in any language. What is more, WestRock argued that it was unaware that CIETAC arbitral proceedings were in fact under way until it received notice that a petition for enforcement of the award was filed by claimant Ji'An in the United States.[29]

Ji'An contended that CIETAC had sent letters notifying WestRock of the arbitral proceedings. The District Court concluded, however, that Ji'An failed to prove that WestRock had in fact received the letters because the letters showed "no signature in the 'accepted by' box, ... [and] Ji'An [had] not explained when or how it obtained the unsigned documents[.]"[30] The District Court stressed that "[d]ue process required that WestRock have notice *reasonably calculated* to apprise it of the pending arbitration" (emphasis

added).[31] Further, the court agreed that because it had not been given proper notice, WestRock had also been deprived of the opportunity to participate meaningfully in the selection of an arbitrator. The alleged correspondence from CIETAC also demonstrated that the parties had to appoint CIETAC's Chairman jointly to designate the sole arbitrator; WestRock proved, however, that it was never contacted by Ji'An or the arbitrator for these purposes.

The District Court denied the petition to enforce the arbitral award on the grounds that (i) WestRock did not receive notice of the arbitration,[32] and (ii) because it was given no proper notice, WestRock had been deprived of its right to select the arbitral tribunal.[33]

Lessons learned and recommendations

It does not appear that the claimant in *Ji'An v WestRock* made any reasonable efforts to notify the respondent of the pending arbitration. It is important to stress that the parties should not have simply relied on CIETAC delivering the notice of arbitration to the respondent. If the party to whom the institution has sent the notice of arbitration does not make an appearance, the claimant should confirm with the institution that the notice was in fact sent, or in any case send the notice itself by a method which it can use to prove service, such as FedEx.

"It does not appear that the claimant in *Ji'An v WestRock* made any reasonable efforts to notify the respondent of the pending arbitration. It is important to stress that the parties should not have simply relied on CIETAC delivering the notice of arbitration to the respondent."

Conclusion and recommendations

Historically, US and Chinese courts have strongly favoured arbitration and have recognised and enforced awards made by arbitral tribunals. As cautioned by Mimmie Chan J in the *Sun Tian Gang* case, however, this policy favouring arbitration and the recognition and enforcement of international arbitral awards should not undercut the stand that courts must take in assuring that due and fair process are observed where there are in fact grounds to set aside or deny the enforcement of an award.[34]

The following key points emerge from the cases discussed.

(1) Courts may well refuse to enforce an award on the ground that a party was not properly notified of the arbitral proceedings if the language of the notice of arbitration is not in that party's native language. In connection with this point, the courts will give special attention to the parties' previous dealings and trade usages.

(2) Where more than one contract governs the same transaction, counsel should ensure that the arbitration clause or arbitration agreement in each contract is consistent and does not contradict the other clause(s) or agreement(s).

(3) Apart from making reasonable efforts to notify the respondent of the arbitration proceedings, the claimant should be prepared to offer evidence that the respondent was in fact served with notice of arbitration, such as a signed return receipt.

1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, 10 June 1958, 330 UNTS 39, available at http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.

2 *Editorial note*: See also the Circular of the Supreme People's Court on Implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China, Fa (Jing) Fa [1987] No 5 (10 April 1987), available at http://www.newyorkconvention.org/implementing+act+-+china. The Circular references the decision of the NPC.

3 UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006, available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

4 *Ibid.*

5 UNCITRAL Arbitration Rules (2010 Edn), available at https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

6 CIETAC Rules (2014 Edn), adopted 4 November 2014, available at http://www.cietac.org/Uploads/201607/5795f078aa6d5.pdf; see also the Hong Kong International Arbitration Centre Administered Arbitration Rules (2013) (HKIAC Rules), art 4.2 ("An arbitration shall be deemed to commence on the date on which a copy of the Notice of Arbitration is received by HKIAC."), available at http://www.hkiac.org/sites/default/files/ck_filebrowser/PDF/arbitration/2013_hkiac_rules.pdf.

7 *CEEG (Shanghai) Solar Science & Technology Co Ltd v Lumos LLC*, 14-CV-03118-WYD-MEH, 2015 WL 3457853, at p 1 (D Colo, 29 May 2015), affd *sub nom CEEG (Shanghai) Solar Science & Technology Co Ltd v Lumos LLC*, 829 F 3d 1201 (10th Cir, 2016).

8 *Ibid* at pp 2, 11 n 2.

9 *Ibid* at pp 2-4.

10 *Ibid* at pp 2-3.

11 CIETAC Rules, art 81.1.

12 Note 7 above, at p 5.

13 *Ibid*.

14 *Ibid* at p 6.

15 See note 7 above.

16 *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd* [2016] 5 HKLRD 221 (Court of First Instance, Hong Kong).

17 *Editorial note*: Mimmie Chan J also made comparative reference to the similar but not identical ground for refusal of enforcement under art 36(1)(a)(ii) of the Model Law: see at [38]. This provision does not, however, apply in Hong Kong: see s 83 of the Ordinance.

18 *Ibid* at [1].

19 Note 3 above, art 3(1)(a).

20 *Ibid*.

21 *Ibid*.

22 Note 16 above, at [20]-[41].

23 Note 3 above, art 3(1)(a). *Editorial note*: See also art 3(4) of the UNCITRAL Rules.

24 Note 16 above, at [43].

25 *Ibid* at [15].

26 *Ibid* at [49].

27 *Ji'An Group Co Ltd v Rock-Tenn CP LLC*, No 1:15-CV-3258-MHC, 1, 1-2 (D Ga, 22 November 2016).

28 Note 6 above, art 11.

29 Note 27 above, at p 3.

30 *Ibid* at p 8.

31 *Ibid* at p 7 (citing *Generica Ltd v Pharmaceutical Basics Inc*, 125 F 3d 1123, 1129-30 (7th Cir, 29 September 1997)).

32 Note 1, art V.1(b).

33 *Ibid*, art V.1(d); see also note 27 above, at pp 9-10.

34 *Editorial note*: See note 18 above.