HCCT 43/2024
[2025] HKCFI 855

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTRUCTION AND ARBITRATION PROCEEDINGS
NO 43 OF 2024

IN THE MATTER of the Arbitral Award of the Asian International Arbitration Centre

and

IN THE MATTER of Section 84 of the Arbitration Ordinance (Cap 609)

and

IN THE MATTER of Order 73 r10 of the Rules of the High Court (Chapter 4A)

BETWEEN

CC — Plaintiff

and

AC — Defendant

Before: Hon Mimmie Chan J in Chambers
Date of Hearing: 23 January 2025
Date of Decision: 27 February 2025

DECISION

Background

1. On 13 June 2024, this Court granted leave to the Plaintiff to enforce an arbitral award dated 31 January 2024 ("**Award**") made in an arbitration commenced in the Asian International Arbitration Center ("**Arbitration**") ("**Enforcement Order**"). The Award was for the Defendant to make payment to the Plaintiff of a sum of Singapore $100,000 and a further sum of US $118,750, and costs of US $82,530.98.

2. On 2 July 2024 the Defendant applied to set aside the Enforcement Order on the grounds that the Defendant was not given notice of the appointment of the arbitrator or of the arbitral proceedings, and was unable to present its case; and that enforcement of the Award would be contrary to public policy. The ground of public policy was premised on the lack of proper notice of the arbitral proceedings and the Defendant's inability to present his case as a result thereof.

3. The underlying facts of the dispute between the parties are not material. Suffices it to say that the Defendant is a securities company in Hong Kong which is licensed under the Securities and Futures Ordinance, and the Plaintiff is an individual residing in Singapore. The parties entered into 3 Master Service Agreements ("**Agreements**"), respectively dated 29 August 2018, 30 November 2018 and 15 August 2020. Under the Agreements, sums of money were paid by the Plaintiff to the Defendant, and the Defendant was to manage and administer a trust fund to generate returns which were to be paid

to the Plaintiff monthly. The Plaintiff claims that the Defendant was in breach of the Agreements by failing to pay various sums to the Plaintiff.

4. On 16 February 2023, the Plaintiff commenced the Arbitration by serving a Notice of Arbitration ("**Notice**"). The Notice was served on the Defendant in the following manner:

(1) by registered mail to Unit 1730, 17th floor Silvercord Tower 2, 30 Canton Road, Tsim Sha Tsui, Kowloon ("**Silvercord Address**");

(2) by registered mail to Unit 1605, 16th floor Saxon Tower, 7 Cheung Shan Street, Cheung Sha Wan, Kowloon ("**Saxon Address**");

(3) by email to enquiries@asiacornerstone.com.hk "**General Email Address**"); and

(4) by email to mi@marcusliew.com ("**mi Marcus Email Address**").

5. It is indisputable, that the Silvercord Address was stated in the Agreements as the Defendant's address, and specifically its "principal address".

6. Further, it is not disputed that clause 12.1 of each of the Agreements provides for service of notices, requests or demands under the Agreements, and the clause states that any such notice shall be in writing and "shall be deemed to be sufficiently served" if sent by the party "by registered post addressed to the other party's address hereinbefore mentioned" in the Agreements (namely the Silvercord Address in respect of the Defendant). Clause 12.1 provides that the notice in such a case shall be deemed to have been received upon the expiry of a period of 2 days of posting of the registered letter.

7. The Defendant cannot dispute that the Silvercord Address was the address it stated in the Agreement as its principal address, but it claims that the Silvercord Address was its registered office address between 7 November 2017 and 22 October 2018 only. The Saxon Address was the Defendant's registered office address from 22 October 2018 to 14 October 2022, and from 14 October 2022 until the present, its registered office address is at Room 521, 5th floor, KT 336, 336 Kwun Tong Road, Kwun Tong, Kowloon ("**KT Address**"). These are the Defendant's respective addresses as registered at the Companies Registry in Hong Kong.

8. The Defendant claims that when the Notice was issued on 16 February 2023, its registered office address had already changed to the KT Address. It claims further that by 16 February 2023, its tenancy at the Silvercord Address had already expired (on 31 May 2018), and that its tenancy at the Saxon Address had also expired on 28 October 2022.

9. For its "official" email address at the Public Register of the Securities and Futures Commission, the Defendant claims that it had 3 different emails, one used prior to September 2021, one from September 2021 to June 2023, and one from June 2023 to the present, all of which are *different* to the General Email Address and the mi Marcus Email Address.

10. On the Defendant's case, since its registered office address had since October 2022 been the KT Address, it was wrong for the Plaintiff to state in the Arbitration and in these proceedings that the Defendant had an address at Saxon Tower. It further claims that at the time when the Notice was issued (in February 2023), the Defendant had no control of or access to either the

Silvercord Address or the Saxon Address, and that the Notice sent by registered post to the Silvercord Address and the Saxon Address could not have reached the Defendant. It claims that it had not received any letter sent to these addresses.

11. As the Plaintiff has highlighted, it is clear that on the Defendant's own admission, at the time when the Agreements were signed (in August 2018, November 2018 and August 2020) its tenancy at Silvercord Tower had already expired (in May 2018) but it still put the Silvercord Address as its "principal address" in all of the 3 Agreements, for effective service under clause 12.1. Emphasis was made of the fact that the Agreements were all prepared and drafted by the Plaintiff. By the time of the second of the 3 Agreements, the Saxon Address had already been used as the Defendant's registered office address but it was not stated in the 2nd and 3rd Agreements to be the address for service. The Defendant chose instead to insert the Silvercord Address as its stated address, and as its "principal address", knowing that clause 12.1 of the Agreements it prepared refers to service at the stated address to be "deemed to be sufficiently served".

12. The Defendant maintains that it had not received the Notice nor any documents sent by the Plaintiff to the Silvercord Address, the Saxon Address, the General Email Address and the mi Marcus Email Address. The explanation offered is that in October/November 2022, there had been a change of management of the Defendant, when one of the directors ceased to be a director on 18 November 2022, and another director Mr L resigned on 8 December 2023. All other employees ceased to be employed or were laid off due to the change of management and contemplated closure of the Defendant's business. Because of the change of personnel, the Defendant now has no

records of the existence or details of the transactions under the Agreements, and the Defendant no longer has any employee or agent who has knowledge of, or had ever used or had access to the General Email Address or the mi Marcus Email Address. The Defendant claims that the General Email address might have been tied to the Defendant's website www.asiacornerstone.com.hk ("**Website**"), but as a result of the change of management and personnel in October/November 2022, no payment had been made to maintain the Website or the domain name, and no updates had been made to the Website, which ceased to be operable and accessible to the Defendant in around June 2023 as a result of non-payment.

13. The Plaintiff's position is that these are all internal matters and problems of the Defendant, of which the Plaintiff had neither knowledge nor control, and that these alleged problems which led to the Defendant's alleged ignorance of the service of the Notice upon it cannot be accepted as valid or good reasons, nor be sufficient to discharge the burden of proof which is placed squarely on the Defendant in an application to set aside the Enforcement Order, to show that it had no proper notice of the arbitral proceedings.

The notice requirement

14. Under section 86(1) of the Arbitration Ordinance ("**Ordinance**"), enforcement of an award "***may***" be refused if the person against whom it is invoked (ie the Defendant in this case) proves that he was not given "***proper***" notice of the proceedings or of the appointment of the arbitrator. As this Court emphasized in *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd* (2016) 5 HKLRD 221, "due and fair notice" of proceedings should be given to the parties and what the Ordinance requires is "proper" notice. Any presumption

or deemed notice may be rebutted by credible evidence that no proper notice had in fact been received by the party, but the burden of establishing this lies squarely on the party seeking to invoke the ground.

15. In this case, Counsel for the Plaintiff has referred to various authorities to highlight the fact that under the Model Law, "proper notice" does not necessarily mean actual notice.

16. *In OUE Lippo Healthcare Ltd v David Lin Kao Kun* [2019] HKCFI 1630, Coleman J held:

> "The concept of 'proper' notice may be different from 'actual notice' and brings into play questions of fairness. Proper notice is usually concerned with assessment of whether the notice is likely to bring the relevant information to the attention of the person notified. That may take into account any contractually agreed notice provisions, any agreed dispute resolution mechanism and relevant institutional rules. It is a question of fact." (Emphasis added)

17. In Gary Born's *International Commercial Arbitration* (3rd edition), the learned commentator observed that:

> "Article V(I)(b) can also be satisfied by proof that a means of notification reasonably required to provide notice was employed (ie proper notice) and does not require proof that the award-debtor received actual notice. For example, notice to an authorized representative or a registered or contractually-specified address has been held adequate (or 'proper') notice even where the party in question denies actual receipt." (Emphases added)

18. In *DBX v DBZ*, SICC No 10 of 2023 (15 November 2023), the Singapore International Commercial Court had the following observation on the service of "proper notice":

> "A sufficient basis for these findings is that the BVI address was ACo's registered address and the 163 email address was a functioning email address, used by A on behalf of ACo. In any event, the various addresses are given in the Client Information Statement …. The purpose of the Client Information Statement was to tell RCo the means of communication with ACo, and with A as a person giving instructions in relation to the Facility and the Account, to which the Guarantee must be added as a part of the provision of the Facility. The observations in *Re Shanghai Xinan Screenwall Building & Decoration Co Ltd* [2022] 5 SLR 393 ("Re Shanghai") at [32], holding that that delivery of a notice of arbitration to the address stated in the contract between the parties was proper notice of the arbitration, are applicable:
>
> Thirdly, the address to which the various documents were delivered was the address indicated in the Contract. Where an address is given in a contract, it is a simple inference that the address has been included to facilitate communication between the parties. Thus, in the absence of any manifestation of a contrary intention, service of a notice of arbitration in respect of that contract at that address will usually amount to proper notice of the arbitration unless prior to the date of service the respondent has notified the claimant of a change of address." (Emphasis added)

19. The Ontario Supreme Court of Justice also held in the case *Tianjin Dinghui Hongjun Equity Investment Partnership v Sha Du & Ran Du* (Ontario Supreme Court of Justice, 20 March 2023) as follows:

> "Proper notice' under the Model Law has been held to mean notice that is reasonably calculated to inform the party of the arbitral proceedings and give them an opportunity to respond. It does not require actual notice: see *Tianjin v Xu*, 2019 ONSC 6 to 8, at paras 31, 43, citing *Tianjin Port Free Trade Zone International Trade Service Co Ltd v Tiancheng International Inc*, 2018 WL 4502497 (CD Cal 2018)."

The Court found in that case that where an address was provided by the defendant as a mode of service, holding parties to the contracts is not a violation of due process.

20. Counsel also referred to the decision of the Dresden Oberlandesgericht in the Judgment of 15 March 2005, 11 Sch 19/05, cited in Born's *International Commercial Arbitration,* where the court denied that there was any obligation on the part of the arbitral tribunal to make further inquiries as to the current address of the award-debtor's general manager, as the arbitration agreement itself imposed an obligation on the parties to inform their counterparty of changes in the address specified in the contract.

Was there proper notice served in this case?

21. The Silvercord Address was the address stated for the Defendant in the Agreements dated 2018 and 2020 for service of notices, requests or demands required to be served by either party on the other under the Agreements.

22. Clause 12.2 of each of the Agreements specifically states that "any change of address by either party shall be communicated to the other".

23. There is no dispute, that at no time did the Defendant notify or communicate to the Plaintiff that its registered or principal address or its address for service at Silvercord Tower had changed, to the Saxon Address in October 2018, or to the KT Address in October 2022.

24. When a party states an address in a contract for the specific and stated purpose of service of notice and documents upon it as required under a contract, its intention and agreement must be that documents sent in the prescribed manner to the stated address can and will be brought to its notice and attention. There is no other purpose for the address to be stated. Its counterparty is entitled to assume that the purpose of the provision can be

achieved, and has no reason to doubt that the address stated in the contract for effective service is not correct.

25. All the authorities cited by the Plaintiff are clear, that where the parties have agreed upon the means of service, such agreement shall prevail, the rationale being that the parties had specifically and consensually stated the manner by which and the address to which documents and notification should be served upon them, and they must have agreed and acknowledged that documents and notification sent to the address stated would be received by them, or would be brought to their notice even if they might not be at the address indicated. At the very least, a party would have knowledge that documents and notification **would** be sent to the address it indicated, and in the manner it specified, such that the party should take the necessary steps to ensure that the documents and notification sent and dispatched in the agreed manner **would** be brought to its notice and attention. Leaving aside the question of whether a party would for its own reasons deliberately state an incorrect address for service - if a party ignores the agreed contractual provisions for service, turning a blind eye to the duty to notify its counterparty of changes in its address for service, or if it takes the risks of ignoring such provisions, then it has no ground to complain.

26. In the present case, the Notice was sent by registered post addressed to the Defendant at the Silvercord Address, being the principal address stated in the Agreements for service of notices under clause 12.1. The Defendant never notified the Plaintiff that at the time of the 1st Agreement the tenancy at the Silvercord Address had already expired, or that the Silvercord Address was no longer to be used. Nor did the Defendant at any later stage after August 2018 inform the Plaintiff pursuant to clause 12.2 of the

Agreements that there was any change of its address for communication or service of documents. In my judgment, the Notice sent to the Silvercord Address as stated in the Agreement is deemed under clause 12.1 to have been received by the Defendant upon the expiry of 2 days of posting of the Notice. There is no other requirement under clause 12 for the proof of actual delivery to the Silvercord Address, as the Defendant contended. Suffices it to say that on the Plaintiff's evidence, the Notice had been posted, and had **not** been returned.

27. In the case of *Sun Tian Gang v Hong Kong & China Gas (Jilin) Ltd* which is relied upon by the Defendant in its contention that deemed service can be rebutted by evidence, this Court actually held (at paragraphs 32 and 33 of the reported judgment) that the applicant in the setting aside application cannot rely on its own breach of the contractual service provisions or its failure to communicate its changed address for service, to claim that the relevant document had not been validly served at the contractual address for service. For the same reason, my judgment in this case is that the Defendant cannot rely and claim any right or advantage arising in consequence of its own breach of the express provision of clause 12.2 of the Agreements.

28. Under clause 12.1, by specifying the Silvercord Address as the Defendant's principal address for notification and service of documents, the parties contemplated and agreed that service there was likely to bring the relevant Notice to the attention of the Defendant. By using the agreed mode of service (by registered post sent to the Silvercord Address), the Defendant had employed a means which the parties had calculated to provide notice to the Defendant. The manner of service satisfies all the criteria considered in the authorities cited at paragraphs 16 to 20 above.

29. As Counsel for the Plaintiff highlighted, the Plaintiff in this case had made all reasonable endeavors to bring the Notice to the notice of the Defendant, by attempting to effect service by means other than in the manner and to the address set out in clause 12.1. This is relevant to the consideration of whether the Plaintiff had taken all the steps reasonably calculated to apprise the Defendant of the arbitration proceedings (the observation made by the US Court in *Tianjin Port Free Zone Trade International Trade Service Co Ltd v Tiangcheng International Inc* 2018 WL 450-2497). I agree that the Plaintiff, in all fairness to the Defendant, had taken all reasonable endeavors to bring the Notice to the attention of the Defendant, by attempting service at the Saxon Address, and by email to the General Email Address and the mi Marcus Email Address.

30. The Plaintiff had located the Saxon Address from the Defendant's own official Website. If the Defendant, for its own reasons, had failed to maintain or update its official Website which is open and accessible to the public and its own customers, and had allowed the Saxon Address to remain there despite the fact that, as the Defendant claims, it no longer was the Defendant's registered office address after 14 October 2022, then this cannot be the concern or fault of the Plaintiff.

31. The same applies to the General Email Address, which was shown in the Defendant's own Website. The Plaintiff cannot be blamed for not knowing that the Defendant no longer had access to its Website, nor had any staff to maintain or check the General Email Address for incoming communications.

32. I accept the Plaintiff's submissions, that the Defendant cannot seek to rebut the deeming provision for service under clause 12.1 of the Agreements, by alleging that it had not in fact received the Notice sent to the Silvercord Address, or the Saxon Address, or the General Email Address, or the mi Marcus Email Address, simply because it had failed to notify the Plaintiff of its changed registered office address, or because it failed for its own reasons to access or check the emails sent to its addresses notified to the public on its own Website. As an illustration, if a party states an office address for service of documents, it lies ill in its mouth to complain that it did not have *actual* notice of letters which were actually delivered to the address, left at the counter, but which the party never took or opened to check their contents.

33. Further, as the authorities show, any presumed or deemed receipt can only be rebutted by appropriate, sufficient and credible evidence of actual non-receipt (*DBX v DBZ* at para 97, *Sun Tian Gang* at para 37).

34. In the present case, the Defendant alleges that there was in fact no valid mi Marcus Email Address, pointing to the fact that the Defendant had never used it, and that its former director L's email address was "ml@marcusliew.com", and not the "mi@marcusliew.com" shown in the mi Marcus Email Address. In an unsworn document, L also alleged that he had not received the Notice. However, these are discredited by the Plaintiff's evidence.

35. The mi Marcus Email Address was discovered from the website of the Securities & Futures Commission, where a letter addressed to the Defendant for the attention of Mr L at the mi Marcus Email Address could be seen. The Defendant sent the Notice to that email address in February 2023. To

ensure that the mi Marcus Email Address was functioning, the Plaintiff had sent a test email to that address on 24 April 2023 at 15:22, with the message "Hi Marcus, Did you see the notice?" In response, the Plaintiff received a notification at 15:55 on 24 April 2023, which read:

> "mi@marcusliew.com read your email 33 minutes after it was sent."

36. The fact that on the Defendant's evidence, the mi Marcus Email Address could no longer be accessible, or there was no user of the email, on **7 October 2024** is irrelevant to the question of whether the Notice sent to the mi Marcus Email Address in February 2023 was or could have been received then.

37. In conclusion, I do not find the Defendant's claim of non-receipt to be credible, or reliable. In my judgment, there was proper service of the Notice on the Defendant. It was entirely the Defendant's own fault if it had not actually received the Notice sent to the contractual address for service at the Silvercord Address, by inserting in the Agreements an address which had been changed, and by failing to notify the Plaintiff of its change in address, as it was obliged to do under clause 12.2 of the Agreements.

38. I do not accept the reasons proffered by the Defendant, as to why it could not receive the Notice sent to all of the addresses of the Defendant in this case. It was entirely the Defendant's own fault for not maintaining and accessing its own emails and Website, if it failed to receive notification of the commencement of the arbitral proceedings, the appointment of arbitrator and the issue of the Award.

39. I am not satisfied that the Defendant has proved that it was not given proper notice, and was unable to present its case as a result. Even if the

ground set out in section 86(1)(c) was established, the Court has a residual discretion to enforce the Award (*Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) to HKCFAR 111, 136A-B). On the facts and evidence of this case, I do not consider that enforcement should be refused when it is the Defendant's own fault in specifying an incorrect and outdated address for service in the Agreements, in ignoring emails sent to its advertised email addresses, and in failing to maintain its Website and email addresses. It was also clearly in breach of the Agreements when it failed to notify the Plaintiff of its change of registered office address for service of documents under the Agreements. Holding the parties to their own agreement is not a denial of due process. I do not accept that there is any evidence of bad faith on the Plaintiff's part, as the Defendant suggested. On the other hand, it would be grossly unfair to the Plaintiff, if the Court should permit the Defendant in this case to avoid the effect of the Award by taking advantage of its own wrongs.

Disposition

40. The application to set aside the Enforcement Order is dismissed, with costs to be paid by the Defendant on indemnity basis with certificate for counsel.

(Mimmie Chan)
Judge of the Court of First Instance
High Court

Mr Wing So, instructed by Joseph MK Chan, Solicitors, for the plaintiff

Mr Jeffrey Tam and Mr Kin Lau, instructed by Siu and Company, Solicitors, for the defendant