

Unofficial Translation

*Aiduoladuo (Mongolia) Co., Ltd. v. Zhejiang Zhancheng Construction Group Co., Ltd.*

**Reply of the Supreme People's Court Regarding the Request for Instruction on the Non-Recognition of the Award No. 73/23-06 Issued by the Mongolia National Arbitration Court**

(8 December 2009, [2009] Min Si Ta Zi No. 46)

Zhejiang Higher People's Court,

Your court's "Request for Instruction [2009] Zhe Shang Wai Ta Zi No. 1 on the Non-Recognition of the Award No. 73/23-06 Issued by the Mongolia National Arbitration Court" has been received. Upon deliberation, we reply as follows:

The present case concerns the recognition and enforcement of a foreign arbitral award. Since the award was made by a Mongolian institution, and both China and Mongolia are Contracting States to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the "**New York Convention**"), pursuant to Article 267 of the Civil Procedure of China and Article I of the New York Convention, the New York Convention is applicable to the review of the award for recognition and enforcement.

1. The validity of the arbitration clause. According to Article V(1)(a) of the New York Convention, the award shall not be refused recognition and enforcement unless "the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made". To declare the arbitration clause invalid according to Chinese law and to further refuse the recognition of the case does not conform to the foregoing provision.

2. The service of the notice of the arbitral proceedings. Based on the facts stated in the report for instruction, the mail No. 1677283941 did not concern the notice of the arbitral proceedings, and the mail No. 1681469484, which specified "the proceedings of the hearings and the date of hearings" did not reach Zhejiang Zhancheng Construction Group Co., Ltd. (hereinafter "**Zhancheng Company**"), as a result Zhancheng Company was not able to appear before the tribunal to present its case. Therefore, the ground under Article V(1)(b) of the New York Convention authorizing the refusal to recognize and enforce the award has been fulfilled.

3. Whether the arbitration agreement existing between the parties was valid. If Zhancheng Company can prove that the stamp of "Zhejiang Yaojiang Construction Group Co., Ltd." (predecessor of Zhancheng Company) was invalid, then the court can rely on Art. II(2) of the New York Convention to hold that there is no "written agreement" between the parties. The People's Court can consequently refuse to recognize and enforce the award.

We agree with the opinion of your court.

We reply as above.

## **Annex**

Zhejiang High People's Court's Request for Instruction concerning the Non-Recognition of the Arbitral Award No. 73/23-06 Made by Mongolia National Arbitration Court

(14 August 2009, [2009] Zhe Shang Wai Ta Zi No. 1)

Supreme People's Court,

In accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "**New York Convention**") and within the time limit prescribed under the Chinese Civil Procedure Law, Mongolia-Aiduoladuo Co., Ltd (hereinafter "**Aiduoladuo Company**") applied to Zhejiang Shaoxing Intermediate People's Court (hereinafter "**Shaoxing IPC**") for the recognition of the arbitral award No. 73/23-06 made by Mongolia National Arbitration Court (hereinafter "**award No. 73/23-06**"). According to Art. V(1)(b) of the New York Convention, Shaoxing IPC intends to refuse the recognition of the award. After review, our court approves the opinion of Shaoxing IPC. We hereby report to your court for review.

### **I. Information on the Parties**

Applicant: Mongolia-Aiduoladuo Co., Ltd., situated at: Mongolia WuLanBaHanWuLa District, Zone 4, TaBenEErDeng Building.

Legal representative: Ao Siligema, director of the company

Counsel: Wu Chunying, Lawyer of Liaoning Kuncheng Law Firm

Respondent: Zhejiang Zhancheng Construction Group Co., Ltd., situated at: Zhejiang Province, Zhuji City, No. 90 JiYang Road.

Legal representative: Wang Miaofu, Director of the company

Counsel: Tang Guohua, Yao Jie, Lawyers at Zhejiang JunAnShiJi Law Firm

### **II. Claims of the Applicant and Defence of the Respondent**

The Applicant, Aiduoladuo Company, submitted the following: On 31 July 2003, Aiduoladuo Company and Mongolia YaoJiang Co., Ltd. (hereinafter "**Mongolia YaoJiang Company**") entered into a construction contract. Zhejiang Yaojiang Construction Group Co., Ltd. (hereinafter "**Zhejiang Yaojiang Company**"), which later became Zhejiang Zhancehng Construction Group Co., Ltd. (hereinafter "**Zhancheng Company**"), provided guarantees to the contract. It was stipulated in the contract that Mongolia Yaojiang Company undertook a construction project, including residence and related services in the BaYaShangLe District in the city of Ulan Bator. After the contract was concluded, Mongolia Yaojiang Company did not perform its obligations under the contract. Disputes therefore arose between the parties. Since the parties failed to resolve the disputes through negotiation, Aiduoladuo Company submitted the disputes to Mongolia National Arbitration Court pursuant to Art. 10 of the construction contract. As the notice could not be served to Mongolia Yaojiang Company, Aiduoladuo Company filed

claims against the guarantor, Zhancheng Company, as the Respondent. On 1 August 2007, Mongolia National Arbitration Court rendered the award. Pursuant to Article IV of the New York Convention, Aiduoladuo Company applied for the recognition of the award concerned.

The Respondent, Zhancheng Company, replied as follows: 1. The award wrongly identified Zhancheng Company as the party. The proceedings were therefore irregular. (1) Zhancheng Company had little knowledge about the authenticity of the construction contract, including its conclusion, and its performance. In addition, Zhancheng Company did not provide any guarantees under the contract. (2) Mongolia Yaojiang Company had no factual or legal connections with Zhancheng Company. As determined by the effective criminal decision [2006] ZhuXingChuZi No. 68 made by Zhejiang Zhuji People's Court, Mongolia Yaojiang Company is solely invested and operated by Ding Jieming as an individual. As to the establishment of the company, Zhancheng Company did not give any authorizations, did not make any contributions, did not give any subsequent approvals, and did not engage in its operation. Moreover, the establishment of the company was not approved by the competent national authority. (3) Unaware of the establishment of Mongolia Yaojiang Company and its business operation, Zhancheng Company could not have put its stamp on the contract which concerned Mongolia Yaojiang Company and could not have provided the guarantees. The stamp of Zhancheng Company on the Construction Contract was a counterfeit. (4) Even if we suppose that someone stole the stamp of Zhancheng Company to sign the contract, pursuant to Supreme People's Court Provisions on Several Questions concerning the Suspicion of Economic Crime when Handling Economic Disputes (Fa Shi [1998] No. 7), Zhancheng Company should not undertake any civil liabilities. (5) Even if there was a stamp of Zhancheng Company on the contract, it did not reflect the true intention of Zhancheng Company. The agreement was null and void. According to the New York Convention, the award should not be recognized or enforced. 2. Article 10 of the construction contract, which stipulated the arbitration clause, was null and void. (1) Article 10 of the construction contract stated: "[s]hould the negotiation fail, the disputes shall be judged by the court or arbitrated by arbitration institutions". The award quoted Article 10 as follows: "[s]hould two parties fail to reach an agreement, the abovementioned disputes shall be resolved through arbitration by the competent Mongolian tribunal or Mongolia National Arbitration Commission". The two statements were ambiguous and conflicted with each other. It was unfounded for the tribunal to hold that the "arbitration institutions" should refer to Mongolia National Arbitration Commission. (2) The composition of the arbitral tribunal did not conform to the descriptions under Article 10 of the construction contract. 3. The award seriously breached the arbitral proceedings and the proceedings as prescribed by the New York Convention. Any documents related to the arbitration, such as the request for arbitration, the notice of hearings, the award and decisions, should be effectively served to relevant parties. However, before receiving the materials concerning the request for enforcement from the Shaoxing IPC, Zhancheng Company never received any written documents concerning the case. The tribunal did not have the real party to the contract, Mongolia Yaojiang Company, involved in the proceedings. In the absence of Mongolia Yaojiang Company, the tribunal only relied on the unilateral statement and evidence of Aiduoladuo Company to proceed with the arbitration, which went against its own intention to consider the construction contract as a tri-party agreement. The consequence was that only two parties to the "tri-party" agreement were involved in the arbitral proceedings, and only one party, the Applicant, appeared before the arbitral tribunal. Even if the contract was actually entered into by three parties, in the absence of

the main debtor the arbitral proceedings were not legal. In light of the above, the award No. 73/23-06 should not be recognized or enforced.

### **III. Facts of the Case**

#### **A. Stipulations with Regard to the Arbitration under the Construction Contract**

Article 1 of the construction contract provides that: the consignor is Aiduoladuo Company, and the contractor is Mongolia Yaojiang Company. Under the section reserved for the signature of the guarantor, there is a stamp of “Zhejiang Yaojiang Construction Group Co., Ltd.”. The contract has two versions, Mongolian and Chinese. According to the Chinese translation, Article 10 of the Mongolian contract as provided by Aiduoladuo Company provides: “[s]hould the negotiation fail, the disputes shall be judged by the court or arbitrated by arbitration institutions”. Article 10 of the Chinese contract provides: “[s]hould two parties fail to reach an agreement, disputes shall be resolved by relevant legal departments or by the arbitration institution of the Department of Industry and Commerce of Mongolia.” Article 11(1) of the two versions of the contract both provide that issue not specified by the contract shall be resolved according to Mongolian law.

#### **B. The Arbitral Proceedings and Conclusions**

As recorded in the award No. 73/23-06, the arbitral proceedings were as follows: On 6 October 2006, Aiduoladuo Company submitted a claim to the Mongolia National Arbitration Court, through the Department of Industry and Commerce of Mongolia. Aiduoladuo Company demanded the resolution of the construction contract and compensation to its damages from Mongolia Yaojiang Company and Zhejiang Yaojiang Company. The arbitral tribunal accepted the case on 10 October. On 17 October, Aiduoladuo Company named Mr. De-EErDengChuLu as its arbitrator. Subsequently, because the respondent could not be located, the arbitral proceedings were unable to proceed. On 11 December 2006, Aiduoladuo Company re-submitted its claim and changed the respondent to Zhejiang Yaojiang Company. On 15 January 2007, the tribunal sent the letter No. 4/4, the request for arbitration and the exhibits to Zhejiang Yaojiang Company through a Mongolian express service, but the documents were returned to the tribunal due to the change of address. On 4 April 2007, Aiduoladuo Company addressed a letter to the arbitral tribunal, stating that Zhejiang Yaojiang Company had become Zhancheng Company, and requested the tribunal to send the arbitration request to Zhancheng Company. On 19 April, the arbitral tribunal sent letter No. 4/153 and other documents to Zhancheng Company by express courier (No. 1677283941) and the Respondent confirmed the receipt of the documents on 1 June 2007. On 3 July 2007, the tribunal, by its order No. 03, appointed Mr. Te-MengHeJiaErGeLe as the arbitrator of Zhancheng company. On the same day, the two co-arbitrators designated Mr. Bi-LangeGeNiMu as the chairman of the tribunal. The tribunal then announced the date for the first conference and informed the Respondent of the date via express courier (in English). On 5 July, the tribunal held a meeting where only the Applicant was present. At the meeting, the tribunal approved the procedure and announced that there would be a hearing on 31 July. On 16 July, the tribunal informed the Respondent of its decision and the date for the hearing via DHL express courier (No. 1681469484). On 31 July, the arbitral tribunal held a hearing where only the Applicant was present, and issued the award. On 4 August 2007, the tribunal sent award No. 34 via DHL express courier to the Respondent (No. 1682186612).

It was decided in award No. 73/23-06 as follows: (1) the construction contract signed by Aiduoladuo Company, Mongolia Yaojiang Company and Zhancheng Company on 31 July 2003 should be terminated; (2) Zhejiang Yaojiang Company (now Zhancheng Company) should pay compensation in the amount of \$1,751,411.08 to Aiduoladuo Company; (3) The arbitration fees of \$17,408 paid by Aiduoladuo Company should be withheld; (4) Zhancheng Company should pay the arbitration fees of \$17,408 to Aiduoladuo Company; and (5) the award should be final and enforceable.

### **C. Facts identified by the Shaoxing Intermediate Court**

On 24 July 2008, the Applicant, Aiduoladuo Company, applied to the Shaoxing IPC to investigate on the receipt of the DHL express courier. The mails No. 1677283941, No. 1681469484 and No. 1682186612 were respectively sent on 24 April 2007, 16 July 2007 and 4 August 2007. On 8 September 2008, the DHL Company Zhejiang Branch provided a statement in which it indicated: "The mail No. 1677283941 arrived on 11 May 2007 at Shaoxing. Our company was entrusted by Shaoxing mail service to deliver the mail. The information shows that the mail was received by Zhou Zhicheng on 25 May. The mail No. 1682186612 and 1681469484 respectively reached Hangzhou on 12 August 2007 and 18 July 2007. Since the address and the recipient were not clear, the mail could not be delivered. After having checked with the mail courier, we confirmed that the two mails were abandoned." On 13 October 2008, the representative of Aiduoladuo Company, Wu Chunying, replied that it did not have any objections to this exhibit. In any case, Aiduoladuo Company produced evidence to prove that the mail No. 1677283491 was signed and received by Zhao Shi Chen from Jao-Jang (Yaojiang) Construction Group. The Shaoxing IPC ordered the production of the 2007 bulletin of salary of Zhancheng Company. Neither Zhou Zhicheng nor Zhao Shichen are on the bulletin.

### **IV. Opinion of the Shaoxing IPC and its Reasons**

Upon review, Shaoxing IPC held as follows: the Applicant, Aiduoladuo, applied for recognition of the award made by the Mongolia National Arbitration Court at the Mongolian Department of Industry and Commerce. This is governed by Article 269 (now Article 267) of the Civil Procedure Law of the People's Republic of China and the conditions for the acceptance of the case are fulfilled. On 24 April 2007, the Mongolia National Arbitration Court sent letter No. 4/153 and other documents to Zhancheng Company. On 16 July, the tribunal sent by mail its decision on the proceedings and the date of the hearing. On 4 August, the tribunal sent the award. The above facts can be proven by the statement provided by DHL Company Zhejiang Branch. The first mail was received by someone, but it was unclear whether the recipient was a member of Zhancheng Company's staff. Whether the mail was served cannot be confirmed. The later two postings were not received by Zhancheng Company. It is recorded in the award No. 73/23-06 that the tribunal held a conference on 5 July 2007, and a hearing on 31 July 2007, both with only the presence of the Applicant. The exhibits at hand cannot prove that the Respondent, Zhancheng Company, has received proper notice concerning the arbitral proceedings. This falls under the ground of Article V(1)(b) of the New York Convention. Other questions raised by Zhancheng Company, which concerned the identity of the party and the arbitration clause, are substantive questions, which are not within the scope of review prescribed by Article V of the New York Convention. The court intended not to review these issues. According to Article 269 of the Civil Procedure Law of the People's Republic of China (now

Article 267) and Article V(1)(b) of the New York Convention, the court intended not to recognize the effect of the award No. 73/23-06 within Chinese territory.

## **V. Opinion of our court and reasons**

Upon review, our court holds the following:

1. As China and Mongolia have both joined the New York Convention, the Convention is applicable to the request for recognition of the Mongolian award. According to the New York Convention and relevant provisions of the Supreme People's Court, the request of the Applicant, Aiduoladuo Company, fulfils the conditions of acceptance of the case. Shaoxing IPC has jurisdiction over the case.

2. Article V of the New York Convention provides that “[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: [...] (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.” According to the statement provided by the express service to the Shaoxing IPC, the Applicant, Aiduoladuo Company, is unable to prove that the first mail posting was served on Zhancheng Company and has expressly abandoned the delivery of the other two postings. Thus, these two postings that were also not served on Zhancheng Company. It is justified for Shaoxing IPC to consider that Zhancheng Company was not given proper notice. The ground under Article V(1)(b) of the New York Convention is fulfilled. For this reasons, the court should refuse to recognize award No. 73/23-06 issued by Mongolia National Arbitration Court.

3. Since the Mongolia National Arbitration Court failed to send any notice with regard to the arbitral proceedings, Zhancheng Company did not and could not participate in the arbitral proceedings. It should be considered that Zhancheng Company was not involved in the arbitration. Zhancheng Company requested the court to review the validity of the arbitration agreement. Such a request should be granted. Article 16 of the Supreme People's Court Interpretations on Several Questions concerning the Implementation of Arbitration Law of the People's Republic of China, Fa Shi [2006] No. 7 provides that: “[t]he law chosen by the parties shall be applicable to the determination of the validity of foreign-related arbitration agreement. If the parties did not choose the applicable law, but agreed on the place of arbitration, the law of the place of arbitration shall be applicable. If the parties did not choose the applicable law, and did not agree on the place of arbitration, the law of the forum shall be applicable”. Though Article 11(1) of the construction contract provides that “that issue not specified by the Contract shall be resolved according to Mongolian law”, pursuant to Article 58 of the Supreme People's Court's “Minutes of 2<sup>nd</sup> National Conference on the Work of Foreign-related Commercial and Maritime Trial”, Fa Fa [2005] No. 26, the law chosen by the parties to govern the contractual disputes is not applicable to the determination of the validity of the foreign-related arbitration clause. Considering that under Article 10 of the contract, the parties only specified the matter subject to arbitration without expressly choosing the place of arbitration, the law of the forum, namely, Chinese law, shall be applicable to the validity of the arbitration clause. According to Article 7 of the Supreme People's Court Interpretations on Several Questions concerning the Implementation of Arbitration Law of the People's Republic of China, Fa Shi [2006] No. 7,

which provides that “if parties have stipulated that they can both submit the disputes to arbitration and bring a lawsuit to the People’s Court, the arbitration agreement is invalid”, the stipulation concerning the arbitration under Article 10 of the construction contract shall be held invalid. The arbitration clause is not binding on Zhancheng Company.

4. Zhancheng Company maintained that it did not participate in the conclusion and performance of the construction contract, and requested the court to confirm that the stamp of the company on the Construction Contract was a counterfeit, and that it was not a party to the arbitration. As the claim concerns a substantive issue, it is justified for Shaoxing IPC not to examine the issue.

In light of the above, our court holds that there exist serious defects within the arbitral proceedings which resulted in award No. 73/23-06 and which fall under the ground in Article V(1)(b) of the New York Convention. The arbitration clause on which the award is based is invalid. The court shall refuse to recognize the award.

We hereby request your court to instruct us on whether the above opinions are correct.