

Unofficial Translation

Boertong Corp. (Group) v. Beijing Liantaichang Trade Co. Ltd.

**Supreme Court Reply to the Beijing Higher People's Court's Request for Instructions
regarding the Application of Boertong for Recognition and Enforcement
of a Foreign Arbitral Award**

(14 December 2006, [2006] Min Si Ta Zi No. 36)

Beijing Higher People's Court:

We have received your Request for Instructions regarding the Application of Boertong for Recognition and Enforcement of a Foreign Arbitral Award with your reference number "[2006] No. 323". On deliberation of the case, this Court hereby replies as follows:

According to the facts based on your discovery, the notice of arbitration proceedings and the copy of the arbitral award No. 05113-0010, issued by the Korean Commercial Arbitration Board ("KCAB"), were sent to the registered address of the Respondent through mail. The Treaty between the People's Republic of China and the Republic of Korea on the Judicial Assistance in Civil and Commercial Affairs, and the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commerce shall not apply to the delivery of notices in arbitration. Rather, the propriety of the delivery shall be subject to the arbitration rules. The Respondent failed to support its statement that the delivery of the notices was in violation of the arbitration rule. The Respondent's failure to receive the notices should be attributable to the Respondent since it changed its address without notifying the arbitration institution. The situation should be not deemed in accordance with the circumstance under Subparagraph b Section 1, Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The application should not be dismissed in accordance with Subparagraph b Section 1, Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. If no further circumstances for non-recognition and enforcement were found, the KCAB Award No. 05113-0010 should be recognized and enforced.

Annex:

Request for Instructions regarding the Application of Boertong for Recognition and Enforcement
of a Foreign Arbitral Award

Supreme People's Court:

The Beijing No. 2 Intermediate People's Court has sent a request to our court on the case concerning the Application of Boertong for Recognition and Enforcement of Foreign Arbitral Award, in which the Beijing No. 2 Intermediate People's Court intends not to recognize and enforce the Arbitral Award of No. 05113-0010 rendered by KCAB. After deliberation, we now submit the details of the case as follows for your reference:

I. Parties

Applicant: Boertong Corp. (Group) (“**Boertong**” or “**Applicant**”),

Address: Seoul, Korea

Legal Representative: Li Yuzheng, Acting Director.

Respondent: Beijing Liantaichang Trade Co Ltd. (“**Liantaichang**” or “**Respondent**”).

Address: 101 Xiba Hedong Li, Chaoyang District, Beijing, China

II. Facts

On August 7, 2000, the Applicant and Respondent signed an Exclusive Sales Agency Contract, which provided that the Applicant shall provide the goods to the Respondent and the latter shall have the exclusive right to sell the provided goods. They also agreed on the price and terms of payment in the contract. Under Article 11.5 of the Exclusive Sales Agency Contract concerning the applicable law, “any dispute with regard to the contract shall be subject to the law of Republic of Korea”. The arbitration clause, Article 11.6, provided that “all disputes shall be submitted to arbitration in Seoul in accordance with the commercial arbitration law recognised by the courts of the Republic of Korea and the arbitration rules of the Korean Commercial Arbitration Board”.

The Applicant commenced the KCAB arbitration in May 2005 for the Respondent’s failure to provide full payment. KCAB sent the notices of the time of hearing by mail on March 26 and August 4, 2005 at the Respondent’s registered address at the Bureau of the Industry and Commerce (the Respondent did not confirm the receipt of the notices). On August 26, 2005, the Arbitral Award No. 05113-0010 was sent to the Respondent in the same way. The contents of the award are as follows: 1) the Respondent shall immediately pay \$431,382.23 to the Applicant, plus the interest from March 23, 2005 to the date of full payment at the annual rate of 6%; and 2) the Respondent shall bear the costs of arbitration.

This Court found that Respondent never received any notice of hearing or the copy of the arbitral award. On February 22 2006, the Applicant filed the application for enforcement of the KCAB Award No. 05113-0010 before the Beijing No. 2 Intermediate People’s Court.

The Respondent argued that: 1) the Respondent had never received any notice or arbitral award from the Korean Commercial Arbitration Board. Thus, the Respondent was not given proper notice and was not able to present the case during the KCAB arbitration. In accordance with Article V(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“**New York Convention**”) and relevant laws of China, the application should be dismissed; and 2) China made a reservation to the delivery of mail at time of adhering to the Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil and Commerce concluded in

Hague in 1965. Accordingly, the delivery through mail should be deemed invalid even if the KCAB did send the notices. Therefore, the application should be dismissed.

The Court also found that: both China and Korea are parties to the New York Convention, and the two countries had concluded a treaty on mutual legal assistance in civil and commercial matters.

III. Tentative Opinion

According to the treaty on mutual legal assistance in civil and commercial matters between China and Korea, if the document has been received by a party, there shall be a letter of proof including the information such as the name, occupation, date of arrival and place, etc. The Applicant failed to prove that the documents had been received by the Respondent. Furthermore, the Respondent denied receiving any such documents.

According to the New York Convention, to which China and the Republic of Korea are both Contracting States, and the Notice on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Acceded by China, the Respondent's argument that it did not receive any proper notice of the arbitration proceedings and the arbitral award constituted a ground for refusal of recognition and enforcement under Article V(1)(b) of the 1958 New York Convention.

In conclusion, we agree with the tentative opinion of Beijing No. 2 Intermediate People's Court denying recognition and enforcement of the KCAB-rendered No. 05113-0010 arbitral award. The application for recognition and enforcement of the arbitral award by Boertong should be dismissed.

We seek comments from your Court on the above tentative opinion.