

# CASE IN BRIEF

## ***Sino Channel Asia Ltd v Dana Shipping and Trading Pte Singapore [2016] EWHC 1118 (Comm)***

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A recent UK case demonstrating the importance of correct service of a notice to commence arbitration. Incorrect service led to a US \$1.68 million arbitral award being set aside as being neither valid or binding.

### **Background and Facts**

Dana Shipping and Trading Pte Singapore ("Dana Shipping") and Sino Channel Asia Ltd ("Sino") entered into a contract of affreightment ("COA") as owner and charterer respectively. Under the COA, Sino was chartered to carry iron ore from Venezuela to China, but Sino anticipated that the operational side of the charter would actually be performed by a third-party affiliate, Beijing XCity Trading Limited ("Beijing XCity").

In the lead up to the COA and following its formation, Mr Daniel Cai, an employee of Beijing XCity, was the main point of contact between Dana Shipping and Sino, and presented himself to Dana as 'Daniel of Sino Channel Asia'. A dispute arose when no shipments were arranged or performed by Beijing XCity, and Dana referred the dispute to arbitration in accordance with the COA. Under the COA, disputes between the parties were to be referred to arbitration, initiated when one party received a "*notification in writing of the appointment of the other party's arbitrator*" [21]. The recipient would then have 14 days to appoint its arbitrator, "*failing which the decision of the single arbitrator appointed shall apply*" [21].

In accordance with the COA, Dana Shipping appointed their arbitrator and served their notice of arbitration on Mr Cai by email, calling upon Sino to appoint their arbitrator. On receipt of the notice, Mr Cai requested an extension of time, but took no further action and did not alert Sino to the notice of arbitration. Consequently, Sino never received the notice and was unaware of the arbitration entirely. Given Sino did not respond, Dana Shipping's arbitrator became sole arbitrator in accordance with the COA, and made an award of US \$1.68 million in Dana Shipping's favour. A hard copy of the award was sent to and received by Sino's registered office in Hong Kong, which was the first Sino had ever heard of the arbitration.

It was not until Dana Shipping began enforcement proceedings that Sino took action themselves. When Dana Shipping attempted to enforce the award, Sino applied for a declaration and order pursuant to s72(1)(b) or (c) of the Arbitration Act 1996, that the award was made without jurisdiction and was of no effect, given Sino had not received the notice of arbitration and had taken no part in the arbitration.

### **Decision**

In support of their application for a declaration setting aside the award, it was Sino's case that Mr Cai had no authority to accept service of the notice of arbitration on behalf of Sino; that such purported service was therefore ineffective; and that consequently, Sino's lack of response was because they were unaware of the arbitration and did not and could not participate in it. Dana Shipping asserted that service of the notice of arbitration was effective on the grounds that Mr Cai had implied actual authority and/or ostensible authority to receive it on Sino's behalf, and/or that such authority was ratified by Sino.



## Case in Brief (Cont..)

In making their decision to set aside the award as neither valid nor binding due to incorrect service of the notice of arbitration, the court considered the three grounds put forward by Dana Shipping:

### - *Implied Actual Authority*

In determining the extent of Beijing X Cty's implied authority, the court examined the actual circumstances of the relationship between the agent, Beijing X Cty, and the principal, Sino. The Court found that while Beijing X Cty had a general authority to act on behalf of Sino in connection with the COA, given the importance of commencing arbitration and significant legal consequences of such action (beyond performance of ordinary contractual obligations), Beijing X Cty did not have any implied actual authority to accept the notice of arbitration on Sino's behalf. Even where an agent has a wide general authority to act on behalf of his principal, the Court found that such authority "*does not (without more) generally include an authority to accept service of a notice of arbitration*" [47].

### - *Ostensible Authority*

As a form of estoppel arising from a representation by the principal to a third party that the agent has authority to act in that matter on the principal's behalf, ostensible authority is generally founded in representations made by the principal and cannot unilaterally be asserted by an employee/agent. However, in certain circumstances, ostensible authority may arise where the principal places the agent in a position to hold themselves out to such effect, and that the principal acquiesced in such activity. The Court found that no such representation could be implied in the present circumstances. The court considered there was nothing which constituted an express representation by Sino that Beijing X Cty or Mr Cai had any authority to accept the notice of arbitration, nor that Sino had put Beijing X Cty or Mr Cai in a position where they could hold themselves out to such effect and that Sino had acquiesced such activity.

### - *Ratification*

Given Sino had waited until Dana Shipping attempted to enforce the award to take action, it was Dana Shipping's argument that Sino's inaction had ratified the award. However, in considering ratification and Sino's subsequent conduct following becoming aware of the arbitration, the Court found that a party who has not participated in arbitration proceedings cannot be taken to ratify an award by mere silence and inaction.

Ultimately, the Court concluded that none of the above grounds validated Dana Shipping's claim. The court granted the section 72 application and set aside the award, holding that the Arbitral Tribunal was not properly constituted and the award was made without jurisdiction.

## Comment

This decision comes as a timely reminder to parties of the importance of correct service. Dealing and communicating with agents is common in commercial contracts, and parties should take extra care to ensure that if a dispute arises, service of any documents is made to the contract parties and not to an agent. An agent for commercial purposes, does not necessarily have authority to accept service of documents on a contract counterparty's behalf.

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