CHINA INTERNATIONAL ECONOMIC AND TRADE ARBITRATION COMMISSION

# ARBITRAL AWARD

Claimant: ANHUI PROVINCIAL IMPORT AND EXPORT CORPORATION
Address: 13-16 F, FINANCIAL BUILDING
256, JINZHAI ROAD
HEIFEI, ANHUI, CHINA

Respondent: HART ENTERPRISES INT'L.
Address: 526, 7TH AVE., 9TH FLOOR
NEW YORK, N.Y. 10018
U. S. A.

BEIJING
AUGUST 3, 1995



REF.NO.:CIETACAWARD/0360/95

Pursuant to the arbitration clauses contained in the 12 Sales Confirmations No. 92AIE3001, 92AIE3003, 92AIE3004, 92AIE3005, 92AIE3011, 92AIE3016, 92AIE3017, 92AIE3018, 92AIE3020, 92AIE3029, 92AIE3031, 92AIE3032 singed by and between the Claimant Anhui Provincial Import and Export Corporation and the Respondent Hart Enterprises Int'l, the arbitration clauses contained in the Sales Confirmation No. 92AIE3058 signed by and between the Claimant and Lustrad Limited on July 8, 1992 and the 5 Sales Confirmations No. 91AIE3033, 91AIE3048, 91AIE3051, 91AIE3053, 91AIE3055 signed by and between the Claimant and Hennyco Trading Ltd. from Aug. 23, 1991 to Nov. 22, 1991, which were all confirmed by the Respondent to effect the payments by the Agreement signed between the Claimant and the Respondent on Sep. 2, 1993, and the written Application for Arbitration submitted by the Claimant on June 18, 1994, China International Economic and Trade Arbitration Commission (formerly named the Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International Trade, hereinafter referred to as the Arbitration Commission) took cognizance of this arbitration case concerning the payment disputes arising from the above-mentioned 18 Sales Confirmations. This case is numbered G94256.

The Respondent did not appoint an arbitrator within the time limit set forth by the Notice of Arbitration after signing the Acknowledgement for Receipt of that Notice and its attachments sent by the Arbitration Commission. Therefore, according to Article 26 of the Arbitration Rules, the Chairman of the Arbitration Commission appointed Mr. Wei Yao-rong as an arbitrator in this case on the Respondent's behalf. Mr. Wei Yao-rong, Ms. Gao Fei appointed by the Claimant and Mr. Jiao Jin-hong, appointed by the Chairman of the Arbitration Commission as presiding arbitrator for this case in accordance with the Arbitration Rules, jointly formed the Arbitral Tribunal on Nov. 3, 1994. After that, since the presiding arbitrator Jiao Jin-hong went abroad for a long period and could not continue with the trying of this case, the Chairman of



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the Arbitration Commission appointed Mr. Wang Jun as the presiding arbitrator pursuant to Article 31 of the Arbitration Rules. Mr. Wang Jun, Ms. Gao Fei and Mr. Wei Yao-rong continued to try this case. On Nov. 30, 1994 and Jan. 23, 1995, the Respondent respectively signed for receipts of the Notice on Formation of the Arbitral Tribunal and the Notice on Change of Arbitrator sent by the Arbitration Commission.

On April 22, 1995, the Arbitration Commission sent to the Respondent the Notice for Oral Hearing through fax and express mail, which notified the Respondent to attend the oral hearing conducted by the Arbitral Tribunal.

The Arbitral Tribunal examined the Application for Arbitration submitted by the Claimant, and held an oral hearing for this case in Beijing on May 23, 1995. The Claimant sent its attorneys to attend the hearing while the Respondent did not. The Arbitral Tribunal, in accordance with Article 42 of the Arbitration Rules, conducted a default hearing. The Claimant's attorneys stated in detail for the facts of this case, and answered the questions put forward by the Arbitral Tribunal. After the hearing, the Claimant submitted its additional comments and the evidential documents. The Arbitration Commission, by fax and express mail, notified the Respondent of the conduct of the hearing, sent to it the Claimant's additional materials, and also required the Respondent to give a reply within a certain time limit, to which the Respondent gave no response within the time limit.

Now this case is concluded. The Arbitral Tribunal, according to Article 42 of the Arbitration Rules, after discussion, rendered a default award.

The facts of this case, the Tribunal's opinion and the award are as follows:

## I. Facts of the Case

From August, 1991 to July, 1992, for the purchase of ramie/ cotton dyed and polyester/ viscose dyed yarn, the Respondent signed 18 Sales Confirmations with the Claimant through a broker



named Lu Zhong-yuan. According to the Sales Confirmations, there were eleven bills of cargo shipped to Cyprus, among which five bills with a quantity of 283,914.25 yards and a total value of USD 339,340.81 should be paid by terms of D/P, and six bills of 281,700 yards and USD 460,443.30 by D/A; there were another seventeen bills of 990,150 yards with a total value of USD 1,184,239.75 shipped to New York, for which the payment terms are by D/P at sight. After the signing of the contracts, the Claimant delivered all the goods accordingly; while the Respondent only paid USD 50,000 and USD 45,360 respectively for the goods in Cyprus under the terms of D/A. For the rest, the Respondent neither bought from the bank the shipping documents for the goods valued USD 1,523,580.56 under D/P payment terms, nor paid for the goods valued USD 357,113.30 under D/A terms. Then on Sep. 2, 1993 the two parties reached an agreement on arrangement of the payment. The Agreement had provided for the exact time limit for payment, but the Respondent still did not fulfill its obligations of payment. Therefore, on May 5, 1994, the Claimant submitted its Application for Arbitration to the Arbitration Commission.

The Claimant stated:

Though the Claimant delivered all the goods in accordance with the contracts, the Respondent refused to accomplish its obligations for payment. The Agreement reached on Sep. 2, 1993 by both parties stipulated the following: within 45 days from the beginning of September 1993, the Respondent should settle all the invoices for the goods kept in Limassol, Cyprus under the bills No. AIE92092, AIE92070, AIE92069, AIE92085 and AIE92133; from October 15, 1993 to January 15, 1994, the Respondent should pay for all the goods kept in New York, i.e. USD 100,000 must be paid for every ten days, and at least USD 300,000 should be effected every month; USD 415,083.30 under D/A terms must be paid off by the end of January 1994. The Agreement specially emphasized that the preconditions for giving such preferential prices were only grounded on the Respondent's complete performance for payments within the time limit set forth in the Agreement. Otherwise, the Respondent must continue to observe all the obligations of the original contracts. However, the Respondent did not keep its promise. In spite such an agreement existed, the Respondent not only not effected the payments, but also collected all the goods only with the so-called letters of guarantee issued by itself and without the Claimant's





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commission and sold out the goods. According to the Claimant, except it is a confirmation to the original agreements signed by the Respondent and its broker, the new Agreement did not become effective as the preconditions of payment time table had not been executed. It is still the original agreements that can regulate both parties for their rights and obligations, and the affairs concerning the claim and arbitration. The Claimant requested that the Respondent should bear the liabilities for its breach of contracts. After the oral hearing was held, the Claimant submitted to the Arbitral Tribunal its Additional Statement and Explanations, in which it amended the original arbitration claims and at the same time raised some new claims. So far, the Claimant's arbitration claims are as follows:

1. The Respondent shall pay to the Claimant the due payments for the goods, USD 1,880,693.86.

2. The Respondent shall pay to the Claimant the interests of the payments, and the interests can be calculated at the rate of 2% per annum, totalled USD 121,365.29.

3. The Respondent shall reimburse the Claimant for the balance loss of the above-said payments for the goods USD 150,282.55. According to the Claimant, after the Claimant had shipped the goods to Cyprus pursuant to the contracts, the Respondent refused to buy the documents from the bank and collect the goods. In order to avoid the expansion of losses, the Claimant resold that lot of goods at a lower price, from which the payment of USD 189,058.26 was taken back, and consequently resulted in a balance loss of USD 150,282.55.

4. The Respondent shall compensate the Claimant for the warehouse fee, bank fee and transportation expenses, totalled USD 63,383.04. Those expenses were due to the Respondent's not collecting the above-mentioned goods shipped to Cyprus, which made the goods kept in the warehouse for a long time and caused some expenses in the process of dealing with those goods, including the warehouse fee of USD 42,383.04 paid for the first time and USD 21,000 for the warehouse fee paid the second time and other expenses.



5. The Respondent shall reimburse the Claimant for the travel and accommodation expenses to the United States and Cyprus, including USD 10,343.15 for going to the States to urge payment in June 1992 and USD 26,932.57 for going to the States and Cyprus to urge payment and inspect the goods from August to September 1993.

6. The Respondent shall pay for the lawyer's fee of USD 20,000 of the Claimant.

Regarding the Claimant's aforesaid arbitration claims, the Respondent produced no oral or written defense.

## II. Tribunal's Opinion

### 1. The Price Payable to the Claimant by the Respondent

According to the Agreement reached in New York between the two parties of this case on Sep. 2, 1993, wishing to get back the payments for the goods through amicable settlement, the Claimant agreed to cut the price. The precondition for the price cutting is that the Respondent should implement the Agreement completely. The Tribunal thinks that since the Respondent did not keep its promise to effect the payments in accordance with the Agreement, the Claimant's promise for lowering the price for the shipped goods shall no longer be binding upon the Respondent. Therefore, the Claimant is entitled to claim against the Respondent on the basis of the actually delivered quantity and the contracted price, and to request the Respondent to reimburse for the due payments.

The Tribunal ascertains, through checking the shipping documents and reviewing the evidential materials submitted by the Claimant, that the prices of the goods delivered to the Respondent by the Claimant are: (1) USD 1,184,239.75 for the goods shipped to New York; (2) USD 339,340.81 for the part of goods shipped to Cyprus under D/P terms of payment; (3) USD 460,443.30 for the part of goods shipped to Cyprus under D/A terms.



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The above items totalled USD 1,984,023.86. The Claimant admited that it had already received two payments form the Respondent, totalled USD 103,330 (USD 45,360 + USD 57,970). So, the Respondent still owed USD 1,880,693.86 to the Claimant after effecting the aforesaid payments.

After the Claimant had shipped the goods to Cyprus pursuant to the contracts, the Respondent refused to pay and buy the documents for part of the cargo under D/P terms. In order to avoid expansion of the losses, the Claimant resold that lot of goods and took back USD 189,058.26. When this sum of money is subtracted from the total amount that the Respondent owed to the Claimant, the balance due is USD 1,691,635.60 (USD 1,880,693.86 - USD 189,058.26).

2. The Interests of the Goods Price that the Claimant Is Entitled to Claim for

According to the Tribunal's opinion, the Claimant has the rights to ask compensation from the Respondent for the interest loss incurred due to the Respondent's default in payment. The interests shall be calculated from the date when the Respondent began to have the obligations to effect the payments to the date that this arbitral award is rendered. And the interest rate raised by the Claimant is 2% per annum. The method of calculations and the results are as follows:

(1) For the goods delivered to New York, with the payment terms of D/P, the Respondent should pay for it on the arrival of the goods at the port of destination. Taken April 15, 1992 as the average shipment date and June 1, 1992 as the average arrival date, the interests shall be calculated from June 1, 1992 to Aug. 3, 1995 when this award is rendered, totalled 1159 days, and the amount of interests is USD 75,207.33 (USD 1,184,239.75 X 1159 days/ 365 days X 2%).

(2) For the goods shipped to Cyprus under D/P payment terms, the Respondent should effect the payment on the arrival of the goods at the port of destination. Taken May 1, 1992 as the average shipment date and June 1, 1992 as the average arrival date, the interests for the price of the goods shall be calculated from June 1, 1992 to Aug. 3, 1995 when this award is rendered,



totalled 1159 days. The money due is USD 236,010.81 (the price for the goods delivered is USD 339,340.81 - the resold price of the goods USD 103,330). Therefore, the interests for it shall be USD 14,988.30 (USD 236,010.81 X 1159 days/ 365 days X 2%).

(3) For the goods delivered to Cyprus under D/A terms of payment, taken July 1, 1992 as the average payment date, the interests shall be calculated from July 1, 1992 to August 3, 1995 when this award is rendered, that totalled 1129 days. The amount of interests is USD 28,484.41 (USD 460,443.30 X 1129/ 365 days X 2%).

The above-mentioned items of interests amount to USD 118,680.04.

3. The Expenses Effected Due to the Storage of the Goods

After part of the cargo to Cyprus arrived at the port of destination, the Respondent did not collect the goods according to the contracts. The Claimant had to store the goods in the warehouse and pay for it. So the expenses shall be borne by the Respondent. Besides, the Claimant had paid the transportation fee, bank fee and other fees in handling those stocks, which shall be reimbursed by the Respondent to the Claimant. According to the evidences provided by the Claimant, those expenses added up to USD 63,253.32 (the warehouse fee for the first time USD 42,383.04 + transportation fee, bank fee and the second time warehouse fee USD 20,870.28).

4. The Balance Loss Claimed by the Claimant

Regarding the balance loss claimed by the Claimant between the contracted price for the part of goods shipped to Cyprus under D/P terms USD 339,340.81 and the resold price USD 189,058.26, for the Tribunal has already supported the Claimant that the Respondent should pay to the Claimant the total price of that part of goods USD 339,340.81, the Tribunal will not agree with the Claimant to claim again for the balance loss.







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5. The Travel Expenses to America of the Claimant

With respect to the travel expenses of the Claimant for going to the United States and Cyprus to urge payment and inspect the goods, the Tribunal thinks that it is reasonable for the Respondent to compensate the Claimant for the to and fro travel and accommodation expenses for two persons to the States and Cyprus for one time. Based on the evidence submitted by the Claimant, the travel expenses of two persons for to and fro journey to the aforesaid two countries is USD 9,443.50, accommodation fee USD 15,000, totalled USD 24,443.50.

6. The Claimant's Lawyer's Fee and Arbitration Fee for This Case

According to the receipt for attorney's fee issued by Shi Xin Law Office submitted by the Claimant, the Tribunal maintains that it is proper for the Respondent to reimburse the Claimant for the lawyer's fee of USD 10,000 spent in handling this arbitration case.

The arbitration fee for this case shall be borne by the Respondent.

III. Arbitral Award

1. The Respondent shall pay to the Claimant the goods price of USD 1,691,635.60;

2. The Respondent shall pay to the Claimant the interests for the above mentioned goods price of USD 118,680.04;

3. The Respondent shall reimburse the Claimant for the storage fee, transportation fee and bank fee, totalled USD 63,253.32;

4. The Respondent shall pay to the Claimant for its travel expenses to America and Cyprus for urging the payments and inspecting the goods USD 24,443.50;



5. The Respondent shall pay for the Claimant's lawyer's fee for handling this case USD 10,000;

6. The arbitration fee for this case is RMB 146,321 Yuan, which shall be totally borne by the Respondent. This amount of money is set off by the equal sum of money paid in advance by the Claimant. Thus, the Respondent should pay to the Claimant RMB 146,321 Yuan to compensate for the arbitration fee paid in deposit by the Claimant.

For the above items of payments, the Respondent should effect all the payments no later than Sep. 15, 1995. An interest calculated at the rate of 8% per annum will be charged from Sep. 16, 1995 to the actual payment date if the Respondent fails to do so within the set time limit.

This arbitral award is final.

Presiding Arbitrator: Wang Jun
(signed)
Arbitrator: Gao Fei
(signed)
Arbitrator: Wei Yao-rong
(signed)

Stamp of

the Arbitration Commission

(stamped)

Beijing, August 3, 1995





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People's Republic of China)
Municipality of Beijing )
Embassy of the United ) ss:
States of America )

I, Daniel W. Piccuta, Consul of the United States of America at Beijing, People's Republic of China, duly commissioned and qualified, do hereby certify that Zhang Jiaxiang, whose true signature and official seal are, respectively, subscribed and affixed to the foregoing document, was on the 27th day of September, 1995, the date thereof, an officer of the Ministry of Foreign Affairs of the People's Republic of China, duly commissioned and qualified, to whose official acts faith and credit are due,

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of the Embassy of the United States of America at Beijing, People's Republic of China this 28th day of September, 1995.

Daniel W. Piccuta
Consul

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ANHUI PROVINCIAL IMPORT AND EXPORT CORP.,

Petitioner,

-against-

96 Civ. 128 (LAK)

HART ENTERPRISES INTERNATIONAL, INC.,

Respondent.

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MEMORANDUM OPINION

Appearances:

Richard V. Singleton
Avisheh Avini
HEALY & BAILLIE
*Attorneys for Petitioner*

Peter A. Lerner
BALLON STOLL BADER & NADLER, P.C.
*Attorneys for Respondent*

LEWIS A. KAPLAN, *District Judge.*

This is a petition to confirm an arbitral award rendered on default by the China International Economic and Trade Arbitration Commission ("CIETAC") in Beijing, China, against Hart Enterprises International, Inc. ("Hart"), a New York textile purchaser. The application is brought pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention") to which both the United States and the People's Republic of China are signatories. Hart resists enforcement under Article V.1(b) and V.2(b) of the Convention, which permit denial of recognition and enforcement where the respondent "was not given proper notice" of the proceedings or where recognition and enforcement would be contrary to the public policy of the state in which it is sought, respectively.

*Facts*

The underlying controversy arises out of the alleged breach by Hart of a series of purchase contracts and a subsequent settlement agreement. The background is set out in more detail in this Court's opinion in *Hart Enterprises International, Inc. v. Anhui Provincial Import and Export Corp.*, 888 F. Supp. 587 (S.D.N.Y. 1995) and need not be repeated here.

The arbitration machinery was set in motion on May 5, 1994, when Anhui Provincial Import and Export Corp. ("Anhui") applied to CIETAC for commencement of arbitration against Hart for breach of contract. The application was confirmed on June 20, 1994, at which time CIETAC notified Hart of the arbitration and requested that it appoint an arbitrator and forward its statement of the case. Hart did not do so. In consequence, CIETAC appointed an arbitrator on Hart's behalf and confirmed that the tribunal had been constituted.

In November 1994, Hart sued Anhui and the action was removed to this Court. At about the same time, CIETAC scheduled an arbitration hearing in Beijing for February 20, 1995 and so advised Hart. Hart neither responded nor appeared.

On January 25, 1995, Anhui moved in this Court to stay Hart's action pending arbitration in China. The moving papers contained an affirmation, a copy of which is submitted in support of the present motion, stating that the arbitration hearing previously scheduled for February

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20, 1995, had been adjourned but no new date set. (Sun Hong Aff. ¶ 19) In due course, this Court on May 30, 1995 granted Anhui's application in substance and entered judgment directing the parties to arbitrate in Beijing. *Hart Enterprises International, Inc.*, 888 F. Supp. 587. Significantly, Hart never sought a stay of the arbitration proceedings pending resolution of the litigation.

Unbeknownst to the Court, matters proceeded apace on the arbitration front while the litigation was pending. Given Hart's claim that it lacked notice of those events, it is important to focus on the precise state of the record.

According to Hart's Mr. Haroutunian, he faxed a message to Anhui on or about March 29, 1995, while Anhui's motion was pending before this Court. The letter purported to confirm an agreement by Hart to "halt [its] litigation against [Anhui] in the United States." It then stated, "In consideration, you will suspend your arbitration case in China." (Haroutunian Aff. ¶ 12 & Ex. B) As Mr. Haroutunian put it in his affidavit, he wrote the letter because Hart "wanted to confirm its belief that the initial action was 'halted' by virtue of the motion to stay pending arbitration and the arbitration hearing would obviously be likewise 'halted' until *after* the Court decided the motion . . ." (*Id.* ¶ 13)

Anhui denies receipt of the letter and the existence of any agreement between counsel. (Hong Decl. ¶ 9; Singleton Decl. ¶¶ 3-4) Moreover, there clearly is some tension between the letter and the affidavit. The former purports to confirm an agreement between counsel. The latter indicates that Mr. Haroutunian sought Anhui's acquiescence in his belief that the motion to stay the litigation pending before this Court operated to stay both the litigation and the arbitration, which is a proposition rather different from an agreement between counsel upon reciprocal stays. It is curious, moreover, that Hart has not offered an affidavit of counsel or any documentary proof of the agreement of which Mr. Haroutunian spoke in his letter. In the last analysis, however, the questions whether there was such an agreement and whether Hart sent such a letter are immaterial to the resolution of this matter.

On April 22, 1995, CIETAC sent to Hart, by fax and express mail, a notice rescheduling the first arbitration hearing for May 23, 1995. (Yuan Decl. ¶ 7) Hart made no mention of this notice in its papers resisting enforcement of the award on the ground of lack of notice. Nonetheless, Anhui submitted a further declaration with a copy of a fax activity report indicating that CIETAC sent a fax to Hart's fax number on April 22, 1995 as well as a copy of an airwaybill showing that it sent a document to Hart on the same date. (Yuan Supp. Decl.) The fax activity report confirms that a connection was made to a fax machine that responded with the fax number that appears on Hart's letterhead and the airwaybill is properly addressed. At oral argument, counsel for respondent admitted that Hart received and ignored the notice, the latter in the belief that the hearing would not occur until this Court ruled.

The hearing went forward before the CIETAC tribunal on May 23, 1995. Hart did not appear. Documents were submitted, though no witnesses were called. (Yuan Decl. ¶ 8; Yuan Supp. Decl. ¶ 2) Neither party, however, informed this Court of the arbitral hearing. Accordingly, when this Court rendered its decision on May 30, 1995 compelling arbitration, it acted in the belief that no hearing yet had been held. Accordingly, the judgment spoke *in futuro*.

On July 14, 1995, CIETAC notified Hart, by fax and courier, of the conduct of the May 23 hearing, sent Anhui's evidentiary submissions, and invited Hart to submit any opposition within fifteen days. (Yuan Decl. ¶ 9; Yuan Supp. Decl. ¶ 3) Anhui has submitted a fax activity report evidencing a six page transmission on that date to Hart's fax number and a courier receipt

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reflecting a shipment to Hart on July 13, 1995. (Yuan Supp. Decl. ¶4 & exhibits) Again, Hart has not denied receipt of those materials.[1] Nevertheless, Hart did not respond.

On August 3, 1995, the tribunal entered the award here in question, which entitles Anhui to recover $1,879,528 plus the arbitration fee of 146,321 yuan, together with interest at the rate of 8 percent from September 16, 1995 to the payment of the award.

*Discussion*

Article V.1 of the Convention provides in pertinent part:

> "Recognition 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 . . ."

Article V.2(b) permits denial of recognition and enforcement if such action would be contrary to the public policy in the state where recognition and enforcement is sought. Hart here claims that it did not receive proper notice and, in consequence, that recognition and enforcement should be denied under both of these provisions.

Article V.1(b) "essentially sanctions the application of the forum state's standards of due process." *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*

[1] At oral argument, Hart's counsel represented that his client could not find these materials at its office, but admitted that it had no basis for submitting surreply papers denying their receipt.



*(RAKTA)*, 508 F.2d 969, 975 (2d Cir. 1974). The core of due process is notice reasonably calculated to inform the respondent of the proceeding and an opportunity to be heard. *E.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *In re Drexel Burnham Lambert Group, Inc.*, 995 F.2d 1138, 1144 (2d Cir. 1993).

Here, Hart quite obviously received notice of the appointment of the arbitrators and of the initial February 20, 1995 hearing date. We know that is so not only because Anhui has established that fact, but because those matters all were rehearsed before this Court in Hart's prior action. Moreover, Mr. Haroutunian's alleged March 29, 1995 letter, assuming its genuineness, evidences his awareness of the arbitration.

The Court therefore comes to question whether Hart had proper notice of the May 23, 1995 hearing, assuming *arguendo* that it was entitled to such notice in view of its prior default in naming an arbitrator and submitting a statement of its defense. Hart seeks to create the impression that it did not by pointing to the controverted March 29, 1995 letter, which arguably supports the view that the parties had agreed to hold the arbitration in abeyance pending the outcome of the lawsuit or, at least, Haroutunian's belief that they had. But the pivotal fact is that CIETAC notified Hart on April 22, 1995 that the hearing would go forward on May 23, 1995 and that it later notified Hart of what had transpired on May 23 and gave it a last chance to put in a defense. It has produced evidence sufficient to raise a presumption that those notices were delivered to Hart.[2] *See, e.g.,*

[2] The presumption arises upon proof by a person with personal knowledge of due mailing or of the routine practices of an organization which, if followed in a given case, would have resulted in due mailing. Assuming, as the Court does, that the summary judgment standard governs this motion, Rule 56(e) requires that petitioner establish the foundation for the presumption by proof in admissible form, a requirement which is not met by petitioner's papers because they rely on hearsay. Hart, however, has not objected to this evidence. As

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*Heckel v. Continental Resources Co.*, 758 F.2d 811, 816-17 (2d Cir. 1985). Hart has not denied receipt of either of them. Accordingly, whatever Hart's belief may have been on March 29, 1995, it subsequently was notified that the arbitration would proceed. It therefore had proper notice of the proceeding and a full opportunity to present a defense. That it failed to do so is no one's fault but its own.

Hart places much stock in the fact that Anhui's U.S. counsel submitted a proposed form of judgment in the prior litigation on June 5, 1995 and correspondence a few days later, after the arbitration hearing already had been held in Beijing, which contained language speaking of the Beijing arbitration *in futuro*. The implication is that Anhui's counsel misled Hart and the Court by falsely implying that no hearing yet had been held.

That the Court was under a misapprehension is clear. But there is no indication whatever that Anhui's U.S. counsel knew in early June 1995 that the arbitration hearing already had occurred in Beijing. Surely this would not be the first occasion on which a foreign party, located thousands of miles away and not engaged in day-to-day interactions with the U.S. legal system, failed to inform its U.S. counsel of an event which, with the benefit of hindsight, should have been communicated. Hart, however, had no comparable basis for ignorance. Hart had received a notice in April stating that the hearing would go forward on May 23, 1995, but elected not to attend. Moreover, even if Hart had been misled in June, the tribunal in July 1995 advised Hart of what had transpired at the May 23, 1995 hearing and gave it yet another opportunity to put forward a defense. Hart elected not to avail itself of that opportunity. In consequence, the question whether the actions and statements of Anhui's counsel during the pendency of the prior litigation and in June 1995, immediately thereafter, misled Hart into believing that the arbitration had not gone forward ultimately is immaterial.

In these circumstances, recognition and enforcement of the award is appropriate and would not offend the public policy of the United States. Accordingly, the petition to confirm the award is granted in all respects.

SO ORDERED.

Dated: May 6, 1996

Lewis A. Kaplan
United States District Judge

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Rule 56(e) defects are waived absent a motion to strike or, at least, timely objection. Hart has waived any such objection. *See DeCintio v. Westchester Co. Medical Ctr.*, 821 F.2d 111, 114 (2d Cir.), *cert. denied*, 484 U.S. 965 (1987).







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