Hong Kong Appellate Court Upholds Mainland Chinese Arbitral Award Despite Claim of Apparent Bias During "Med-Arb"

By James Hosking and Matthew Draper

In *Gao Haiyan v. Keeneye Holdings Ltd.*,[1] the Hong Kong Court of Appeal enforced a Chinese arbitral award despite allegations that it was tainted by an appearance of bias because the arbitrators had attempted to mediate the parties' dispute during the arbitration. The Court's conclusion that Respondents had waived their right to allege bias by failing to have done so during the arbitration is, perhaps, not that surprising. The Court's alternative holding, however, that an enforcement court should look to local practices at the seat of the arbitration—in this case, mainland Chinese "med-arb" practices—to inform its analysis as to whether enforcing the award would violate the enforcing forum's public policy, is more controversial. The case also highlights the potential for cross-cultural differences arising in the practice of "med-arb"[2] and raises important questions about how those differences can play out in the international context.

Factual Background

While the background is "complicated and murky,"[3] it is clear that in July and August 2008, Gao Heiyan and his wife, Xie Heping ("Applicants"), signed Share Transfer Agreements ("STAs") assigning their indirect interest in a Chinese mining joint venture to Keeneye Holdings Ltd. and New Purple Golden Resources Development Ltd. ("Respondents"). The STAs provided that disputes would be resolved in arbitration under the auspices of the Xi'an Arbitration Commission ("XAC").

Respondents initiated arbitration to enforce the STAs. Applicants counterclaimed that the STAs were void for misrepresentation and duress. An arbitration hearing was held in December 2009, at which the tribunal suggested mediation. The parties agreed. Following the hearing, the tribunal apparently decided amongst themselves to suggest that the parties settle the case by Respondents paying Applicants RMB 250 million. The tribunal enlisted the XAC's Secretary General Pan Junxin to assist them in settling the case. Pan communicated to Applicants the tribunal's suggestion. Pan obtained from Respondents' lawyer the telephone number of a Zeng Wei, a shareholder of Respondents. Pan and Zhou Jian, the Applicants' party-appointed arbitrator, invited Zeng to dinner at the Xi'an Shangri La Hotel. At the dinner, Pan apparently told Zeng that the tribunal had decided on a "result" that the STAs were valid but that Respondents should pay RMB 250 million to the Applicants. Pan and Zhou asked Zeng "to work on" the Respondents to reach settlement with Applicants on these terms.

Respondents subsequently refused to settle the case on the proposed terms. A second arbitration hearing was held, at which Respondents made no complaint about the conduct of Pan or Zhou. In June 2010, the tribunal issued an award finding the STAs not valid and made a non-binding recommendation that the Applicants pay Respondents RMB 50 million. Respondents then challenged the award in the Xi'an Intermediate People's Court of Shaanxi (the "Xi'an Court"), the court with supervisory jurisdiction. Respondents alleged that Pan had pressured the Tribunal to reverse its conclusion that the STAs were valid, and that the Tribunal had shown "favouratism and malpractice." The Xi'an Court rejected these arguments, finding that the events at the Shangri La Hotel amounted to a mediation permitted under the XAC arbitration rules ("XAC Rules"),[4] and enforced the award.

Hong Kong Court of First Instance ("CFI") Denies Enforcement of the Award

The Applicants subsequently sought to have the award enforced in Hong Kong. On April 12, 2011, the CFI refused to enforce the award on the basis that such would be contrary to Hong Kong public policy as the award was "tainted by an appearance of bias."[5] It found that the failed mediation showed apparent bias on the part of the Tribunal because "the impression conveyed, rightly or wrongly, is that Pan and Zhou were acting on their own on an initiative which favoured Applicants."[6] While it was true that the parties had agreed to mediation, the court stated:

> labeling a process as mediation does not mean that anything goes…. The would-be mediator must ensure at all times, especially when one might act as arbitrator later on, that nothing is said or done in the mediation which could convey an impression of bias.[7]

The CFI premised its finding of "apparent bias" on, among others, the following factors: (1) the setting of the *ex parte* "mediation"—an expensive hotel restaurant—was inappropriate; (2) the RMB 250 million settlement proposal seemed to favor Applicants because it was made on the mediators' own initiative and was far larger than previously discussed settlement amounts; (3) the arbitrators involved third parties like Pan and Zheng, rather than going directly to the parties or their counsel; (4) the final arbitral award reversed the settlement proposal and

declined to enforce the STAs; and (5) the award favored the Applicants.[8]

In reaching this conclusion, the CFI rejected two arguments by Applicants. First, it found that Respondents had not waived their right to allege bias at the enforcement stage by failing to do so during the arbitration. The CFI found Respondents were excused from raising the allegation earlier because, "if the Arbitration Tribunal were actually biased, their complaint would be rejected and they would lose everything."[9] Further, the CFI noted that under the XAC Rules, Pan, the XAC Secretary General, may have been the one to decide whether the Tribunal was biased.[10]

Second, the CFI found that it was not prohibited from undertaking its public policy analysis even though the Xi'an Court rejected Respondents' bias arguments in the course of confirming the Award. "That does not prevent the Hong Kong Court from considering the question of bias from the viewpoint of Hong Kong public policy. This is because Hong Kong public policy may well be different from public policy in Xi'an."[11]

Hong Kong Court of Appeal Overturns CFI and Enforces Award

Applicants appealed the CFI's ruling and, on December 2, 2011, the Court of Appeal reversed. It found that Respondents had waived their right to object to the conduct of the mediation at the enforcement stage because they failed to object during the arbitration. The Court noted that the XAC Rules explicitly provide for waiver when a party fails to object to procedural irregularities during the arbitration.[12]

The Court held in the alternative that there was no actual or apparent bias on the part of the Tribunal. The Court noted that in Hong Kong an award will not be enforced if it "would be contrary to the fundamental conceptions of morality and justice of [Hong Kong]."[13] It added that "a determination by an impartial and independent Tribunal which is not influenced, or seen to be influenced, by private communications are basic to notions of justice and morality in Hong Kong."[14]

The Court found, however, that the Xi'an Court was "in a much better position to ascertain the facts and to decide whether those facts established a case of actual or apparent bias,"[15] adding that, "[s]uch a finding, though not binding, is entitled to serious consideration by our court."[16] The Court found that the CFI "should have given more weight to the decision of the Xian Court,"[17] in its consideration of whether the conduct of the "mediation" demonstrated bias in violation of Hong Kong public policy:

> although one might share the learned Judge's unease about the way in which the mediation was conducted because mediation is normally conducted differently in Hong Kong, whether that would give rise to an apprehension of bias, may depend also on an understanding of how mediation is normally conducted in the place where it is conducted. In this context, I believe due weight must be given to the Xian Court refusing to set aside the Award.[18]

The Court reasoned that the public policy exception to enforcement "does not mean, for example, if it is common for mediation to be conducted over dinner at a hotel in Xian, an award would not be enforced in Hong Kong, because, in Hong Kong, such conduct, might give rise to an appearance of apparent bias."[19]

Court of Appeal's Surprising Approach to a Public Policy Analysis

Article V(2)(b) of the New York Convention[20] provides: "Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that…[t]he recognition or enforcement of the award *would be contrary to the public policy of that country*" (emphasis added). Most jurisdictions interpret Article V(2)(b) to mean that only the enforcement forum's public policy is relevant.[21] The Court of Appeal's consideration of, and marked deference to, mainland Chinese notions of what constitutes apparent bias is therefore surprising.

The Court of Appeal cited to the English High Court decision in *Minmetals Germany GmbH v. Ferco Steel Limited*[22] for the proposition that "any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be reinvestigated by the English courts on an enforcement application is to be most strongly deprecated."[23] The *Minmetals* court's deference to the supervisory court's recognition of the award was due in part to "the great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction."[24]

However, reliance on the reasoning in *Minmetals* seems misplaced for two reasons. First, the court in *Minmetals* in fact reviewed the underlying facts presented to the supervisory court and independently concluded that "the application to the Beijing court to revoke the second award appears to have been bound to fail."[25] Second, in *Minmetals,* the Chinese and English public policy concerns under analysis appear to have been identical.[26] But in *Keeneye*, the Xi'an Court had obviously not considered Hong Kong's public policy and, as the CFI concluded, "Hong Kong public policy may well be different from public policy in Xian."[27] While the Court of Appeal appropriately considered the Xi'an Court's factual conclu-

sions and determinations of Chinese law, deferring to its analysis when considering Hong Kong public policy goes farther than courts are generally willing to go in most New York Convention jurisdictions.[28]

What Does the Decision Mean for Med-Arb?

The risks and potential benefits of med-arb have been covered in depth elsewhere.[29] Some jurisdictions have legislated to provide procedural safeguards to mitigate the complexities associated with med-arb. For example, Hong Kong's recent amendment to its arbitration ordinance explicitly recognizes the use of med-arb and possibility of *ex parte* communications during the mediation, but provides that if the mediation is unsuccessful, the arbitrator must disclose any confidential communications if material to the arbitration proceeding.[30] Arbitral institutions, the XAC among them, have also provided med-arb guidelines in their rules.[31]

In *Keeneye*, the CFI judge was careful to state that there was nothing inherently wrong with the med-arb process[32] but he then went on to note the "self-evident difficulties" that create a risk of a "mediator turned arbitrator appearing to be biased."[33] Most importantly, the CFI was concerned with the mediator's need for unilateral dealings with the parties in which he could learn confidential information that might affect the outcome of the arbitration if the mediation failed.[34] U.S. courts, while not prohibiting med-arb, have also expressed the same concerns and emphasized the need to "agree to certain ground rules at the outset."[35] This heightened sensitivity to perceptions of bias clearly influenced the outcome in the CFI Decision.

The Court of Appeal, while expressing some "unease" about the way in which the mediation was conducted, proceeded on the basis that it was a "mediation" for purposes of the XAC Rules and, as discussed above, was more willing to consider the Xi'an Court's interpretation of the probity of the conduct surrounding the mediation. In this respect, one could argue that in the specific context of alleged "apparent bias" and its necessary focus on how the reasonable person may view the allegations, it might be appropriate to look to the cultural norms prevalent at the seat of arbitration (and in this case mediation). This appears to be the Court of Appeal's point in stating that whether the conduct of the mediation "would give rise to an apprehension of apparent bias, may depend also an understanding of how mediation is normally conducted in the place where it was conducted."[36] Faced with the possibility of conflicting cultural perspectives on the mechanics of med-arb, perhaps the Hong Kong Court of Appeal's hybrid approach of considering Hong Kong public policy through the lens of mainland Chinese business custom is a useful compromise. On the other hand, it is a bold departure from the traditional approach to an enforcing court's public policy analysis.

Given the unusual facts surrounding the failed "mediation," it is unclear what weight the *Keeneye* decision will have in subsequent cases involving med-arb—either in Hong Kong or in other (particularly UNCITRAL Model Law) jurisdictions. Indeed, the CFI judge expressed "serious reservations" that the meeting at the Shangri La Hotel constituted a "mediation" at all.[37] But if nothing else, the *Keeneye* decision is a timely warning that users of med-arb must pay careful attention to its mechanics and to recording the parties' consent thereto, so as to minimize any appearance of bias. This issue is all the more important where the award may be subject to scrutiny by a foreign enforcement court in a jurisdiction in which attitudes to hybrid dispute resolution may be different. The parties to a med-arb cannot count on other courts displaying the same degree of cultural forbearance as that evinced by the Hong Kong Court of Appeal in the *Keeneye* decision.

Endnotes

1. *Gao Haiyan and another v. Keeneye Holdings Ltd. and another*, CACV 79/2011, High Court of the Hong Kong Special Administrative Region Court of Appeal, Hon Tang VP, FOK JA and Sakhrani J (December 2, 2011) ("Court of Appeal Decision").
2. The term "med-arb" is used here to encompass any of the variations on proceedings in which a decision-maker acts as both mediator and arbitrator, regardless of how he or she is first appointed. In this case, the arbitrators were appointed and sat as arbitrators before one of them acted as a mediator and then subsequently reverted to being an arbitrator.
3. Court of Appeal Decision, ¶ 7.
4. The XAC Rules provide that if the parties agree, the tribunal may "conduct mediation at any time before the rendering of an award" (Art. 36) and such mediation "may be conducted by the arbitral tribunal or the presiding arbitrator…[or w]ith the approval of the parties, any third party may be invited to assist the mediation, or they may act as mediator" (Art. 37).
5. *Gao Haiyan and another v. Keeneye Holdings Ltd. and another*, [2011] 3HKC 157, High Court of the Hong Kong Special Administrative Region, Court of First Instance, Reyes J. (April 12, 2011) "CFI Decision"), ¶ 99. The CFI Decision arose from Respondents' application to set aside an *ex parte* order of enforcement from August 2, 2010.
6. CFI Decision at ¶ 63.
7. *Id.*, ¶ 79.
8. *Id.*, ¶¶ 52-80.
9. *Id.*, ¶ 87.
10. *Id.*, ¶ 88.
11. *Id.*, ¶ 96.
12. Court of Appeal Decision at ¶¶ 52-55.
13. *Id.*, ¶ 105.
14. *Id.*, ¶ 109.
15. *Id.*, ¶ 64.
16. *Id.*
17. *Id.*, ¶ 68.
18. *Id.*, ¶ 102.
19. *Id.*, ¶ 105.
20. The New York Convention, or The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), provides for the enforcement of foreign arbitral awards in 146 countries. The

Hong Kong Arbitration Ordinance preserves the public policy exception to enforcement of mainland Chinese arbitral awards. Cap. 609 of the Laws of Hong Kong, Section 95(3)(b).

21. International Law Association, Committee on International Commercial Arbitration, Interim Report on Public Policy as a Bar to Enforcement of International Arbitration Awards, p. 30 (2000) *reprinted in*, 19 Arb. Int'l 217, 243 (2003) (noting that France and Germany do not recognize violations of foreign rules of law or policy).
22. [1999] 1 All ER (Comm) p. 315 *et seq*. in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 1999 - Volume XXIVa*, (Kluwer Law International 1999) at p. 749
23. Court of Appeal Decision at 22-23, *quoting Minmetals* at 661.
24. *Id.*
25. *Minmetals Germany GmbH v. Ferco Steel Limited*, [1999] 1 All ER (Comm) p. 315 *et seq*.
26. In both cases, the party resisting enforcement argued it had been denied its right to present its case. But both the Chinese and English courts agreed that the party had waived its right to make such an objection because it had been provided the opportunity to present its case, but failed to do so. *Id*., at pp. 749-750.
27. CFI Decision at ¶ 96.
28. However, the New York Convention does not *require* a court to deny enforcement of a foreign arbitral award that violates its public policy. *See* Article V (enforcement "may be refused….").
29. *See*, *e.g*., Sophie Nappert & Dieter Flader, "Psychological Perspective on the Facilitation of Settlement in International Arbitration—Examining the CEDR Rules," 2(2) *J. Int'l Disp. Settlement* 459 (2011); Edna Sussman, "Combinations and Permutations of Arbitration and Mediation: Issues and Solutions," in Arnold Ingen-Housz (ed.), *ADR in Business* (Kluwer, 2011); Tai-Heng Cheng, "Reflections on Culture in Med-Arb," in Arthur Rovine (ed.), *Contemporary issues in International Arbitration and Mediation: The Fordham Papers 2009* (Martinus Nijhoff, 2010); Gabrielle Kaufmann-Kohler, "When Arbitrators Facilitate Settlement: Towards a Transnational Standard," 25(2) *Arbitration International* 187 (2009); Beijing Arbitration Commission, "East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China," 9 *Pepp. Disp. Resol. L.J*. 379 (2009); Tai-Heng Cheng & Anthony Kohtio, "Some Limits to Applying Chinese Med-Arb Internationally," 1(2) *N.Y. Disp. Resol. Law.* 95 (2009); and Gabrielle Kaufmann-Kohler & Fan Kun, "Integrating Mediation into Arbitration: Why It Works in China," 25(4) *J. Int'l Arbitration* (2008).
30. See section 33 of the Arbitration Ordinance (Or. No. 17 of 2010).
31. See also, for example, the joint med-arb rules of the Singapore Mediation Centre and Singapore International Arbitration Centre. Available at http://www.mediation.com.sg/Med-Arb_The_SMC_SIAC_Procedure.htm.
32. CFI Decision at ¶ 71.
33. CFI Decision at ¶ 72.
34. CFI Decision at ¶¶ 73-76.
35. *Bowden v. Weickert*, No. S-02-017, 2003 WL 21419175, at *6 (Ohio App. 6 Dist., June 20, 2003) (unreported) (vacating an award in which the arbitrator had relied on information obtained in his role as mediator without the parties' consent). *See also Society of Lloyd's v. Moore*, No. 1:06-CV-286, 2006 WL 3167735 (S.D. Ohio, Nov. 1, 2006) (applying the presumption of confidentiality to communications during a med-arb).
36. Court of Appeal Decision at ¶ 102.
37. CFI Decision at ¶ 40.

James Hosking and Matthew Draper are a partner and senior associate, respectively, with Chaffetz Lindsey LLP, an international arbitration and litigation boutique based in New York City. They may be reached at j.hosking@chaffetzlindsey.com and m.draper@chaffetzlindsey.com.