

Enforcement of Mainland Chinese arbitration award refused on public policy grounds in Hong Kong amid warnings on the dangers of arb-med

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The Hong Kong Court of first instance has refused to enforce an arbitration award issued by the Xian Arbitration Commission on public policy grounds where one of the arbitrators acted as both arbitrator and mediator in the case of *Gao Haiyan and Another v Keeneye Holdings Ltd and Another* [2011] HKEC 514.

While the Court confirmed that there is nothing wrong in principle with an arbitrator acting as a mediator in the same proceedings, the judge expressed serious reservations about the conduct of the arbitrator who acted as mediator in this case holding that it would cause a fair minded observer to apprehend a real risk of bias, and therefore contrary to public policy in Hong Kong.

The decision is a rare example of the Hong Kong court refusing enforcement of a foreign award on public policy grounds. It has also caused much interest amongst practitioners and users given the high degree of usage of arb-med in many jurisdictions including Mainland China. And indeed, the new Hong Kong Arbitration Ordinance which comes into effect on 1 June 2011 allows mediator-arbitrators.

Background

Under a share transfer agreement, Gao and his wife ("Gao") agreed to transfer shares to Keeneye (the "Agreement"). Gao subsequently alleged that the Agreement was void on the grounds of duress and misrepresentation. Arbitration was commenced by Keeneye and the arbitral tribunal eventually issued an award in favour of Gao and ordered the agreement to be revoked and made a non binding recommendation that Keeneye pay Gao RMB50 million (the "Award"). Gao then sought to enforce the Award in Hong Kong against Keeneye. Keeneye applied to set aside the court's order enforcing the Award complaining that the Tribunal was biased in granting the Award since the Secretary General of the Arbitration Commission and one of the arbitrators in the Tribunal (the arbitrator nominated by Gao) had a dinner in the Xian Shangri-La Hotel with one of Keeneye's representative three months before the Award was issued. At the private meeting, Keeneye's representative was told that the Tribunal intended to issue an award in their favour but that Keeneye must pay compensation of RMB 250 million. Keeneye refused and the Tribunal subsequently issued the Award in favour of Gao.

The Hong Kong Court is empowered under the current Arbitration Ordinance (Cap. 340) to refuse enforcement of a Mainland arbitral award if to do so would be contrary to public policy (Section 40E). Keeneye argued that the private meeting was serious improper interference by the Secretary General with the Tribunal and that the Tribunal had shown favoritism and malpractice in making the Award as shown by the difference in the arbitration outcome. Gao, on the other hand, suggested that the procedure adopted by the Secretary General and the arbitrator constituted part of a valid mediation process under the Arbitration Commission's practice and procedure.

In deciding Keeneye's application to resist enforcement of the Award, the court focused on assessing whether the award was made in circumstances which would cause a fair-minded observer to apprehend a real possibility of bias on the part of the Tribunal (*Porter v Magill* [2002] AC 357 (HL)).

Decision of the Hong Kong Court

Relying on *Hebei Import & Export Corp v Polytek Engineering Company Ltd* (1992) 2 HKCFAR 111, the leading authority in Hong Kong on the use of the public policy ground for refusing enforcement of an award, the Court held that what happened at the Xian Shangri-La Hotel would give the fair-minded observer a palpable sense of unease and the fair-minded observer would be concerned that the Tribunal favoured Gao. The Court also rejected the argument by Gao that the meeting at the hotel was tantamount to a mediation and even if it did, it was not conducted in a way as to avoid the problem of apparent bias. The Court also considered two competing public policy considerations at play in this case, namely (1) where the parties have opted for arbitration, they should be held to their choice and the resultant award should normally be enforced by the court and (2) it would be wrong to uphold an award tainted by an appearance of bias.

The Court held that the second consideration must override the first, otherwise it would bring justice into disrepute if the Court were to allow an award with the appearance of bias to be enforced. Hence, as a matter of public policy, the Court refused to enforce the Award by the Tribunal.

In practice, arb-med is comparatively rare in common law jurisdictions including Hong Kong . However, it is much more commonly used in resolving disputes in other jurisdictions in this region especially Mainland China . The judgment does highlight the risks involved in an arbitrator acting as mediator.

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