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THE REAL RISK OF BIAS IN "CHINESE STYLE" ARBITRATIONS

It is not uncommon for arbitrations conducted in Mainland China to morph from an arbitration to a mediation and then back to an arbitration if a mediated settlement cannot be achieved. Under these types of arbitrations, it is the arbitrator who usually proposes to the parties that mediation should be utilized to assist with the resolution of the dispute, and, of critical significance, the arbitrator takes on the role of mediator. If the mediation fails, the parties resume the arbitral proceedings and the mediator returns to the role of arbitrator.

This hybrid process of dispute resolution, sometimes referred to as "Arb-Med" (or "Med-Arb" where a failed mediation turns into an arbitration), is not confined to Mainland China. For instance, the Singapore Mediation Center ("SMC") and the Singapore International Arbitration Center ("SIAC") have prescribed a procedure to govern disputes that are submitted to the SMC and the SIAC for resolution by Med-Arb. Similarly, there are provisions placed in the new Hong Kong Arbitration Ordinance (Cap.609), which comes into effect on June 1, 2011, that help facilitate Med-Arb and Arb-Med in Hong Kong by providing a statutory framework for them.

However, the use of such procedures in the international arbitration arena as well as arbitrations in Hong Kong are uncommon due to the real risk of the arbitrator being tainted by actual or apparent bias. The recent Hong Kong case of *Gao Haiyan v Keeneye Holdings Ltd* is a clear example of this risk as an arbitral award was rendered unenforceable due to the presence of bias. In this case, Reyes J held that an award made by the Xian Arbitration Commission ("XAC") could not be enforced in Hong Kong on the ground that it was contrary to public policy because of the apparent bias of the arbitral tribunal that resulted from a mediation that took place during the arbitration proceedings.

BACKGROUND

In July and August 2008, pursuant to a share transfer agreement (the "Agreement") and a supplementary

share transfer agreement, Gao and Xie (the "Applicants") transferred their interests in a BVI company to Keeneye Holdings and New Purples (the "Respondents"). In July 2009, the Respondents commenced arbitration proceedings in Xian, pursuant to an arbitration clause in the Agreement, claiming that the Agreement was valid while the Applicants counterclaimed that the Agreement was invalid.

The arbitration tribunal consisted of Jiang Ping (the chief arbitrator), Zhou Jian (the arbitrator nominated by the Applicants), and Liu Chuntian (the arbitrator nominated by the Respondents). At the end of the first arbitration hearing in December 2009, both parties agreed, when asked by the tribunal, to attempt mediation to settle their disputes.

The tribunal appointed Pan Junxin (XAC's Secretary General) and Zhou Jian to contact the parties with a proposal that the parties settle the case by the Respondents paying RMB 250 million to the Applicants in return for a decision in the Respondents' favor (*i.e.*, that the Agreement would remain valid). Pan contacted a lawyer acting for the Applicants and told him the tribunal's proposal. Subsequently, both Pan and Zhou contacted Zeng Wei, a person who was perceived to have influence over the Respondents, to present to him the tribunal's suggestion.

Zeng suggested that the three of them (Zeng, Pan, and Zhou) meet and discuss this matter over dinner at the Xian Shangri-la Hotel on March 27, 2010. During dinner, Pan and Zhou told Zeng about the tribunal's proposal of RMB 250 million and asked Zeng to "work on" the Respondents.

The Respondents later refused to pay RMB 250 million to the Applicants. Arbitral proceedings resumed, and an award was published on June 17, 2010 by the XAC (the "Award"). The Award dismissed the Respondents' claim in its entirety and held that the Agreement was invalid and unenforceable. The tribunal went on to give a mere recommendation, which was not a part of the Award, that for the sake of fairness and reasonableness, the Applicants should pay RMB 50 million to the Respondents as economic compensation.

On August 2, 2010, Saunders J of the Hong Kong High Court granted an ex parte order for the enforcement of the Award in Hong Kong. The Respondents applied to set aside the ex parte order by contending that the enforcement of the Award would be contrary to public policy as it was tainted by actual or apparent bias. The Applicants argued that there was no bias and that the dinner on March 27, 2010 was an "abortive mediation" that was carried out pursuant to the XAC's Arbitration Rules.

THE DECISION

Reyes J noted that in deciding whether or not to set aside the ex parte order to enforce the Award in Hong Kong, he would have to decide if enforcing the Award would be contrary to public policy. One element that would suggest a contradiction to public policy is actual or apparent bias. In considering all the material facts, such as how the mediation was conducted and the events that transpired during the dinner on March 27, 2010, Reyes J set aside the ex parte order on grounds of public policy because the Award was indeed tainted with apparent bias.

Reyes J held that there were problems with the mediation right from the onset as neither the tribunal as a whole nor the chief arbitrator (Jiang Ping) conducted the mediation. Instead, the mediation was conducted by Zhou (the arbitrator nominated by the Applicants) and Pan (the XAC's Secretary General who had nothing to do with the arbitral proceedings).

To add to the problem of apparent bias, Pan and Zhou never conducted a mediation with all the parties present. Instead, the mediation was conducted with "related parties." Pan contacted the Applicant's lawyers and proposed the RMB 250 million settlement, to be paid by the Respondents to the Applicants, while the Respondents' lawyer was contacted to obtain details of Zeng (a third party who was perceived to have influence on the Respondents). There was no evidence that the Applicants had approved the RMB 250 million settlement before it was presented to Zeng, nor was there evidence to show that the Respondents had agreed to have Zeng represent them in the mediation. To make the bias even more apparent, Pan and Zhou had asked Zeng, during the dinner at Shangri-la, to

"work on" the Respondents with regards to the RMB 250 million settlement. According to Reyes J, the expression "work on" had overtones of Pan and Zhou "actively pushing" for the settlement. Finally, the proposed RMB 250 million settlement, to be paid by the Respondents to the Applicants in return for the Agreement remaining valid, was actually far from the RMB 50 million that the tribunal "recommended" that the Applicants pay the Respondents for economic compensation following the Award in the Applicant's favor for the termination of the Agreement.

Accordingly, Reyes J held that all of the above would lead a "fair-minded observer" to conclude that the tribunal was biased, because they had clearly structured the negotiations in a way that favored the Applicants.

COMMENTARY

This case warns that one must be careful when engaging in Med-Arb or Arb-Med because any signs of actual or apparent bias exerted by the tribunal may lead to the subsequent award becoming invalid and unenforceable. The decision in this case raises concerns because it is common for arbitrations in Mainland China to have some form of mediation conducted by the arbitral tribunal.

Reyes J stated that there was nothing wrong in principle with such hybrid procedures. However, in terms of impartiality, the procedure "runs into self-evident difficulties." This is because, in the Judge's words, "justice requires that decision-makers are not only impartial, but seen to be such.... [t]he 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."

As such, it seems that the bottom line is that the arbitral tribunal must, when conducting mediations for the same dispute, take extra precautions to ensure that they stay neutral and conduct the mediations in a way that would not cause a "fair-minded observer" to conclude that there was any bias or apparent bias present.

MED-ARB/ARB-MED AND THE HONG KONG ARBITRATION ORDINANCE

To facilitate Med-Arb or Arb-Med proceedings, sections 32 and 33 of the new Hong Kong Arbitration Ordinance (Cap. 609) provide a statutory framework for Med-Arb and Arb-Med. Furthermore, as a safeguard to protect the arbitrator against claims for actual or apparent bias, Section 33(4) provides that upon resuming the role of an arbitrator, the mediator must disclose to the parties all confidential information material to the dispute that was obtained during the mediation. Although this appears to be a good measure to be adopted by arbitrators to avoid bias, such a safeguard has many negative implications. For instance, in knowing that the mediator will have to disclose all confidential information to the parties before resuming the role of an arbitrator, the parties may be hesitant about what they disclose to the mediator. This is likely to hinder the mediation process.

In this regard, Reyes J highlighted that information obtained by the mediator may consciously or subconsciously affect him/her when sitting as the arbitrator. Hence, the mediator who may subsequently become the arbitrator must be particularly careful not to show any signs of bias. Given this, Reyes J has stated that "the problems inherent in Med-Arb are such that many arbitrators decline to engage in it. They view the risk of apparent bias arising from their participation in Med-Arb as an insurmountable difficulty." The same concerns apply equally to Arb-Med.

CONCLUSION

Parties wishing to use Med-Arb or Arb-Med to settle their disputes must be prepared to accept that if mediation fails, any confidential information exchanged during the mediation will be disclosed to all parties before arbitration begins or resumes. Arbitrators must also take extra steps to stay impartial throughout the mediation/arbitration proceedings and be careful with how they convey suggestions to settle during the mediation. A balance must be struck between staying neutral and, at the same time, not hindering the mediation process. It remains to be seen if Arb-Med or Med-Arb will take off in Hong Kong. However, given the distinct

differences between the legal systems and procedures in Hong Kong and Mainland China, it is unlikely that we will see a surge in the use of hybrid mediation-arbitration procedures in Hong Kong anytime soon.

The words of Reyes J in *Gao Haiyan v Keeneye Holdings Ltd.* suggest that it is almost inevitable that parties and arbitrators will be very reluctant to adopt such procedures. More importantly, parties engaged in arbitrations in Mainland China, where there is a likelihood of enforcement outside of Mainland China, should be wary of the effects of apparent bias if they agree to arbitrators sitting as mediators and then resuming the role of arbitrator if the mediation fails, because the risk of apparent bias in "Chinese style" arbitrations is real.

LAWYER CONTACT

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