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Arb-med procedures and enforcement in Hong Kong: The crest of the waiver?

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Last month's judgment of the Hong Kong Court of Appeal ("CA") in *Gao Haiyan and Xie Heping v. Keeneye Holdings and another* CACV 79/2011, is the latest in a long line of cases demonstrating the pro-enforcement approach of the Hong Kong courts. The decision makes clear that it is not the place of the Hong Kong courts to comment on the merits of an arbitral award. Rather, the courts' role in enforcing arbitral awards should be as mechanistic as possible. This is consistent with existing caselaw on enforcement and reinforces the respect of the Hong Kong courts for the finality of arbitral awards.

The CA in *Keeneye* reversed the much-discussed decision of the Hong Kong Court of First Instance ("CFI") to refuse enforcement of a PRC arbitral award on grounds of public policy. The CFI had held that the conduct of an arbitration in which one of the arbitrators and the General Secretary of the Xian Arbitration Commission acted as mediators (a so-called "arb-med" procedure) was tainted by apprehended bias. The CFI therefore refused enforcement of the award on the basis that it would be against the public policy of Hong Kong, pursuant to section 40E(3) of Hong Kong's old Arbitration Ordinance (Cap. 341) (which was then in force, but has since been superseded by section 95 of the new Arbitration Ordinance, Cap. 609).

The CA allowed Gao and Xie's appeal against the CFI decision, and approved the enforcement of the award in Hong Kong on two principal grounds.

First, Keeneye had failed to raise any objection to the "arb-med" procedure during the arbitration itself, and had therefore waived its right to do so in the enforcement proceedings. This decision was underpinned by the governing arbitral rules (the Xian Arbitration Commission Arbitration Rules), which specifically provided for waiver of the right to object in such circumstances. (Similar rules on waiver exist in many institutional rules, including Article 28.1 of the HKIAC Administered Arbitration Rules, Article 39 of the new ICC Rules (which came into effect on 1 January this year), and Article 36.1 of the SIAC Rules.) On this point, the CA also emphasised the principle that a party may not keep a complaint about impropriety or bias "*up his sleeve*" for potential use at a later stage.

Secondly, the "arb-med" procedure adopted in the arbitration did not disclose apprehended bias giving rise to an issue of public policy in any event. This part of the CA's decision may come as a surprise to some, given the striking factual circumstances in this case. These included the facts that (i) the mediation took place in the form of a private meeting over dinner at the Xian Shangri-la

Hotel, (ii) the mediation was not held in the presence of both parties, and (iii) the mediators appeared to make a settlement proposal on their own initiative. However, in reaching its conclusion that there was no apprehended bias, the CA indicated that due consideration should be given to how mediation is typically conducted in the jurisdiction of the seat (here, the PRC). In this regard, the CA placed considerable weight upon the fact that the local court in Xian (which had supervisory jurisdiction over the arbitration) had refused an application to set aside the award – citing with approval English authority that such circumstances will be a “*very strong policy consideration*” for the court to take into account in deciding whether or not to enforce an award.

According to the CA, the test for determining what is contrary to public policy in Hong Kong is whether the relevant matter is contrary to “*fundamental conceptions of morality and justice*” in Hong Kong. Thus, if the procedure is acceptable practice in the jurisdiction in which it took place, it will not be in breach of public policy in Hong Kong unless it was so serious as to be contrary to fundamental conceptions of morality and justice.

Although this “when in Rome” approach might seem slightly troubling at first sight, the conclusion of the CA appears to be the right one. In particular, when a party consents to arbitration in a particular jurisdiction, it agrees to be bound by the rules and procedures of that seat. Whilst there is a public policy ceiling on adopted procedures beyond which the enforcing courts will be unwilling to cross, this outer limit will be narrowly construed in practice. For those engaging in “arb-med” procedures in the PRC (where practices often differ significantly from those in Hong Kong and other jurisdictions), the *Keeneye* judgment may provide some comfort that the mediation procedure will not in itself threaten the enforceability of any award in Hong Kong on the basis of public policy.

The CA’s recent judgment is likely to generate much (further) discussion about the development of arb-med in Hong Kong. Whilst the judgment acknowledges that arbitrators can act as mediators in the course of arbitration proceedings (a practice which is recognised expressly in section 33 of Hong Kong’s new Arbitration Ordinance, Cap. 609), the acceptable boundaries of that role in Hong Kong are far from clear. Moreover, the concept as a whole can be rather alien to common law lawyers.

It is suggested that parties and counsel should keep an open mind to the possibility of adopting arb-med in the light of the pivotal role such procedures have played in the settlement of disputes in other jurisdictions. That said, for a number of reasons (including the fact that arbitrator-mediators are compelled by Hong Kong’s arbitration legislation to disclose to all parties any confidential but materially relevant information they learned during private caucus sessions), it is likely that arb-med procedures in Hong Kong will favour an evaluative, rather than a facilitative, approach (with appropriate waivers from the parties). Such an approach would avoid the risk of any subsequent complaint about *ex parte* communications between a party and the arbitrator-mediator – as was featured in *Keeneye*.

It remains to be seen which direction the development of arb-med in Hong Kong will take. In the meantime, the *Keeneye* judgment serves as a powerful reminder to parties to raise any objections they may have to the arbitral procedure promptly. Failure to do so may result in a waiver of the right to object at a later date, including in the context of enforcement proceedings.

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