Newsflash: Hong Kong Court of Appeal confirms public policy criteria in respect of enforcement of Mainland arbitration awards

Introduction

The Hong Kong Court of Appeal's recent decision in in *Gao Haiyan v Keeneye Holdings Ltd*[1] has refined the guidance on what public policy considerations the Hong Kong courts should make when assessing whether or not to enforce arbitration awards made in Mainland China. The guidance applies equally to awards made in New York Convention states. The decision will confirm Hong Kong's status as a desirable place for enforcement of international arbitration awards. Hong Kong must enforce the award unless to do so would violate the "*most basic notions of morality and justice*"[2], for example where the original arbitral tribunal has shown apparent bias to one party. However, an appearance of apparent bias does not necessarily arise, for example, if it is common for mediation to be conducted in a particular way in the place where it is conducted - even if mediation is normally conducted differently in Hong Kong. Thus, a mediation which takes place over dinner at a hotel in Mainland China may not give rise to an appearance of apparent bias, even if in Hong Kong, it might...

Tang V-P's leading judgment overrules a first instance decision by Reyes J that an arbitral award made in mainland China could not be enforced in Hong Kong on public policy grounds, as the result of the apparent bias shown by the mainland arbitral tribunal during a mediation that took place during arbitration proceedings.

Background

The underlying dispute arose out of two share transfer agreements under which the Applicants (Gao and Xie) transferred their interests in a Hong Kong company to the Respondents (Keeneye and New Purple). The Respondents later commenced arbitration at the Xian Arbitration Commission ("**XAC**").

As part of the arbitration, the arbitration tribunal asked if the parties were agreeable to meditation - it is not unusual for arbitrations in Mainland China to switch to mediation, and then back to arbitration if a settlement is not achieved. This process, known as "med-arb", has also been provided for in Hong Kong's new Arbitration Ordinance ("**AO**")[3]. Nevertheless, "med-arb" is viewed with caution by many in Hong Kong due to the risk of the arbitrator being found as biased through his actions as a mediator. This was indeed the allegation before the court of first instance, which considered whether an order for enforcement of the award already obtained in Hong Kong should be set aside on the basis that "*it would be contrary to public policy to enforce the Award*"[4]. The facts before both courts were as follows:

- The arbitration tribunal appointed Mr Pan Junxin (XAC's Secretary General) and one of the arbitrators to contact the parties with a suggestion to settle the case by the Respondents paying the Applicants RMB250 million in return for a decision in the Respondents' favour.
- Rather than contacting the Respondents directly, they contacted Mr Zeng Wei, a person perceived to have influence over the Respondents.
- There followed a dinner at the Xian Shangri-La with Mr Zeng at which he was asked to "work on" the Respondents.
- The Respondents later submitted Supplemental Submissions in which they appeared to attack the integrity of the Applicants and tried to bargain the RMB250 million offer down to a

1 [2011] HKEC 1626.

2 This paraphrases the leading authority in Hong Kong on refusal of enforcement of arbitral awards, *Hebei Import & Export Corp. v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111.

3 AO (Cap. 609) Section 33.

4 AO (Cap.341) Section 40E(3). The new AO provides for the same issue at Section 95(3). Public policy grounds may also be used to prevent enforcement of New York Convention awards in Hong Kong.

RMB60 million plus costs. The arbitration recommenced.

- The arbitration award dismissed the Respondents' claim and made a non-binding recommendation that the Applicants pay the Respondents RMB50 million as economic compensation.
- The Respondents' subsequent appeal to the Xian Intermediate Court accusing the arbitral tribunal and Mr Pan of bias was rejected.

Reyes J in the Court of First Instance interpreted these facts to find that there was real apprehension of bias (though he made no finding of actual bias) by the original arbitral tribunal in favour of the Applicants. In the Court of Appeal, Tang V-P took a different view.

Apparent bias - The Court of Appeal found that this had not been established on the basis that:

- While it was not entirely clear why Mr Zeng was contacted by Mr Pan rather than the actual Respondents, it was difficult to imagine that he could have agreed to seek the Respondents agreement to pay RMB250 million if he had gone to meet Mr Pan without the agreement or authority of the persons behind the Respondents, whoever they were.
- The Respondents themselves never complained at the time that Mr Zeng was contacted as opposed to someone else.
- As for holding a mediation over dinner in a hotel, a Mainland court is better able to decide whether that is acceptable. Again, the Respondents themselves never complained about the venue.
- Tang V-P could not agree with Reyes J that there was any connection between the RMB250 million Mr Pan suggested the Respondents should pay the Applicants and the eventual suggestion in the arbitration award that the Applicants pay the Respondents RMB50 million.
- Mr Pan asked Mr Zeng to "*work on*" the Respondents. While Reyes J found this expression to have overtones of actively pushing for settlement, Tang V-P found this to be a common expression in the Mainland (and devoid of the negative indication that Mr Zeng had ever "pushed" the Respondents).

Tang V-P concluded that although "*one might share [Reyes J]'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 apparent bias, may depend also on an understanding of how mediation is normally conducted in the place where it was conducted. In this context, I believe due weight must be given to the decision of the Xian Court refusing to set aside the Award*."

Waiver - Unlike Reyes J, Tang V-P found that the failure of the Respondents to complain at the time about the Xian Shangri-la meeting, to proceed with the arbitration, and to make a counter offer of RMB60 million constituted a waiver of their right to object to the arbitration. The Respondents should have complained to the arbitral tribunal. Both the tribunal and the Xian court would have been in a much better position to ascertain the facts and to decide whether those facts established a case of actual or apparent bias: "*Such finding though not binding is entitled to serious consideration by our court*".

Conclusion

The case confirms that parties involved in arbitration proceedings outside Hong Kong must raise any procedural concerns promptly (and in accordance with any procedural rules). Hong Kong courts will examine the facts bearing in mind the local practice before finding any bias or appearance of bias, and also whether the complaints have already been examined and rejected by the supervisory court of the seat of arbitration.

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