International Dispute Resolution

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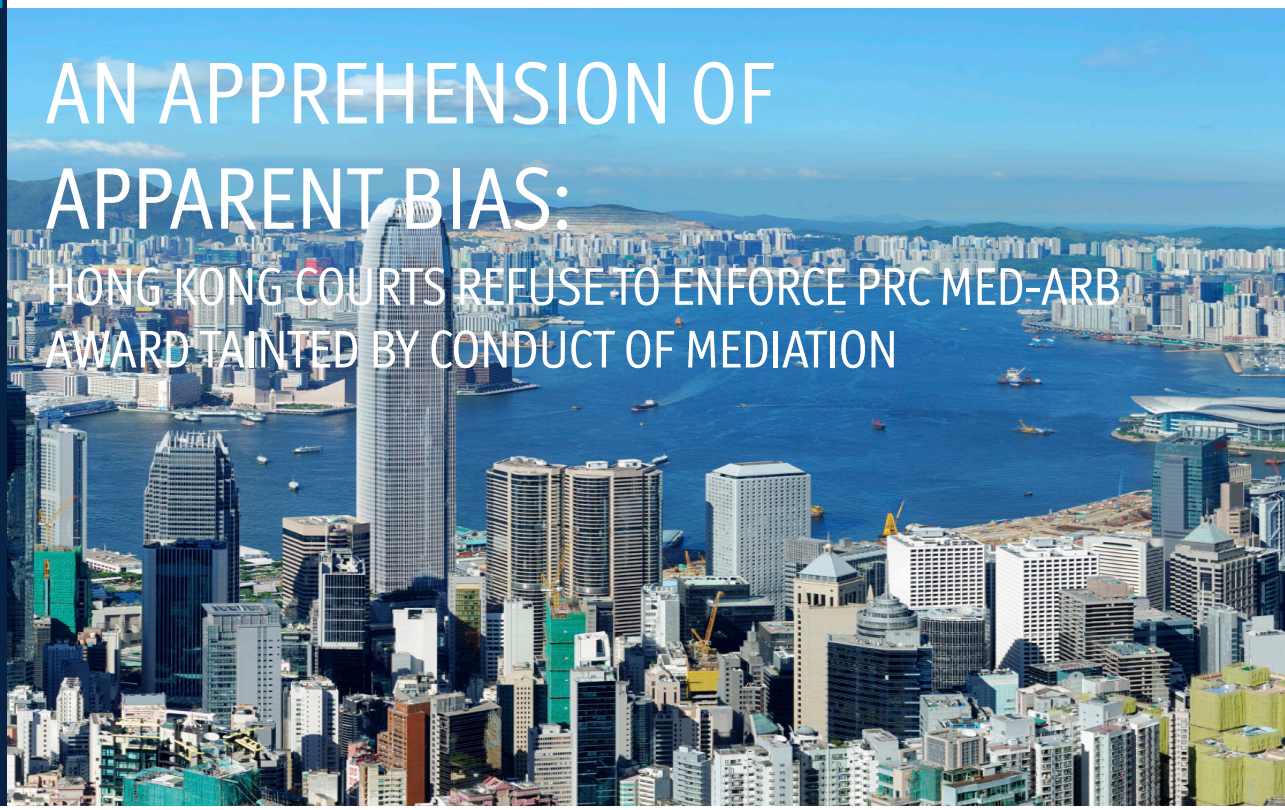

AN APPREHENSION OF APPARENT BIAS:

HONG KONG COURTS REFUSE TO ENFORCE PRC MED-ARB AWARD TAINTED BY CONDUCT OF MEDIATION

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In many parts of the world, it is common for the arbitrators appointed to resolve a dispute also to make attempts to mediate the claim. Indeed, under Hong Kong's new Arbitration Ordinance, which became law on 1 June, this procedure has now become possible in Hong Kong. A recent decision of the Hong Kong High Court, however, provides a salutary lesson on the difficulties which engaging in "med-arb" can cause when it comes to enforcement, particularly when the award is to be enforced in another jurisdiction.

Background

The Gao and Xie v Keeneye Holdings Ltd case was the latest in a series of courtroom battles between the same and/or related parties over ownership of interests in a joint venture company operating a Chinese coalmine. This particular dispute was started when Keeneye commenced arbitration against Gao and Xie in Xian under the Xian Arbitration Commission's Arbitration Rules (the "XAC Rules"), claiming that shares in the joint venture company had validly been transferred to it under a 2008 share transfer agreement. Gao and Xie counterclaimed that the transfer was invalid.

Under the XAC Rules, the Tribunal was empowered to conduct mediation at any time prior to the rendering of an award, subject to the parties' consent and certain rules as to the conduct of the mediation. The parties were found to have consented to mediation being attempted; the manner in which the Tribunal went about trying to achieve this was, however, somewhat unorthodox.

Attempted "mediation"

In March 2010, when the arbitration was well underway, the Tribunal appointed two other members of the XAC, Messrs Pan and Zhou, to approach a third party close to Keeneye, Mr Zeng, and ask him to "work on" Keeneye and get them to agree to settle the case on terms that Keeneye were to pay RMB250 million to Gao and Xie, in exchange for the

issue of the ownership of the shares being resolved in Keeneye's favour. Pan and Zhou did so without checking with Gao and Xie whether they would be happy to accept such a figure, without asking Keeneye's representatives whether they were amenable to mediation being conducted through Zeng and without notifying all parties of the attempt to mediate. In addition, rather than inviting Zeng to a formal discussion of the proposal, Pan and Zhou invited him to dinner at the Shangri-La Hotel, the dinner possibly (on some of the evidence) being held in a private room. Much of the way in which Pan and Zhou proceeded was contrary to Article 37 of the XAC Rules, which regulated the conduct of a mediation by the arbitrators.

Keeneye refused to accept the Tribunal's proposal, in the end sending supplemental submissions to the Tribunal on the issue. Those submissions stated that Gao and Xie would "behave improperly whenever they have some money" and were "playing 'Karate'", and that a settlement figure of RMB60 million (from Keeneye) would be a very favourable offer in their view, in exchange for a decision that the share transfer was valid. Perhaps unsurprisingly, an agreed settlement could not be reached and the Tribunal proceeded to an award. Somewhat more surprisingly given the stance taken by the Tribunal during their apparent attempt at mediation, the award on share ownership was in favour of Gao and Xie, who were merely "recommended" (but not compelled) to pay Keeneye RMB50 million compensation.

Challenging award for bias

Keeneye attempted to challenge the award for bias, initially by appeal to the Xian Intermediate Court and, when Gao and Xie subsequently obtained an order for enforcement of the award in Hong Kong, by applying for that order to be set aside. The Xian Intermediate Court rejected Keeneye's submission that the award was biased. By contrast, the Hong Kong High Court decided that the award was contrary to Hong Kong public policy on the ground that it would give rise to "an apprehension of apparent bias" on the part of a fair-minded observer (citing Porter v Magill [2002] AC 357).

Ruling

The judge in Hong Kong considered that there were "many awkward, unanswered questions arising out of the way in which Pan and Zhou proceeded", and that the impression conveyed was that Pan and Zhou were favouring the applicants. The clincher in this regard was the award, which - Keeneye having rejected the Tribunal's proposal that they should pay Gao and Xie RMB250 million, in exchange for a finding that the share transfer was valid - went in favour of Gao and Xie, who were also not required to pay Keeneye a penny.

Whilst stating that there was nothing in principle wrong with "med-arb", the judge noted that it could give rise to various difficulties from the point of view of a Tribunal's impartiality. This was as a result of the different requirements placed upon arbitrators and mediators by the mediation and arbitration processes. For example, mediators will often meet privately with each of the parties to discuss a matter; by contrast, arbitrators are generally required to eschew unilateral contact with the parties. Similarly, a person will often obtain confidential information from a party when acting as a mediator, which the other party will not be given the opportunity to challenge or comment on; such information may well influence the same person when later acting as arbitrator in the dispute.

The judge also held that he was not prevented from refusing to enforce the Award by the Xian court's decision that the Award was not biased. The Hong Kong courts were required to look to their own public policy and not that of other courts, which might well be different, when considering such issues. There was no doubt that a similarly tainted Hong Kong award would be set aside by the Hong Kong courts; a foreign award should be treated no more favourably by reason of being foreign.

Commentary

This case demonstrates very clearly the difficulties that can arise when different cultures of conflict resolution rub up against one another. From a common law perspective, the commercial settlement and the judicial resolution of a dispute are viewed as very different processes and considerable effort is made to ensure that these procedures are conducted in parallel but separately, so that one does not affect the other – the most obvious example being the "without prejudice" rule. Having one person play both roles can easily induce considerable stress in this system. By contrast, the perhaps more holistic approach

taken in – amongst other places – China sees less of a dividing line between the two processes, with the focus more on the resolution of the dispute by whichever means works best. Consequently, an award which could not be appealed in Xian was unenforceable in Hong Kong.

It is, however, worth noting that the Hong Kong judge placed considerable weight on the fact that conduct of the Tribunal was outside the XAC rules in reaching the conclusion that it had given rise to an appearance of bias. Parties who will need to enforce an award elsewhere should therefore be alive to the fact that such conduct on the part of the arbitrators is likely to prejudice their chances of enforcement, and seek to take corrective action (e.g. in seeking to have new arbitrators appointed) before it becomes too late.

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