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International Mediation

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I. Mediation-Arbitration (Med-Arb)

The subject of Med-Arb, a combination of arbitration and mediation by the same neutral party, has drawn increasing attention in recent years[1] for two principal reasons: (1) it offers the promise of a more expeditious and cost-effective process to resolve disputes; and (2) countries where mediation is an accepted part of arbitration have become increasingly important to the global stream of commerce. A recent court decision from Hong Kong, while issued in the context of a convoluted and unique set of facts, is notable and suggests a possible path for courts to enforce foreign arbitration awards even if they present Med-Arb facts that might not comport with local requirements regarding a lack of apparent bias or even due process.

II. A Case Study from Hong Kong

In *Gao Haiyan v. Keeneye Holdings*, an arbitration regarding share transfer agreements governed by Chinese law was held at the Xian Arbitration Commission (XAC) in mainland China.[2] Following the initial hearing, the tribunal suggested that the parties settle the dispute for a specified sum and enlisted the Secretary-General of the Institutional Provider in China to assist them in settling the case. But before the second sitting of the tribunal, an Arb-Med took place at a private dinner attended by the XAC's Secretary-General, an arbitrator appointed by the claimant, and a third party related to the respondent, but without the formal participation of the respondent. At this meeting, the XAC Secretary-General informed the respondent's representative of the XAC's settlement recommendation and asked him to "work on" the respondents.[3] But the settlement suggestion was ultimately refused. A second arbitration hearing was held, at which the XAC

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1. *See, e.g.*, Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25(2) ARB. INT'L 187, 187 (2009); Beijing Arbitration Comm'n, Straus Inst. for Dispute Resolution, *East Meets West: An International Dialogue on Mediation and Med-Arb in the United States and China*, 9 PEPP. DISP. RESOL. L.J. 379, 379 (2009).

2. Katherine Sanger & Clifford Chance, *Hong Kong*, *in* ASIA-PACIFIC ARBITRATION REVIEW 2013, 32 (Global Arbitration Review ed., 2013).

3. *Id.*

entered an award for the claimant and no complaint was lodged in the arbitration by the respondents about the claimant's earlier meeting with the XAC arbitrator. The respondent then challenged the final award in the Xian Intermediate People's Court (XIPC) on the ground that the tribunal had showed favoritism and malpractice.[4] The Chinese court rejected these arguments, finding that the events at the dinner amounted to mediation that was permitted under the governing Chinese institutional arbitration rules, and it enforced the award.

Following affirmation by the XIPC, the winning party then took the arbitration award to Hong Kong for enforcement. The Hong Kong courts could have rested their decision on whether or not there had been a waiver of the right to allege bias by failing to raise it during the arbitration under section 95(3) of Hong Kong's New Arbitration Ordinance.[5] But both the lower court and the appellate court in Hong Kong also reviewed whether the Chinese arbitration award should be enforced in light of the "public policy exception" to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[6] Under that exception, a court may refuse recognition and enforcement of an arbitral award where "recognition or enforcement . . . would be contrary to the public policy of that country."[7] Leave to appeal further was denied in March 2012.

The lower Hong Kong court refused to recognize the Chinese award, finding that enforcement on such facts would be an affront to the Hong Kong court's sense of justice.[8] The court stated that an arbitrator must avoid unilateral dealings with a party and that confidential information reviewed in meetings with one party may subconsciously influence the mediator when sitting as an arbitrator. The court concluded that a foreign tribunal should normally receive treatment that is no more favorable as far as public policy is concerned than that accorded to a Hong Kong arbitration award and accordingly found that enforcement of the Chinese award at issue would be contrary to the public policy of Hong Kong.

The Hong Kong Court of Appeal reversed the lower court's decision, holding that there was not sufficient cause to refuse to enforce the Chinese award and that no case of apparent bias was established.[9] In making its determination, the court stated that "whether that [conduct] 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."[10] The court gave weight to the decision of the mainland China XIPC court that had refused to set aside the award and held that the arbitration award should be recognized in Hong Kong. Thus, in its analysis, the Hong Kong appellate court did not look to its own public policy in determining enforcement, but gave credence to that which would be acceptable where the award was issued.

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4. *Id.*

5. Hong Kong Arbitration Ordinance, (2011) Cap. 609, 34, § 95(3) (H.K.).

6. *See generally* Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

7. *Id.* art. V(2)(b).

8. Gao Haiyan v Keeneye Holdings, [2011] 3 H.K.C. 157 (C.F.I.) (H.K.). The High Court decision arose from respondents' application to set aside an ex parte order of enforcement from Aug. 2, 2010. *Id.*

9. Gao Haiyan v. Keeneye Holdings, [2011] 1 H.K.L.R.D. 627 (C.A.) (H.K.).

10. *Id.* ¶ 106.

One might also view the conduct in the case as acceptable as found by the Chinese court: the adoption by the parties of the Chinese institutional rules that sanctioned actions such as those taken. The knowing adoption by the parties of such rules might even be viewed as the "informed consent" required under the U.S. case law for a mixed arbitration and mediation process.[11]

III. CIETAC Rules on Conciliation

In its rules revision effective in 2012, the China International Economic and Trade Arbitration Commission (CIETAC)[12] took steps to accommodate western concerns and added a provision in article forty-five, which deals with conciliation, to enable parties to have their conciliation conducted by person(s) other than the arbitration tribunal. Rule forty-five of the CIETAC Rules provides for a "Combination of Conciliation with Arbitration":

1. Where both parties wish to conciliate, or where one party wishes to conciliate and the other party's consent has been obtained by the arbitral tribunal, the arbitral tribunal may conciliate the case during the course of the arbitration proceedings. The parties may also settle the case by themselves.
2. With the consent of both parties, the arbitral tribunal may conciliate the case in a manner it considers appropriate.
3. During the process of conciliation, the arbitral tribunal shall terminate the conciliation proceedings if either party so requests or if the arbitral tribunal believes that further conciliation efforts shall be futile.
4. Where settlement is reached through conciliation by the arbitral tribunal or by the parties themselves, the parties shall sign a settlement agreement.
5. Where a settlement agreement is reached through conciliation by the arbitral tribunal or by the parties themselves, the parties may withdraw their claim or counterclaim. The parties may also request the arbitral tribunal to render an arbitral award or a conciliation statement in accordance with the terms of the settlement agreement.
6. Where the parties request for a conciliation statement, the conciliation statement shall clearly set forth the claims of the parties and the terms of the settlement agreement. It shall be signed by the arbitrators, sealed by CIETAC, and served upon both parties.
7. Where conciliation fails, the arbitral tribunal shall resume the arbitration proceedings and render an arbitral award.
8. Where the parties wish to conciliate their dispute but do not wish to have conciliation conducted by the arbitral tribunal, CIETAC may, with the consent of both parties, assist the parties to conciliate the dispute in a manner and procedure it considers appropriate.

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11. Edna Sussman, *Combinations and Permutations of Arbitration and Mediation: Issues and Solutions*, *in* 2 ADR IN BUSINESS 381 (Arnold Ingen-Housz ed., Wolters Kluwer 2011).

12. CIETAC Arbitration Rules, China Int'l Econ & Trade Arbitration Comm'n (May 1, 2012), http://www.cietac.org/index.cms.

9. Where conciliation fails, any opinion, view or statement, and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation, shall not be invoked by either party as grounds for any claim, defense or counterclaim in the subsequent arbitration proceedings, judicial proceedings, or any other proceedings.
10. Where the parties have reached a settlement agreement by themselves through negotiation or conciliation before the commencement of an arbitration proceeding, either party may, based on an arbitration agreement concluded between them that provides for arbitration by CIETAC and the settlement agreement, request CIETAC to constitute an arbitral tribunal to render an arbitral award in accordance with the terms of the settlement agreement. Unless otherwise agreed by the parties, the Chairman of CIETAC shall appoint a sole arbitrator to form such an arbitral tribunal, which shall examine the case in a procedure it considers appropriate and render an award in due course. The specific procedure and time limit for rendering the award shall not be subject to other provisions of these Rules.[13]

The China Council for the Promotion of International Trade/China Chamber of International Commerce adopted the new rules on February 3, 2012.[14] These rules entered into effect on May 1, 2012.[15]

13. *Id.*
14. *Id.* art. 45.
15. *Id.*