

# THE KEENEYE CASE: RETHINKING THE CONTENT OF PUBLIC POLICY IN CROSS-BORDER ARBITRATION BETWEEN HONG KONG AND MAINLAND CHINA

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*A recent decision of the Hong Kong Court of Appeal in *Gao Haiyan v Keeneye Holdings Ltd* considers public policy-based procedural objections in the context of enforcement of a mainland China arbitration award that was made following the hybrid process of mediation and arbitration (med-arb). This article attempts to decipher what this case means to Hong Kong and the cross-border arbitral relations. What has changed in the playing field of public policy in the enforcement of arbitral awards in Hong Kong and what can parties expect of Hong Kong courts on public policy issues in treating Mainland arbitral awards after the Keeneye case? In light of the rising use of med-arb procedures, this article studies particularly the novel issue of public policy of enforcing med-arb awards, and analyses how the different legal practices in Hong Kong and mainland China may cause much uncertainty in the cross-border enforcement arena. It is revealed that even after unification for more than 15 years there are legal as well as ideological conflicts between the two sides. Although the Keeneye case may have, on the one hand, lowered the predictability of outcome in cases which involve a cross-border clash in ideology in the enforcement of arbitral awards, it has simultaneously acted as a catalyst in reducing such differences, as seen from the rapid Mainland reform to the rules on med-arb. In the long run, a potentially more credible Chinese arbitration system is expected to be built upon and in the course of its improvement, understanding from the Hong Kong side will be helpful for the healthy development of a cross-border arbitration scheme.*

## I. Introduction

Arbitration has been a popular means of dispute resolution for handling foreign business in both mainland China ("the Mainland") and Hong Kong.<sup>1</sup>

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<sup>1</sup> According to the Working Report of CIETAC, foreign-related arbitration cases it accepted reached the record high in 2009 to 559 and in 2010, all 209 arbitration commissions in

Cross-border recognition and enforcement of arbitral awards between the two jurisdictions can be traced back to 1989 when the first award made by China International Economic and Trade Arbitration Commission (the “CIETAC”) in Beijing was enforced in Hong Kong and approximately 150 mainland China arbitral awards were recognised in Hong Kong according to the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”).<sup>2</sup> Hong Kong has been a member of the Convention since 1977, when the United Kingdom extended its application to Hong Kong. In 1987, the People’s Republic of China became signatory to the Convention, and upon the handover on 1 July 1997, China extended the application of the Convention to Hong Kong.<sup>3</sup> With respect to cross-border arbitration post the hand-over, the Supreme People’s Court of the Mainland and the Department of Justice of the Hong Kong Special Administrative Region (the “SAR”) effectively signed an Arrangement on Mutual Enforcement of Arbitral awards (the “Arrangement”) between each other under the “one country, two systems” principle in June 1999.<sup>4</sup>

Although the Basic Law of the Hong Kong SAR explicitly provides that the SAR may, through consultation and in accordance with the Basic Law, maintain judicial relations with the judicial organs of other parts of the Mainland and render assistance to each other,<sup>5</sup> the lack of implementation details took both sides two years to work out the Arrangement in 1999 as the new legal basis to replace the old landscape set up by the 1958 New York Convention. The Arrangement basically maintained the principles and rules of the New York Convention for refusal of recognition and enforcement of arbitral awards and Art 7 explicitly provides public policy as a legal ground to refuse enforcement request from the other side.<sup>6</sup> This provision was later codified into the Hong Kong Arbitration Ordinance.<sup>7</sup> Up to June 2011, more than 90 Mainland

mainland China accepted 1219 foreign-related arbitration cases. Information collected from Newsletters of CIETAC from its web site at <http://cn.cietac.org/newsletter/newsletter.asp>.

<sup>2</sup> Xianchu Zhang, “Enforcement of Arbitral Awards between Mainland China and Hong Kong: Before and After Reunification”, in Raymond Wacks (eds), *The New Legal Order in Hong Kong* (Hong Kong University Press, 1999), pp 192–196.

<sup>3</sup> China has made two reservations when agreeing to the New York Convention. First, it only recognises awards made by member states of the Convention; second, it only applies the Convention provisions to conflicts arising from legal relationships, whether contractual or not, that are considered commercial under PRC law.

<sup>4</sup> The full text of the Arrangement is available at <http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandmutual2e.pdf>.

<sup>5</sup> Article 95 of the Basic Law.

<sup>6</sup> Article 7 of the Arrangement; see also Xianchu Zhang, “The Arrangement between Mainland China and the Hong Kong SAR on Mutual Enforcement of Arbitral Awards: Problems and Prospects” (1999) 29 HKLJ 463–485.

<sup>7</sup> Section 95(3) of Hong Kong Arbitration Ordinance (Cap 609).

arbitral awards, including not only CIETAC's but also many other made by local arbitration commissions, were recognised and enforced in Hong Kong.<sup>8</sup> On the other hand, from 2000 to 2008, at least 24 arbitral awards made in Hong Kong were executed in the Mainland by Chinese people's courts.<sup>9</sup>

Despite the encouraging progress, the significant disparities in legal tradition and rule of law development between Hong Kong and the Mainland have given rise to controversies of the cross-border legal cooperation on commercial matters with public policy as a focal point.<sup>10</sup> Thus far, in the context of enforcement of cross-border arbitral awards, public policy issues have been disputed in a number of cases. Claims under this ground are particularly easy to make. As Hong Kong and mainland China obviously hold on to different legal standards and principles, an arbitration which has been conducted according to Mainland standards may be impeached by applying a more stringent common law standard in Hong Kong.

For reasons of comity between the two jurisdictions and the unreasonableness of requiring Mainland arbitrations to adhere to the strict standards of Hong Kong law, Hong Kong courts have long since closely scrutinised all public policy claims, and have placed a high threshold of requiring the alleged infringement to be fundamental to Hong Kong's fundamental sense of justice and morality.<sup>11</sup> While the high threshold set by Hong Kong courts may have acted as a potent disincentive against frivolous claims on public policy, and to protect the operation of the arbitration systems, both in Hong Kong and with the Mainland, it seems that the bar has been set so high that parties subject to irregular awards with genuine issues of public policy are finding it difficult to avail themselves of the public policy exception to enforcement.

A most recent decision of the Hong Kong Court of Appeal considers public policy-based procedural objections in the context of enforcement of a Mainland award that was made following the hybrid process of mediation and arbitration (the "med-arb"). *Gao Haiyan v Keeneye Holdings Ltd* (the "Keeneye case"),<sup>12</sup> decided by the Court of Appeal in early December 2011, where the appeal against the ruling of the High

<sup>8</sup> Information collected from the web site of Hong Kong International Arbitration Centre.

<sup>9</sup> Document of Panel on Administration of Justice and Legal Services of the Legislative Council of Hong Kong SAR, CB (2) 1129/10-11(01), Feb 2011, paras 5-6 (in Chinese).

<sup>10</sup> Gu Weixia, "Recourse against Arbitral Awards: How Far Can a Court Go? Supportive and Supervisory Role of Hong Kong Courts as Lessons to Mainland China Arbitration" (2005) 2 *Chinese Journal of International Law* 481-500.

<sup>11</sup> *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111.

<sup>12</sup> *Gao Haiyan v Keeneye Holdings Ltd* [2012] 1 HKLRD 627.

Court was allowed,<sup>13</sup> represents the latest development on the ground of public policy.<sup>14</sup>

This article attempts to decipher what this case means to Hong Kong in cross-border arbitral relations. What has changed to the playing field of public policy in the enforcement of arbitral awards in Hong Kong and what can parties expect of Hong Kong courts on public policy issues in treating Mainland arbitral awards, after the *Keeneye* case? In light of the rising use of med-arb procedures in mainland China, this article will focus particularly on the novel issue of the public policy of enforcing med-arb awards, and how the different cross-border legal practices may cause much uncertainty in the enforcement arena.

To discuss these issues, this article is structured into five parts. Following this introduction, in Section II, the *Keeneye* case is briefly described, and the problems it poses in the cross-border enforcement will be pointed out. Section III explains the ground of public policy in enforcement of foreign arbitral awards, and its treatment internationally will be analysed. This section will also include a case review on how the Hong Kong courts have treated public policy in screening foreign arbitral awards, particularly awards from the Mainland, over the past 20 years. Section IV evaluates the new playing field of public policy brought by the med-arb procedure—its system, its rising significance and problems. Section V evaluates the impact of *Keeneye* case on cross-border arbitral relations before the article ends with a conclusion in Section VI. It is revealed that there are legal as well as ideological gaps between the two jurisdictions. Although the *Keeneye* case may have, on the one hand, lowered the predictability of outcome in cases which involve a cross-border clash in ideology in the enforcement of arbitral awards, it has simultaneously acted as a catalyst in reducing such differences, as seen from the rapid Mainland reform to the rules. In the long run, a potentially more credible Chinese arbitration system is expected to be built upon and in the course of its improvement, understanding from the Hong Kong side will be helpful for the health development of a cross-border arbitration scheme.

## II. The *Keeneye* Case

On 12 April 2011, Reyes J delivered his judgment in the Court of First Instance (the “CFI”), denying the enforcement of a Mainland arbitral

<sup>13</sup> [2011] 3 HKC 157.

<sup>14</sup> Robert Morgan and Man Sin Yeung, “Enforcement of Foreign and Mainland Arbitral Awards in Hong Kong: Med-Arb, Public Policy and Waiver” (2012) *Asian Dispute Review* 28–31.

award by reason that it infringed Hong Kong's public policy, by being made under circumstances indicating apparent bias.<sup>15</sup>

The *Keeneye* case arose out of a dispute concerning the validity of two share transfer agreements made between the parties. The reason for the refusal by the CFI to allow enforcement of the award in Hong Kong arose from alleged procedural defects in a mediation conducted as part of the arbitration process, ie med-arb.<sup>16</sup> The bias was found to arise from a private meeting between an arbitrator nominated by the applicants and the Secretary General of the Xi'an Arbitration Commission (the "XAC") and an affiliate of the respondents, who was told to "work on" an RMB 250 million proposal with the respondents in the med-arb process. The respondents eventually refused to pay the proposed settlement and proceeded to arbitration. The arbitral award amounted to RMB 50 million only.<sup>17</sup>

The Arbitration Rules of the XAC make express provision for med-arb. Article 37 of the Rules provides that the med-arb should be conducted "by the arbitral tribunal or the presiding arbitrator", although it goes on to say that "with the approval of the parties, any third party may be invited to assist the mediation, or they may act as mediator".<sup>18</sup> After the award was made, the respondents appealed to the Xi'an Intermediate Court to set aside the award, alleging bias and breaches of the XAC's arbitral rules on proper procedure of med-arb. The case was later dismissed by the Xi'an court, which stated that there was no evidence of bias and no breach of the arbitral rules, and upheld the award. It stated that the private meeting was validly held as a part of an agreement to the med-arb process.<sup>19</sup>

As the presiding judge in the CFI trial, Reyes J refused to follow the decision of the Xi'an Court, deciding that to enforce the award would breach Hong Kong's public policy. Although the Xi'an Court found the award to be perfectly valid by its standards, Reyes J held that Hong Kong courts could apply its own standards when deciding whether an award is to be refused enforcement under public policy grounds. He further held that a med-arb process may run into self-evident difficulties from the point of view of impartiality and the risk of apparent bias arising from

<sup>15</sup> See n 14 above. For the procedural history of the case, see also *Gao Haiyan v Keeneye Holdings Ltd* (unrep., HCCT 41/2011, 8 November 2010) (Saunders J).

<sup>16</sup> The Med-Arb process will be explained more completely later in this article, but in short, it is a process where the parties agree to mediate their dispute within the process of arbitration.

<sup>17</sup> See n 16 above.

<sup>18</sup> Article 37 of the Rules of the XAC.

<sup>19</sup> See n 16 above.

an arbitrator also acting as mediator.<sup>20</sup> Under the principle that “justice has to be done and also seen to be done”, he concluded that the private meeting, while insufficient to prove actual bias, when combined with the contrasting result of the RMB 50 million and the proposed RMB 250 million settlement during mediation, can lead to a “reasonable bystander to apprehend bias as a real possibility in the making of the award”.<sup>21</sup>

However, upon appeal, Tang VP, Fok JA and Sakhrani J at the Court of Appeal (the “CA”) unanimously allowed the appeal and reinstated the award.<sup>22</sup> They stressed and reapplied the usual strict policy of disallowing the refusal of enforcement of arbitral awards except in the most exceptional circumstance of cases.<sup>23</sup> They disagreed to Reyes J’s finding of apparent bias, and surprisingly, also held that although Hong Kong can apply its own public policy when deciding whether an award is to be enforced, deference should also be had to the fact that the supervising court had previously found that there was no finding of bias and that the med-arb process was properly proceeded with according to their standards. While the CA came to this conclusion based on the understandable principles of finality of arbitration and comity of cross-border arbitration, its application is somewhat controversial. The CA’s decision was questioned whether it has lowered its standards too far in the court’s usual policy of refusing to enforce biased awards, in order to protect the vibrancy of the cross-border arbitration system.<sup>24</sup> Thus far, the *Keeneye* case has not been further appealed.

### III. Public Policy in Hong Kong

#### III.1. Public Policy and its Treatment Internationally

The origin of the public policy ground for refusing enforcement of an arbitral award arises from the New York Convention. Article V 2(b) of the Convention provides that recognition or enforcement of an arbitral award may be refused if “it would be contrary to the public policy of that country”.<sup>25</sup> Although the words “of that country” clearly bear the

<sup>20</sup> See n 14 above, at para 72.

<sup>21</sup> *Ibid.*

<sup>22</sup> See n 12 above.

<sup>23</sup> The authority of this principle is in the CFA case of *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (n 11 above).

<sup>24</sup> For a general review of the criticism of the case, see Phillip Georgiou, “The Real Risk of Bias in ‘Chinese Style’ Arbitrations” (2011) *Asian Dispute Review* 89.

<sup>25</sup> Article V 2(b) of the Convention.

meaning that the public policy in question refers to that of the particular jurisdiction under which the enforcing court is acting, there has been much argument on whether this public policy should adhere to an accepted international standard, or the standard of the *lex arbitri*, instead of that of the enforcing court.

The international community seems to be split on the point. According to Fouchard, Gaillard and Goldman, the authors of the most authoritative text on international commercial arbitration in the European Continent, public policy under the New York Convention refers to international public policy, and not domestic public policy.<sup>26</sup> In a more recent commentary, it was claimed that enforcement states are, however, not obliged to consider supranational public policy when deciding to recognise or enforce an international arbitral award.<sup>27</sup> The traditional common law view, although emphasising the public policy of the enforcement state, ie the English public policy, seems to favour a more balanced construction of Art V 2(b), when considering public policies between place of arbitration and place of enforcement.

A leading English judgment in this area is *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd*.<sup>28</sup> In this case, Westcare was to procure sales of Jugoimport military equipment in Kuwait. Jugoimport sought to repudiate the agreement and alleged that a military contract was illegal and contrary to public policy under Kuwait law, as it would have to involve bribing Kuwaiti officials. The case went to arbitration in Switzerland, and the tribunal disagreed on the public policy ground, granting an award to Westcare. Jugoimport sought to resist enforcement of the award in England. The English Court of Appeal held that even if this contract, being a contract of personal influence, was illegal in Kuwait law, as it was held, by the arbitration tribunal, to be not illegal, in the law of the place of arbitration and substantive law of the contract, which were both Swiss law. It would not offend English public policy either, as it was not against English public policy to enforce an award legally made in its arbitral seat which albeit involved elements infringing the public policy of Kuwait. The underlying basis of the decision was that in English public policy, the public policy of international comity in enforcing validly made international arbitral awards outweighed the public policy of discouraging international commercial corruption.

<sup>26</sup> E Gaillard and J Savage (eds), *Fouchard, Gaillard, Goldman On International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), pp 996–997.

<sup>27</sup> James D. Fry, “Désordre Public International under the New York Convention: Wither Truly International Public Policy” (2009) 8 *Chinese Journal of International Law* 81.

<sup>28</sup> *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1998] 4 All ER 570.

The kind of public policy balancing envisaged by the *Westcare* case has significantly referred to *E D & F Man (Sugar) Ltd v Yani Haryanto (No 2)*,<sup>29</sup> in which Neill LJ said:

“The crucial question, as I see it, is whether, as a matter of English law, the public policy in favor of finality is overridden by some more important public policy based on the unenforceability of illegal contracts. I do not consider that this issue has been decided by the judgment of the District Court in Jakarta... The public policy invoked is a policy based on the rules of Indonesian domestic law. It is the English Court which must carry out the balancing exercise.”<sup>30</sup>

It appears that the English position on public policy involves a balance exercise. It is a balance between the importance of preventing a breach of public policy of the enforcement court using its domestic standards, with the importance of principle of pro-enforcement in international arbitration, before deciding whether to defer its judgment on the issue to the opinion of the supervising court. Although the public policy of the supervisory court should be paid due respect, according to Neill LJ, it is justified for the enforcement court to consider a public policy which the supervising court has not considered. Then, if such a public policy is found to be of a greater importance than the principle of finality and comity, then the enforcement may be refused. But if enforcing the award in some way infringes the public policy of England, it has to be an infringement serious enough to outweigh England’s public policy of finality and comity in enforcing awards validly made at the arbitral seat. This cautious approach in the application of public policy ground has been well followed in the common law world.

In one of its latest cases on arbitration, the Federal Court of Australia in *Traxys Europe SA v Balaji Coke Industry PVT Ltd (No 2)*<sup>31</sup> held that the expression public policy means those elements of the public policy of Australia which are so fundamental to the notions of justice that the courts of this country feel obliged to give effect to even in respect of claims which are based fundamentally on foreign elements. In coming to this conclusion, the Australian court quoted heavily from the Hong Kong Court of Final Appeal (the “CFA”) judgment, *Hebei Import and Export Corporation v Polytek Engineering Co Ltd*.<sup>32</sup> The *Hebei* case is one

<sup>29</sup> *E D & F Man (Sugar) Ltd v Yani Haryanto (No 2)* [1991] 1 Lloyd’s Rep 429.

<sup>30</sup> *Ibid.*, at 436.

<sup>31</sup> *Traxys Europe SA v Balaji Coke Industry PVT Ltd (No 2)* [2012] FCA 276 BC201201492.

<sup>32</sup> See n 11 above.



of those leading ones in interpreting “public policy” in the common law world and will be explained in subsequent discussions.

### III.2. Review of Public Policy in Hong Kong

Below is a chronological review of the cases in the past 20 years, in which public policy of enforcing a Mainland arbitral award has been a significant issue.

Public policy issues began to concern Hong Kong courts before the reunification. In *Paklito Investment Ltd v Klockner East Asia Ltd*,<sup>33</sup> the High Court of Hong Kong affirmed refusal to recognise a CIETAC award on the ground that the respondent in the case was not allowed the opportunity to challenge the opinion of the expert witness appointed by the tribunal. Kaplan J held that no doubt a serious procedural irregularity occurred and the party’s right to be heard was denied. Later, in *Apex Tech Investment Ltd v Chuang’s Development (China) Ltd*,<sup>34</sup> an appeal to challenge a CIETAC award was allowed by the Court of Appeal because the court found that the Hong Kong party in the proceeding was not given an opportunity to respond to an opinion issued by the local government bureau, which was taken by the tribunal as a decisive document in rendering the award.

Before the Mainland-Hong Kong Arrangement entered into force on 1 February 2000, the basis of Hong Kong’s stance on its public policy on enforcement of arbitral awards had been set up in early 1998, in the Court of Final Appeal case *Hebei Import & Export Corp v Polytek Engineering Co Ltd*.<sup>35</sup> In the case, a CIETAC arbitral tribunal made an award in favour of the claimant, Hebei. The respondent, Polytek, applied unsuccessfully to the supervisory court in the Mainland to set aside the award. *Hebei* was granted leave to enforce the award in Hong Kong. Polytek then sought to resist enforcement at the Hong Kong court, on the ground that they were unable to properly present its case.<sup>36</sup> The respondent complained that the presiding arbitrator and expert witness appointed by the tribunal had inspected allegedly defective equipment at issue in the case, in the presence of the claimant’s technicians but not the respondents’. In association, the respondents did not receive proper notice of the inspection, were refused a further hearing subsequent to the inspection and

<sup>33</sup> [1993] 2 HKLR 39.

<sup>34</sup> [1996] 2 HKLR 155.

<sup>35</sup> [1998] 1 HKLRD 287.

<sup>36</sup> This claim was made under s 44(2)(c) of the former Hong Kong Arbitration Ordinance (Cap 341).

were not allowed to call the manufacturer to give evidence on the findings of the report of the inspection. It was thus complained that the award was tainted by apparent bias and violated public policy of Hong Kong.<sup>37</sup> Despite the fact that the supervising court in the Mainland, the Beijing Intermediate People's Court, refused to entertain the respondent's complaints, the CA in Hong Kong ruled against enforcement of the award on the ground of public policy.<sup>38</sup>

The case went further to the CFA. The CFA unanimously allowed the appeal and demonstrated the pro-enforcement approach. It was found that the opportunity of a party to present his case and a determination by an impartial and independent tribunal are basic to the notions of justice and morality in Hong Kong.<sup>39</sup> However, in determining whether what happened in the case was contrary to such notions, the CFA considered that the respondent had been given ample opportunity to deal with the expert's report. Although it was said that the holding of the inspection at the end user's factory and the presentation by the technicians in the absence of the respondent were procedures which in Hong Kong might be considered unacceptable, it was held that by inaction the respondent had waived his right to complain about the irregularity.<sup>40</sup>

On the point of waiver, the CFA held that refusal by a supervisory court at the seat of arbitration to set aside an award would not debar the party from resisting enforcement of the award in Hong Kong on the same ground, as public policy reason in a supervisory court may be different from a court of enforcement.<sup>41</sup> The position would, however, be different if a party had failed to raise the challenge before the supervisory court; it would then be estopped from raising that point before the court of enforcement.<sup>42</sup>

The *Hebei* case is a leading authority, as the CFA has, for the first time since the handover, dealt with public policy issues concerning Mainland arbitration practice with detailed explanations and guidance. Being a decision made before the conclusion of the Mainland-Hong Kong Mutual Enforcement Arrangement, the CFA placed its emphasis on adherence to the fundamental principle of the New York Convention to encourage the recognition and enforcement of arbitration agreements and awards in cross-border commercial transactions. Therefore, in fulfilling that purpose, public policy as a legal device to safeguard the integrity of

<sup>37</sup> See n 36 above.

<sup>38</sup> *Ibid.*

<sup>39</sup> See n 11 above, *per* Bokhary PJ, at 122.

<sup>40</sup> See n 11 above, *per* Bokhary PJ, at 123.

<sup>41</sup> See n 11 above, *per* Sir Anthony Mason NPJ, at 136.

<sup>42</sup> See n 11 above, *per* Sir Anthony Mason NPJ, at 139-140.

the justice system of the enforcing jurisdiction should be given a narrow construction.<sup>43</sup> Courts should also recognise the validity of decisions of foreign arbitral tribunals as a matter of comity, and give effect to them unless to do so would be against the forum court's most basic notions of morality and justice.<sup>44</sup> Litton PJ stated that public policy could only be grounded on extreme injustice.<sup>45</sup> Quoting Bokhary PJ:

“In regard to the refusal of enforcement of awards on public policy grounds, there are references in the cases and texts to what has been called ‘international public policy’. Does this mean some standard common to all civilized nations? Or does it mean those elements of a State's own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other States are affected? I think that it should be taken to mean the latter...”<sup>46</sup>

Hence, an award to be denied must be so fundamentally offensive to that particular jurisdiction's notion of justice.<sup>47</sup> Sir Anthony Mason NPJ added his agreement with the opinion that the public policy could only be applied to the situation “contrary to the fundamental conceptions of morality and justice of Hong Kong”.<sup>48</sup> In this regard, all the justices firmly took the same stand on the application criterion of public policy.<sup>49</sup> It was generally believed that the pro-enforcement approach was well taken to face the new political reality of the reunification.

Less than two years later, the *Hebei* case was applied in *Shanghai City Foundation Works Corp v Sunlink Ltd*,<sup>50</sup> and the case was handed down by Burrell J in the CFI. In the case, the defendant alleged that enforcement of an arbitral award should be refused, as there was an oral agreement between the parties providing that whatever the outcome of the arbitration, the settlement of the outstanding sums would only be payable after certain other conditions were fulfilled. The court refused to withhold enforcement of the award to allow factual testimony as to the existence of the alleged agreement. Applying *Hebei*, it was held that the defendant's failure to raise its challenge in the supervising court in

<sup>43</sup> *Ibid.*

<sup>44</sup> See n 11 above, *per* Litton PJ, at 117-118.

<sup>45</sup> See n 11 above, at 118.

<sup>46</sup> See n 11 above, at 123.

<sup>47</sup> See n 11 above, *per* Bokhary PJ at 122.

<sup>48</sup> See n 11 above, *per* Sir Anthony Mason NPJ at 139.

<sup>49</sup> In this case Li CJ and Ching PJ did not write their separate opinions, but agreed with Sir Anthony Mason NPJ on his judgment.

<sup>50</sup> *Shanghai City Foundation Works Corp v Sunlink Ltd* [2001] 3 HKC 521.

the Mainland amounted to an estoppel or a defeat of *bona fide* such as to justify enforcement of the award.

In 2007, the CFA decided another case concerning public policy. In *Unruh v Seeberger*,<sup>51</sup> it was alleged that a Mainland arbitral award should not be enforced because it was made in circumstances involving a champertous agreement, which was illegal in Hong Kong. Following the English approach in balancing public policy, it was held that it was improper for Hong Kong courts to impose its public policy against champerty on mature commercial parties who have chosen to arbitrate in a jurisdiction where champerty is not contrary to public policy.

The role of the Hong Kong courts in enforcement actions is properly explained in *Xiamen Xinjingdi Group Ltd v Eton Properties Ltd* in 2008.<sup>52</sup> In that case, the respondent applied to set aside leave to enforce an arbitral award, claiming that it was impossible to perform a part of the award which imposed non-monetary obligations. It claimed that to enforce it would be against public policy, as it was fundamentally offensive to the court's notion of justice to order it to perform the award, when the applicant was not ready, willing or able to perform its obligations under the agreement. The case eventually reached the CA. However, it was at the CFI and through Reyes J that much analysis was given on the enforcement policy of arbitral awards, and such analysis was agreed to in the CA. Reyes J accepted the counsel's opinion at the CFI that in ensuring the effective and speedy enforcement of international arbitration awards, the court should play a "mechanistic role" when requested to enforce an arbitral award.

According to Reyes J, an enforcement court only has two tasks. First, it has to determine whether according to Art II of the New York Convention, it is a valid Convention award. Second, to determine whether the award may be refused under one of the exclusive grounds of refusal in Art V, in which public policy is one of such grounds. If the award is valid and there exists no valid ground to refuse enforcement, the award should be mechanistically enforced. The enforcement court needs not bother itself with the reasoning or circumstances in which the award was made. Hence, the court's role should be "although by no means entirely 'mechanistic', 'as mechanistic as possible'."<sup>53</sup>

Consistent with the "mechanistic" principle, Reyes J held that unless an award was plainly incapable of performance, such that it would be obviously oppressive to order a party to comply with it, the court could

<sup>51</sup> (2007) 10 HKCFAR 31.

<sup>52</sup> *Xiamen Xinjingdi Group Ltd v Eton Properties Ltd* [2008] 4 HKLRD 972.

<sup>53</sup> *Ibid.*, at para 47.

not hold that to enforce the award would be contrary to public policy. If it was merely arguable that the award was incapable of performance, it is incumbent on the parties that the issue be raised at the courts of supervision; it was held that it is not the place of enforcement courts “to go behind the award, explore the reasoning, and allow the re-opening of what the arbitrators had already decided”.<sup>54</sup> If the issue was not raised at the courts of supervision, it was not for the courts of enforcement to second-guess how the courts of supervision might have decided. The Hong Kong judgment and the “mechanic” principle had quoted an earlier English Court of Appeal judgment, *C v D*.<sup>55</sup> The English Court held that an agreement as to the seat of arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the validity of an existing interim or final award is agreed to be made only in the courts of the place designated as to the seat of the arbitration.

Reyes J made another important judgment on the issue of public policy in 2009. In *A v R*,<sup>56</sup> the respondent sought to avoid an award against him, by claiming that the award was based on damages arising from a penalty clause, which was against public policy in Hong Kong. However, as the respondent did not even show up for the arbitration, applying the rule of estoppel in *Hebei*, the respondent was held to have waived his right to challenge the issue. Although a straightforward case in fact, the judgment has been well acclaimed in shedding light on why Hong Kong courts have traditionally been restrictive in interpreting the public policy exception. Reyes J held that the court must be vigilant that the public policy objection is not abused in order to obtain for the losing party a second chance at arguing a case. He found that to allow frivolous cases under public policy would undermine the efficacy of the parties’ agreement to pursue arbitration. That by itself would not be conducive to the public good.

It seems that the Hong Kong position on public policy, up to the *A v R* case, has been consistently in a cautious manner. The courts generally follow the narrow interpretation of the public policy,<sup>57</sup> although, in the meantime, parties are reminded of the importance of raising procedural objections at the place of arbitration in a timeously manner.<sup>58</sup> As a line of the above cases shows, the Hong Kong courts respect the fact that when parties agree to arbitration, it is their intention that their dispute be settled and argued by arbitration and not in court. Hence, any

<sup>54</sup> *Ibid.*, at para 62.

<sup>55</sup> *C v D* [2008] Lloyds Rep 239, at para 17.

<sup>56</sup> *A v R* [2009] 3 HKLRD 389.

<sup>57</sup> See *Hebei, Unruh, Xiamen Xinjingdi Group*, and *Karaha Bodas* cases.

<sup>58</sup> See *Shanghai City Foundation Works Corp* and *A v R* cases.

error in judgment by arbitration would be insufficient to counterbalance the public policy of pro-enforcement, unless there is some substantial injustice to render the enforcement repugnant.

The next significant case on the public policy in refusing an arbitral award is the *Keeneye* case. As illustrated before, the disparity in reasoning by the CA and the CFI is significant, and it throws the interpretation of the standard of public policy to refuse enforcement of a foreign award in Hong Kong into confusion.<sup>59</sup> This confusion is highlighted, as the CA has criticised Reyes J's standard of viewing public policy, when, as we have seen above, much of the more recent case laws on the matter have been set by Reyes J. Therefore, the most recent judicial approach, as concerned in the new context of public policy regarding med-arb, has thrown a shroud of uncertainty over its authoritative value in the past two decades in Hong Kong.

#### IV. Public Policy Concerned in the New Context: Med-Arb

##### IV.1. *The Relevance of Med-Arb*

The issue of how the Hong Kong courts view the practice of med-arb in mainland China is highly important to parties who arbitrate in Greater China, as it is has been a very much relied on system. Inherited from the Confucian culture and Chinese legal traditions, mediation has been enjoying a prominent status in the Chinese dispute resolution system. The Arbitration Law of China (the "AL") provides that if parties suggest mediation, the tribunal is obliged to conduct it.<sup>60</sup> Arbitrators may act as mediators, and the outcome of a mediation so conducted by arbitrators enjoys the legal effect as an award enforceable under the New York Convention.<sup>61</sup> Hence, med-arb is not only the outstanding feature of arbitration of CIETAC, but also prevailing practice in all Chinese local arbitration commissions. Statistics show that in the period from 1983 to 1988, about 50 percent of the CIETAC cases were settled through mediation by arbitrators; the figure maintained from 1989 to 2000.<sup>62</sup> These days CIETAC still enjoys a steadily successful rate of med-arb in the range of 20 to 30 percent.<sup>63</sup>

<sup>59</sup> See discussions above in Section II of this article.

<sup>60</sup> Article 51(1) of the AL.

<sup>61</sup> Article 51(2) of the AL.

<sup>62</sup> Source: CIETAC web site, <http://cn.cietac.org/Mediation/index.asp?hangye=1> (visited 28 Aug 2012).

<sup>63</sup> *Ibid.*

It is in this context that the *Keeneye* case raises new questions. It has been questioned whether the Mainland practice of med-arb is compatible with Hong Kong's public policy. The usual med-arb practice in mainland China often does not meet the common law standards against apparent and actual bias, as well as the protection of confidentiality and due process. When such a shortfall occurs in a Mainland med-arb, can such a shortfall ever be a valid ground to challenge an arbitral award in Hong Kong courts? In the *Keeneye* case, as previously discussed, neither the CFI nor the CA has ruled out such an argument, but they seem to have different standards on what factors should be looked at and what weight they should be given to, in deciding whether a public policy issue can be raised.

Before proceeding, it is necessary to lay out the theoretical framework of what med-arb is in the international context. The practice has not had a settled definition, having wider and narrower concepts. The narrower or the more internationally recognised concept refers to the situation when a party decides to employ the mediation process and arbitration process in a single case. The mediators and arbitrators shall be independent, and the mediation and arbitration proceedings shall operate independently.<sup>64</sup> However, a wider concept refers to any hybrid process where mediation is employed in the arbitration process. It does not matter whether the arbitral tribunal or an arbitrator takes over the mediation itself, or where an arbitrator plays a dual and often conflicting role of a mediator.<sup>65</sup>

The wider or more loosely perceived concept of med-arb has become the concern of most of the Western world, most of them having reservations of allowing arbitrators to act as mediators at the same time. Not surprisingly, as a result of his active involvement in both the mediation and arbitration phase of the process, the med-arbitrator loses his impartiality by becoming privy to confidential information which would never have been disclosed to a pure arbitrator. This concern is further highlighted when private caucuses were used during the mediation stage. While discussing confidential matters with the parties, it is possible that the med-arbitrator will become (consciously or unconsciously) empathetic towards one of the parties or otherwise involved with the subject matter.<sup>66</sup> This may not be a problem while acting as a mediator, but when called on to make discretionary decisions as an unbiased

<sup>64</sup> See, Carlos de Vera, "Arbitrating Harmony: 'Med Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China" (2004) 1(18) *Columbia Journal of Asian Law* 155-157.

<sup>65</sup> *Ibid.*

<sup>66</sup> Barry C. Bartel, "Med-Arb as a Distinct Method of Dispute Resolution: History, Analysis, and Potential" (1991) 3(27) *Willamette Law Review* 664, 685.

arbitrator, one can hardly ignore information disclosed. According to James Peter, it is difficult to believe that the med-arbitrator will remain unaffected as an arbitrator after engaging in caucuses and becoming privy to “confidential, perhaps intimate, emotional, personal, or other ‘legally’ irrelevant information”.<sup>67</sup>

The controversy of the two concepts of med-arb has been partially fleshed out by the *Keeneye* case. First, there is the issue of apparent bias which was alleged, when an arbitrator for the appellant and the Secretary General of the XAC pressurised a third party to push the respondents to agree to a RMB 250 million settlement, while the eventual arbitral award turned out to be of only RMB 50 million. Second, there is the problem of due process, which was brought about by the private caucus between the arbitrator, the Secretary General and the third party. Meetings as such are perceived dangerous in the common law settings, as involved parties are deprived the chance of rebutting anything said in the caucus which he may believe to be an inaccurate reflection of his case. A third and related issue demonstrated by the *Keeneye* case is that arbitrators who act as mediators may unduly coerce parties into accepting their proposals, and that parties, for fear of being antagonised, may compromise in an unfavourable arbitration outcome.

#### IV.2. *Recent Development of Med-Arb*

Despite the problems mentioned above, med-arb is gaining track, not just in mainland China, but also in other parts of the world. This is mostly due to its case settlement efficiency, as the arbitrator who was previously the mediator is already familiar with the case when mediation fails. Also, it saves costs. The practice may also produce more persuasive results for the parties, as the med-arbitrator understands more of the parties’ concerns and will thus be able to make an award more in line with the interests of the parties, instead of parties’ pure legal rights.

In Asia, med-arb is picking up popularity these days. This is possibly due to the fact that the rule of law tradition has historically not been as strong as in the West, and adjudicators have traditionally preferred to mediate the cases. Amongst others, Japan, South Korea, Taiwan, Hong Kong and Singapore have all made particular provisions on med-arb.<sup>68</sup>

<sup>67</sup> James T. Peter, “*Med-Arb in International Arbitration*” (1997) 8 *American Review of International Arbitration* 83, 91.

<sup>68</sup> Michael Pryles (ed), *Dispute Resolution in Asia* (Kluwer Law International, 3rd edn, 2006), pp 15–17.



In the West, there has been a bit more resistance to allowing med-arb in the statutes, particularly in common law countries, where it is still a controversial practice and the hybrid of which is considered to endanger due process. Some civil law countries have a rather different take on the issue. According to Kaufmann-Kohler, in Germany, Austria and Switzerland, arbitrators have an active public and private duty to promote and facilitate settlement negotiations. She however stresses that it is not the same as mediation, but a form of “proactive managerial judging”, as unlike the mediator it is not the arbitrators “main remit” to settle the case, but only an “ancillary duty” to facilitate it.<sup>69</sup> The situation is not the same in other civil law countries; as in France, arbitrators do not have such a duty, and therefore arbitrators have been much more reluctant to act as mediators of the same case.<sup>70</sup>

Although on the rising interest in the dispute resolution community, it seems that the legislative take on med-arb is fairly divided in the international community. It would therefore be ideal to have some international legislation to officially clarify on the point, for example, whether to allow or disallow challenges to an award on the mere basis that an arbitrator has acted in such a dual role as mediator. Unfortunately, the most recently revised Model Law on International Commercial Arbitration is also silent on the issue,<sup>71</sup> leaving the enforcement courts with the discretion of deciding in each case with whether their public policy has been infringed by such practice.

In Hong Kong, the med-arb provisions can be found under ss 32 and 33 of its most recently updated Arbitration Ordinance.<sup>72</sup> Under the Ordinance, a member of an arbitral tribunal is permitted to serve as a mediator after arbitration proceedings have begun, provided that all parties give their written consent.<sup>73</sup> The Ordinance further provides that, in these circumstances, the proceedings are to be stayed in order to afford the mediation the maximum chance of success<sup>74</sup>—although if the mediation fails, the arbitrator-mediator is required to disclose to all parties any confidential information obtained during the mediation which he

<sup>69</sup> Gabrielle Kaufmann-Kohler, “When Arbitrators Facilitate Settlement: Towards a Transnational Standard” (2009) 2(25) *Arbitration International* 190.

<sup>70</sup> *Ibid.*

<sup>71</sup> The Model Law on International Commercial Arbitration, drafted by the United Nations Commission of International Trade Law (the “UNCITRAL”), comprises of a set of most widely accepted international arbitration norms. The Model Law has been most recently revised by UNCITRAL in 2006.

<sup>72</sup> Hong Kong Arbitration Ordinance (Cap 609) was amended in 2010 and took effect on 1 June 2011.

<sup>73</sup> Section 33(1) of the Ordinance.

<sup>74</sup> Section 33(2) of the Ordinance.

considers to be material to the arbitral proceedings.<sup>75</sup> Lastly, it is provided that no challenge can be made against an arbitrator solely on the ground that he has acted previously as a mediator in accordance.<sup>76</sup>

The Hong Kong provision on med-arb is different from that of the Mainland. In Hong Kong, if mediation fails, the arbitrator-turned-mediator is required to disclose to all parties any confidential information obtained during the mediation which he considers to be material to the arbitral proceedings. This requirement is critical because it helps clear up the due process concerns of the common-law-trained Hong Kong legal professionals.<sup>77</sup> Apart from difference on paper, more subtle disparities lie in practice, as driven by strong but contrasting legal systems, legal traditions and ideologies between Hong Kong and mainland China. As will be shown in Section V of the article, much of what Hong Kong and the common law world view as problems in the med-arb context, are, however, non-issues in the Mainland.

### **IV.3. Public Policy in the Context of Med-Arb**

The *Keeneye* case has fleshed out a new wave of discussions on public policy that the Hong Kong common law mindset has had against the Mainland style med-arb. The first is on the issue of bias, the second is on due process and the third is on waiver, all relevant to the notion of “fundamental morality and justice” in Hong Kong. The three issues are intertwined with each other, to test whether a party has been deprived of legitimate rights to present and proceed with his case in arbitration, and this has pulled the alarm of the enforcement of the award and cross-border arbitral relation through the public policy ground.

To echo with earlier discussions, the problem of bias in the med-arb context is latent, as when an arbitrator becomes a mediator and then when mediation fails and he reverts back to the role of an arbitrator, he may lose his impartiality.<sup>78</sup> The med-arbitrator becomes privy to information not placed before the arbitral tribunal during the mediation and hence, he loses his impartiality as the arbitrator becomes attached to any settlement proposals he may have made or legal opinions he may have given during the mediation, and tries to prove himself right during the

<sup>75</sup> Section 33(4) of the Ordinance.

<sup>76</sup> Section 33(5) of the Ordinance.

<sup>77</sup> But in the meantime, the provision may deter some parties from engaging in frank discussions during the mediation, particularly during any caucus sessions, which may impede the effectiveness of the design of the overall med-arb process.

<sup>78</sup> See discussions in Section IV.1 of this article.

arbitration. It is the combination of these factors which costs an arbitrator his impartiality. The common law arbitrators therefore tend to refuse to participate in med-arb, so that they can avoid appearing to be biased, even if they are confident that they can act professionally and adjudicate without bias.<sup>79</sup> This point was the main thrust of the challenge of the award in the *Keeneye* case.

At the CFI, Reyes J held that when the circumstances surrounding an arbitrator would cause a fair-minded observer to apprehend a real risk of bias,<sup>80</sup> then an award made in that situation could be refused enforcement under the public policy exception of Hong Kong.<sup>81</sup> According to him, if an award were found to be tainted by the appearance of bias, the enforcement would be an affront to this court's sense of justice.<sup>82</sup> Reyes J, however, only cited *A v R*<sup>83</sup> generally as authority for all the above points. That is a bit unfortunate, as *A v R* was a case he himself decided, and in that case he did not specifically deal with issues of bias or apparent bias. One of the main ratios of *A v R* was that Hong Kong's public policy of enforcement, as a matter of comity, should be pro-enforcement.<sup>84</sup> Given that, it seems the theme of *A v R* does not seem to support Reyes J's statement in the *Keeneye* case.

Fortunately, the point on apparent bias was picked up and has been further investigated in the CA. The CA found the *Hebei* case to be the definitive authority on the issue.<sup>85</sup> Of particular importance on the issue of bias are the following two quotes which were referred to by Tang VP in the CA.

Bokhary PJ at page 124 of the *Hebei* case said:

“Short of actual bias, I do not think that the Hong Kong courts would be justified in refusing enforcement of a Convention award on public policy grounds as soon as appearances fall short of what we insist upon in regard to impartiality where domestic cases or arbitrations are concerned... After all, where the appearance of bias is strong enough, it can lead to an inference that actual bias existed.”<sup>86</sup>

<sup>79</sup> Carlos de Vera, “Arbitrating Harmony: ‘Med Arb’ and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China” (2004) 1(18) *Columbia Journal of Asian Law* 155–157.

<sup>80</sup> See n 14 above, *per* Reyes J, at para 53.

<sup>81</sup> *Ibid.*, at para 69.

<sup>82</sup> *Ibid.*, at paras 99 and 100.

<sup>83</sup> [2009] 3 HKLRD 389.

<sup>84</sup> *Ibid.*

<sup>85</sup> See n 12 above, *per* Tang VP, at para 49.

<sup>86</sup> *Ibid.*, at para 107.

From this quote, it seems that only the finding of actual bias would be sufficient to raise the public policy ground to resist the enforcement of the award. Following Bokhary PJ, Reyes J may have had erred to think otherwise.

In *Hebei*, however, Sir Anthony Mason NPJ at page 139 said:

“The opportunity of a party to present his case and a determination by an impartial and independent tribunal which is not influenced, or seen to be influenced, by private communications are basic to the notions of justice and morality in Hong Kong.”<sup>87</sup>

Since the concept of “basic to the notions of justice and morality in Hong Kong” in the *Hebei* case has been held to be the most authoritative test of public policy exception in Hong Kong for refusal of enforcement of a foreign award, it seems that Sir Anthony Mason NPJ, different from Bokhary PJ's threshold, was saying that apparent bias could also be a ground under public policy to refuse enforcement. Despite the seemingly contrary views, Tang VP said that he could not see a conflict between the views, that Bokhary PJ was merely pointing out that “one should not be too ready to refuse to enforce an award on the basis of one's notion on what may amount to apparent bias”.<sup>88</sup>

It seems that the current public policy of Hong Kong on apparent bias is as follows. What is normally considered apparent bias by Hong Kong courts, or in domestic arbitrations, is insufficient to constitute sufficient grounds under public policy for the courts to refuse enforcement of a foreign award. For a foreign award to be refused enforcement under the ground of apparent bias, circumstances in the case must point towards very strong appearances of bias. Unfortunately, Tang VP has not confirmed whether Bokhary PJ's statement that if an appearance of bias is strong enough that actual bias can be inferred is an accurate reflection of the court's current threshold of refusing foreign awards under apparent bias. Fairly speaking, it is not that when an arbitrator acts as a mediator, he is already under suspicions of apparent bias, but it is reasonable to say that arbitrators acting as mediators are under conditions where it is easy to develop a bias.

The second associated problem with med-arb is its likely violation of due process. In one situation, if there is more than one arbitrator and they are not notified of such additional information, the additional information may affect the mind of one arbitrator and not the others, causing the

<sup>87</sup> *Ibid.*, at para 109.

<sup>88</sup> *Ibid.*, at para 110.

tribunal to decide on unbalanced grounds.<sup>89</sup> In another situation, a violation of due process may occur, as the additional information obtained in the private caucus of mediation may affect the arbitrator's mind without the other party having the right to question the validity and accuracy of what was said in the caucus.<sup>90</sup> Internationally, the problems of these two situations are often solved by requiring the arbitrator who participated in the mediation to disclose all information which may be relevant to the issues, or for the mere purpose of recording a settlement reached during mediation, when arbitration resumes. For example, in Hong Kong, the Arbitration Ordinance requires arbitrators to disclose to all other parties all such confidential information received by him in the role as a mediator if he considers the information material to the arbitral proceedings.<sup>91</sup> There are similar safeguards in Singapore. In Singapore, in relation to the dual-role dilemma whereas the mediator is concurrently appointed as the arbitrator, the Singapore Mediation Center Mediation Procedure requires that the arbitrator's appointment is merely "nominal", and is "solely for the purpose of recording any settlement reached as a result of the mediation as a consensual arbitral award".<sup>92</sup>

Unfortunately, the situation is far from satisfactory in mainland China. The 1994 Arbitration Law only provides sweep reference to the practice of med-arb.<sup>93</sup> The Law contains no provisions disallowing private meetings (caucus), nor are there any provisions requiring arbitrators to disclose information obtained from such meetings to other parties or to the rest of the tribunal. The Law is further silent on whether arbitrators are restricted from using their knowledge of such information when deciding the case afterwards and many mainland Chinese med-arbitrators are found to have heavily relied on these information in making the award. Hence, the difference in legislative policy the two jurisdictions have towards the maintenance of due process is outstanding where mainland Chinese awards are transferred to Hong Kong seeking enforcement.

The third associated problem concerns waiver, and the argument of waiver may counteract all endeavours made for a public policy exception resisting enforcement. As stated in earlier part of the article, the respondents had, before coming to Hong Kong courts, unsuccessfully sought

<sup>89</sup> Carlos de Vera, "Arbitrating Harmony: 'Med Arb' and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China" (2004) 1(18) *Columbia Journal of Asian Law* 155-157.

<sup>90</sup> *Ibid.*

<sup>91</sup> Section 33(4) of the Ordinance.

<sup>92</sup> Article 6 of the Singapore Mediation Center Mediation Procedure.

<sup>93</sup> Article 51 of the AL only provides that if parties suggest mediation, the tribunal is obliged to conduct it.

the setting aside of the arbitral award by the supervising court (Xi'an Intermediate Court).<sup>94</sup> In response to an argument by the applicants that the respondents were estopped in Hong Kong from raising on enforcement a public policy point on which they had failed before a court of the arbitral seat, the CA held, following principles established in *Hebei*, that a party which unsuccessfully challenges an award before the supervisory court is not precluded from raising the same ground before the enforcing court because the latter's public policy may well differ from that of the former.<sup>95</sup>

Reyes J in the CFI considered that there had been no waiver on the respondents' part in not having complained to the Xi'an court about what had happened at the dinner meeting. Tang VP in the CA concurred with Reyes J that no estoppel arose from the decision of the supervisory court.<sup>96</sup> The CA was, however, concerned that the refusal of a supervisory court to set aside an award on the ground of apparent bias could lead to injustice as such refusal was relevant to the enforcing court's decision. In support of that proposition, the English authority *Minmetals Germany GmbH v Ferco Steel Ltd*<sup>97</sup> was cited,<sup>98</sup> where Coleman J said:

“... In international commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration... That is because by his agreement to the place in question as the seat of the arbitration he has agreed not only to refer all disputes to arbitration but that the conduct of the arbitration should be subject to that particular supervisory jurisdiction.”<sup>99</sup>

Coleman J explained that it was a cardinal English public policy to respect that agreement, so that parties aggrieved by defects to an arbitration or its award are obligated to first pursue such remedies as exist under that supervisory jurisdiction. In the case where the remedy for an alleged defect is applied for in the supervisory court but is refused, it will normally require very strong public policy considerations before the English court will overturn the decision of the supervising courts. Coleman J went on

<sup>94</sup> See discussions in Section II of this article.

<sup>95</sup> See n 11 above, *per* Sir Anthony Mason NPJ at 140.

<sup>96</sup> See n 12 above, *per* Tang VP, at para 66.

<sup>97</sup> *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647. (Queen's Bench Commercial Court, England and Wales).

<sup>98</sup> See n 12 above, *per* Tang VP, at para 67.

<sup>99</sup> See *Minmetals*, n 98 above, *per* Coleman J, at 661, cited in *Keeneye*, n 12 above, *per* Tang VP, at para 67.

to explain that in exceptional cases, however, such as in cases involving corruption, so that the supervising courts could not effectively review the irregularity in the case, the English courts may then come to their own decision without deference to the conclusion made by the supervising courts. Outside such exceptional cases, any allegations of substantial injustice in the conduct of arbitration that have already been considered by the supervisory court seeking re-investigation at the enforcement court- (English court) - is to be mostly strongly deprecated.<sup>100</sup>

Tang VP went on to say that deference should be paid to supervisory court and hence, blamed Reyes J for not having placed enough weight on the decision of the Xi'an Court.<sup>101</sup> Tang VP considered that the enforcement court must take into account the difference in mediation culture and practice between Hong Kong and mainland China. Thus guided, a Mainland court is better able to decide whether mediation by way of a dinner meeting in a hotel would be acceptable in mainland China, where the court saw no bias and no complaint about the venue had been made to the Xi'an Court.<sup>102</sup> After considering the facts, the CA held that no apparent or actual bias had been established that would entitle the respondents to refusal of enforcement, and the respondents had clearly waived their right to complain what happened in the hotel and, on this basis, the appeal was allowed.<sup>103</sup>

It may be true that in light of the principle of international comity and respect of the agreement of the parties' choice of the supervisory jurisdiction, the award should have been enforced. Nonetheless, it cannot be the case that Hong Kong courts should defer to the opinion of the supervising courts without first balancing the above pro-enforcement policies against Hong Kong's public policy of requiring arbitrations to be free from bias and be in due process. If the public policy of the enforcement court is not to be balanced against the policy of deferring to the opinion of the supervisory court, and deference is automatic in all but the most exceptional situations such as corruption, then the public policy exception of allowing enforcement courts to refuse awards according to its own public policy would be emasculated.

As discussed in earlier part of this article, established in *Westcare Investments Inc v Jugoinport*<sup>104</sup> and *E D & F Man (Sugar) Ltd v Yani Haryanto (No 2)*,<sup>105</sup> under English law, there has to be a balance test

<sup>100</sup> *Ibid.*, cited in *Keeneye*, n 12 above, *per* Tang VP, at para 67.

<sup>101</sup> See n 12 above, *per* Tang VP, at para 68.

<sup>102</sup> *Ibid.*, at para 99.

<sup>103</sup> *Ibid.*, at para 69.

<sup>104</sup> See n 29 above.

<sup>105</sup> See n 30 above.

before deciding whether to defer its judgment on the issue to the opinion of the supervising court.<sup>106</sup> This point, if applied to the *Keeneye* case, could lead it to a different result. It could be argued that Tang VP too readily deferred his opinion to the court of supervision (ie the Xi'an Intermediate Court). Although it may be justified that it is against the principle of finality to re-open the case under the point of actual bias, it may have been more appropriate to conduct the above balancing test between the importance placed on the principle of finality and the public policy of enforcing awards made in circumstances of apparent bias, before deciding whether to defer the court's opinion to that of the supervising court.

Applying the English approach, it seems that the CFI and CA have both gone too far in opposite directions. The CFI has too stringently applied a Hong Kong standard of public policy which may open the floodgates to parties resisting enforcement of Mainland awards which do not conform strictly to Hong Kong standards on bias and due process, and the arbitral tribunal may not even have in mind when making the award. On the other hand, the CA may have too readily deferred its opinion of the enforceability of an award to the supervising court without consideration and balancing of the relevant issues of Hong Kong policy against the policy of pro-enforcement. It is proposed that the appropriate approach towards public policy should lie in the middle.

What does the *Keeneye* case mean for parties who are seeking enforcement of arbitral awards in Hong Kong? It seems that in assessing public policy, the most recent Hong Kong approach is that an enforcement court (ie the Hong Kong court) is entitled to consider the question of bias from its own view point. But when it comes to facts, due regard should be given to the views of supervisory courts. In considering the refusal of enforcement on public policy ground, waiver is also a balancing factor. The current position, although challenged as not cautious enough after comparison with the English approach, has transmitted a clear message that the public policy consideration should be leaning towards the perspective of the supervisory court.

## V. Implication of *Keeneye* in Cross-border Arbitral Relations

What can parties expect of Hong Kong courts on public policy issues in treating Mainland arbitral awards after the *Keeneye* case? As the

<sup>106</sup> See discussions in Section III.1 of this article, particularly regarding the English approach.



elaboration goes, there are a number of implications that we can draw from *Keeneye* in cross-border arbitral relations.

First, the *Keeneye* case has highlighted two conflicts which may cause confusion in the cross-border enforcement of arbitral awards. On the one hand, the case reveals a disagreement between Hong Kong courts in the relative weight they should place on the pro-enforcement policies of comity and finality and whether the courts should defer their opinion on the enforceability of an award when the supervisory court's public policy is substantially different from what the Hong Kong courts apply. As has been analysed, this conflict is highly undesirable and makes it difficult for parties to anticipate an outcome of challenges made on the public policy ground. On the other hand, there is the more subtle legal conflict between the two jurisdictions. The conflict has long been known to both sides, as Hong Kong and mainland China have had different legal histories and have been driven by different sets of legal systems and ideologies. Notwithstanding the fact that Hong Kong has been back to China's sovereign power for over 15 years, the conflicts outlined above are predicted to continue in cases where courts from both jurisdictions are involved.

The second conflict delineated by the *Keeneye* case does not stop there, and can be found in many earlier cases, such as in the *Hebei* case (where the Mainland courts were found to have less respect for the importance of due process), and in *Unruh v Seeberger* (where the Mainland side has no qualms about champertous agreements). In the particular scenario of med-arb, the implications by *Keeneye* are more serious with respect to Mainland med-arb awards than to New York Convention awards, not only as the process will arise more frequently in the former context, but also there are less procedural safeguards accorded to parties. Hence, the *Keeneye* case bears strong influence in the far-reaching Hong Kong-Mainland cross-border arbitral relations. For parties involved in cross-border business transactions, they need to do research on the public policy relevant to their contract in question and their arbitration agreement, paying attention not only to the usual policies of the supervisory court, but also that of the enforcement court.

The *Keeneye* case also indicates that the level of standard of public policy in the cross-border enforcement might be somewhat China-oriented, or comparatively lower than what is applied to the New York Convention. Pursuant to *Keeneye*, because both parties involved in the arbitration come from mainland China and the Chinese court has interpreted the legality of the case, it would thus be undesirable for Hong Kong courts to read into the mind of mainland Chinese judges, unless the issues threaten the fundamental justice and morality in Hong Kong. The legal issues such as bias and due process concerned in med-arb procedures, although challenged as problems in Hong Kong (at least

in its domestic arbitration), have, however, been taken for granted and never been considered as problems in the Mainland. Hence, the public policy ground that should be narrowly construed and cautiously applied in Hong Kong may not be able to deal with all procedural violations and impartiality issues in the Mainland as a developing legal system under the cross-border regime. Regardless of legal terms and technical grounds, the real concern behind all the worries seems to be the quality and competence of the arbitral award of the Mainland, particularly when the awards are made by the government-affiliated local arbitration commissions that have taken shape only after the Arbitration Law was put into practice in 1995.<sup>107</sup>

From the Hong Kong side, it might be argued that a more sensible understanding is needed for a healthy development of cross-border arbitral relations. As what has been reflected in *Keeneye*, Tang VP at the CA, when considering the properness of med-arb, asked the panel to pay regard to how mediation was normally conducted in the jurisdiction of the supervisory court (ie whether mediation by way of a dinner meeting in a hotel with “work on” by other parties would be acceptable in the Mainland). Although the CA judgment, as we see the analysis in the previous discussions, has been challenged as deviating from the Hong Kong usual level of standard, the allow of the appeal did indicate a signal of such understanding by the Hong Kong judiciary of the status quo of the Mainland on legal aspects. In the long run, the Mainland side is expected to pick up on the legal aspects. Otherwise, the legal as well as ideological gaps between Hong Kong and the Mainland will continue to be sources of conflict and misunderstanding in cases where courts from both jurisdictions are involved, and the considerable differences between the two regions will become an insurmountable barrier to cross-border judicial cooperation.

Notwithstanding the gap and conflict, in the meantime, the fact that Hong Kong and the Mainland have been able to maintain a flourishing cross-border arbitration system through the Arrangement is a laudable feat. Moreover, the Arrangement has been well implemented by the very pro-arbitration judiciary at the Hong Kong side.<sup>108</sup> The smooth development of the cross-border arbitration scheme is valuable to the legal professions in both jurisdictions and to the health of cross-border

<sup>107</sup> For a brief account of the development of local arbitration commissions in mainland China, see Gu Weixia, *Arbitration in China: The Regulation of Arbitration Agreements and Practical Issues* (Sweet & Maxwell, 2012), Ch 6.

<sup>108</sup> Gu Weixia, “Recourse against Arbitral Awards: How Far Can a Court Go? Supportive and Supervisory Role of Hong Kong Courts as Lessons to Mainland China Arbitration” (2005) 2(4) *Chinese Journal of International Law* 481–500.

transactions and businesses. Therefore, whenever a mainland Chinese arbitral award is criticised by a Hong Kong court, the Mainland side pays attention and takes action, so that it can be aware of the health conditions of its own arbitration system which the Mainland values in the process of its deepening marketisation.

The *Keeneye* case, ever since the publishing of its first round judgment (at the CFI), has received much academic attention in the Mainland.<sup>109</sup> The arbitration community is also taking active actions. Of particular note, on 1 May 2012, CIETAC implemented a new set of arbitration rules (the “2012 CIETAC Rules”),<sup>110</sup> in which some particular reforms were made to the med-arb practice. To allay the concerns on independence and impartiality of mediator and arbitrator assumed by the same person, the 2012 Rules now provide for a CIETAC-assisted mediation process not to be carried out by the arbitral tribunal under Art 45(8).<sup>111</sup> As some practitioners comment on the revision, the latest CIETAC reform reflects a quick response to the *Keeneye* case (particularly regarding some of the criticisms made by Reyes J), and to a certain extent mirrors the approach of having accredited mediators to serve the med-arb process which recently took place under the Hong Kong International Arbitration Center.<sup>112</sup> The quick response by CIETAC to *Keeneye* echoes with its previous reform in 2000 following an award turned down by Hong Kong courts (the *Hebei* case).<sup>113</sup> Hence, although the *Keeneye* case may have, on the one hand, lowered the predictability of outcome in cases which involve a cross-border clash in legal system and ideology in the enforcement of arbitral awards, it has simultaneously acted as a catalyst in improving the arbitration system in the Mainland. The attention which the Mainland is paying to the standard of the Hong Kong courts is a most encouraging phenomenon. It is hoped that this attention will increase in time, leading to more reforms in arbitration system in the Mainland, pulling together the legal schism between the two jurisdictions in Greater China.

Finally, as the med-arb system is quite popular worldwide, both Hong Kong and the Mainland should let go of its fear of the system so

<sup>109</sup> Fan Kun, “The Risks of Apparent Bias When an Arbitrator Act as a Mediator: Remarks on Hong Kong Court’s Decision in *Gao Haiyan*” (in Chinese), (2011) 13 *China Yearbook of Private International Law* 535–556.

<sup>110</sup> CIETAC has historically revised its rules on seven occasions, in 1988, 1994, 1995, 1998, 2000, 2005 and 2012 respectively. The most recent CIETAC Rules were revised on 3 Feb 2012, effective as from 1 May 2012, available at the CIETAC web site <http://www.cietac.org/index.cms>.

<sup>111</sup> Article 45(8), 2012 CIETAC Rules.

<sup>112</sup> Allen & Overy, “CIETAC in 2012 – a year of change and challenges”, on file with author.

<sup>113</sup> Gu Weixia, “Judicial Review of Arbitration Awards: Lessons and Convergence between Two Jurisdictions in China” (in Chinese), (2009) 4 *Jurists* 106–117.

as to achieve a more credible cross-border enforcement arena. The crux is to adopt med-arb with proper safeguards. One of the plausible ways to prevent a med-arb award from being challenged is to have the parties engage in a procedural conference, so they can agree on the detailed format of how the med-arb will be proceeded with, and decide on issues whether private caucuses will be permissible. The arbitrator must also set a very high standard of his own professionalism. When making proposals to settlements, he must be careful not to pressurise the parties, or be assertive. In order to avoid appearing to be biased, he must avoid private caucuses unless necessary. If he unilaterally comes across information relevant to the case, he must disclose such information to all parties to protect their rights of due process. If the mediation fails and arbitration is proceeded with, he must remind himself that his role has changed, and only consider information placed before the tribunal, and not consider information he obtained which are irrelevant to the issues in the case. If an arbitrator can carry out a med-arb with such professional standards, it is hard to envision a situation how an award thus made may be refused enforcement in any court under the public policy exception. To encourage the proliferation of such best practices, it is hoped that arbitration institutions in both Hong Kong and the Mainland will create enforceable guidelines for their arbitrators to follow when engaging in med-arb practice, thus creating an unimpeachable med-arb system which awards will be unassailable in both jurisdictions.

## VI. Conclusion

From the practical perspective, the decision of the CA on *Keeneye* should be welcomed as the case law representing the latest development of cross-border enforcement of arbitral awards under the Mainland-Hong Kong Arrangement. The *Keeneye* decision not only consistently follows the pro-enforcement stance of the Hong Kong judiciary in dealing with set aside challenges, but also extends the jurisprudence into med-arb context as an emerging practice area gaining increasing importance. The judgment will provide both Mainland and Hong Kong practitioners with useful guidelines in dealing with new issues and concerns arising out of the med-arb proceedings. Moreover, institutionally, the discussion involved in the judgments at the two levels of the Hong Kong courts will be conducive for further improving the rules and practice of med-arb procedures, in both mainland China and Hong Kong.

From the academic point of view, Hong Kong's closer economic relationship with the Mainland and rapid development of med-arb practice at both sides will demand further research on some controversial issues

left out by *Keeneye*. For example, how to determine the test to which apparent bias and effective waiver can be found for relying upon the public policy exception in arbitration in Hong Kong. And how far the weight should be given to the decision of the Mainland supervising court in public policy review by the Hong Kong enforcement court. Even after unification for more than 15 years, the legal, cultural and ideological conflicts between the two sides as reflected in *Keeneye* are still outstanding. The common expression of “work on” and practice to involve third party for influence played an interesting role in the *Keeneye* case and led to different judgments at the Mainland and Hong Kong sides, as well as disparity rulings at the two levels of courts in Hong Kong. Reyes J at the CFI found apparent bias with the apprehension of “a fair minded observer (in Hong Kong)”<sup>114</sup> whereas Tang VP at the CA based his judgment more on “an understanding of how mediation is normally conducted in the place where it was conducted”.<sup>115</sup> As the *Keeneye* ruling shows, despite the disagreement between the two levels of Hong Kong courts in the relative weight they should place on the pro-enforcement policy and deference to pay to the supervisory court, the different legal practices in Hong Kong and mainland China may cause much uncertainty in the cross-border arbitration. But the future is not without hopes. Although *Keeneye* may have, on the one hand, lowered the predictability of outcome in cases which involve a cross-border clash in ideology in the enforcement of arbitral awards, it has simultaneously acted as a catalyst in reducing such differences, as seen from the rapid Mainland reform to the rules on med-arb.

To conclude, the *Keeneye* case has once again reminded the legal community of the difficulties and uncertainties in public policy application in arbitration. In the particular context of cross-border arbitration between mainland China and Hong Kong, it is perceived that the application of public policy will continue to be challenged by novel issues arising more at the Mainland side as a developing legal jurisdiction. As argued, a potentially more credible Chinese arbitration system is expected to be built upon and in the course of its improvement, understanding from the Hong Kong side will be helpful for the healthy development of a cross-border arbitration scheme.

<sup>114</sup> See n 14 above, at para 53.

<sup>115</sup> See n 12 above, at para 102.

