HCCT 41/2010

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CONSTRUCTION & ARBITRATION PROCEEDINGS

NO. 41 OF 2010

IN THE MATTER of enforcement of an Arbitration Award by the Xian Arbitration Commission

and

IN THE MATTER of Sections 2GG and 40B of the Arbitration Ordinance (Cap. 341)

BETWEEN

GAO HAIYAN	1st Applicant
XIE HEPING	2nd Applicant
and	
KEENEYE HOLDINGS LIMITED	1st Respondent
NEW PURPLE GOLDEN RESOURCES DEVELOPMENT LIMITED	2nd Respondent

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Before: Hon Reyes J in Chambers

Date of Hearing: 30 March 2011

Date of Judgment: 12 April 2011

J U D G M E N T

I. INTRODUCTION

1. Keeneye and New Purple (the Respondents) apply to set aside Saunders J's ex parte Order of 2 August 2010 for the enforcement of an Arbitration Award as a Judgment of this Court. The Award was made on 17 June 2010 by 3 panel members of the Xian Arbitration Commission (XAC) in favour of Gao and Xie (the Applicants).

2. The Applicants are husband and wife. The Respondents are BVI companies. The Award is a Mainland Award as that term is defined in the Arbitration Ordinance (Cap.341) (AO).

3. The question is whether I should set aside Saunders J's Order on the basis that "it would be contrary to public policy to enforce the Award" (AO s.40E(3)). The Respondents suggest that enforcement would be contrary to public policy because the Award is tainted by bias or apparent bias. In other words, the main issue before me is whether the Award was made in circumstances which would cause a fair-minded observer to apprehend a real possibility of bias on the part of the Arbitration Tribunal (*Porter v. Magill* [2002] AC 357 (HL)).

4. Saunders J ordered that, for the purposes of determining whether or not to set aside his ex parte Order, there be a one-day trial of an issue. That issue is as to what took place on 27 March 2010.

5. The arbitration occurred over 2 sittings, the first on 21 December 2009, the second on 31 May 2010. The circumstances alleged by the Respondents to give rise to an apprehension of bias took place between the 2 sittings, at a dinner in the Xian Shangri-la hotel on 27 March 2010.

6. In deciding whether to refuse enforcement on public policy grounds, I have to determine what happened; whether what happened gives rise to any real apprehension of bias; and whether, in proceeding with the second sitting without complaining about what happened on 27 March, the Respondents waived any entitlement to complain about bias.

7. There is one additional matter to decide if I find that the Award is tainted by bias or apparent bias. After the Award was made, the Respondents appealed to the Xian Intermediate Court to set it aside on a variety of grounds including partiality on the part of the Arbitration Tribunal. On 19 October 2010 the Xian Court dismissed the Respondents' appeal. It is consequently an issue before me whether the Respondents are estopped by the decision of the Xian Court from raising the issue of bias before this Court.

II. BACKGROUND

8. The parties and their underlying dispute are no strangers to the Hong Kong Court.

9. In September 2004 the Applicants, acting through their company Zhongxin, entered into a joint venture with Changle Gongmao to operate the Changlebao coal mine in the Mainland. Zhongxin had a 70% stake in the joint venture (known as Changlebao Mining).

10. In December 2004 the Applicants transferred 50% of their shareholding in Zhongxin to Angola (a BVI company) under a Cooperation Agreement. The Applicants transferred the remaining 50% to Clarigain (a BVI company) on trust for Baijun (a Hong Kong company). As a result, Zhongxin and its 70% interest in the joint venture became beneficially owned in equal measure by Angola and Baijun.

11. In HCA No. 1284 of 2005 Baijun sought rescission of the Cooperation Agreement and the return of the Zhongxin shares. That proceeding was consolidated with HCA No. 1287 of 2005 in which Angola had made counterclaims against Zhongxin. The consolidated litigation was to be tried on 22 July 2009. But trial was adjourned. It was then stayed on 24 July 2009.

12. In July and August 2008 respectively, by a Share Transfer Agreement and a Supplementary Share Transfer Agreement, the Applicants transferred their interest in Baijun to the Respondents. The arbitration agreement is in the Share Transfer Agreement. In October 2008 the Respondents' shares in Baijun were transferred to Daynew and Far Orient (both BVI companies).

13. In June 2009 the Applicants commenced High Court Action (HCA No.1315 of 2009) alleging that the Share Transfer Agreements in relation to Baijun were void for misrepresentation and duress. The misrepresentations were said to have been made by Liu Jian Shen. Liu controls the Respondents.

14. On 25 June 2009 the Applicants obtained an ex parte Order from Chung J appointing an interim receiver over Baijun. The powers conferred on the receiver by the Order were later enlarged. But on 23 July 2009 Chung J discharged the Order on the ground of material non-disclosure. In September 2009 the Court of Appeal dismissed the Applicants' appeal against the discharge.

15. In the meantime, in July 2009, the Respondents commenced arbitration proceedings in Xian pursuant to the arbitration agreement. Pleadings were exchanged. The Respondents claimed that the Share Transfer Agreements were valid. The Applicants counterclaimed that the Share Transfer Agreements were invalid.

16. The Arbitration Tribunal consisted of Jiang Ping (Chief Arbitrator), Zhou Jian (nominated by the Applicants) and Liu Chuntian (nominated by the Respondents). In the course of the arbitration, the Applicants' legal representative was Lan Yongqiang; that of the Respondents was Li Tao.

17. At the end of the first arbitration hearing in December 2009, the Tribunal asked whether the parties were agreeable to mediation. The written record of the proceedings stated that the parties "agreed" with the Tribunal's suggestion of mediation.

18. There is a dispute as to whether the parties unequivocally accepted that, before it finally determined the substantive dispute, the Tribunal could attempt to resolve the parties' differences through mediation. The Applicants say that the parties' lawyers definitely agreed to mediate. The Respondents claim that the parties' lawyers only signified their clients' willingness to consider resolving their dispute through mediation by the Tribunal. Li Tao and Lan Yongqiang gave conflicting oral evidence on this point.

19. In my view, I should go by the written record of the proceedings, rather than rely on the recollection of either lawyer. In all probability, the written record means what it says when it notes that the parties "agree" to the Tribunal's suggestion of mediation. I will proceed on the basis that the parties' lawyers agreed on behalf of their clients that the Tribunal could engage in what is sometimes known as "med-arb," that is, that the arbitrators first attempt to resolve the matter as mediators, before themselves determining the merits of the dispute as arbitrators.

20. In this connection, I observe that the XAC's Arbitration Rules (which governed the arbitration) empowered the Tribunal, subject to the parties being willing, to "conduct mediation at any time before the rendering of an award" (see Art. 36).

21. Art. 37 of the Rules provides for the "Mode of Mediation" thus:-

> "A mediation may be conducted by the arbitral tribunal or the presiding arbitrator (hereinafter called mediator). With the approval of the parties, any third party may be invited to assist the mediation, or they may act as the mediator.
>
> The mediation may be proceeded simultaneously between both parties or with one party separately; the time and place for that mediation are confirmed after the mediator obtains the consent from the parties.
>
> The mediator may put forward a mediation resolution plan for the parties' reference, and the parties may accept, refuse to accept, or render some amendment(s) to the resolution plan set forth by the mediator.
>
> No written record of the specific process of that mediation shall be made, but the content of the mediation agreement shall be made as a written record."

22. The parties disagree over what took place at the Xian Shangri-la on 27 March 2010 and shortly thereafter. But there is no dispute that at least the following events took place:-

(1) Following the first sitting, the members of the Tribunal decided to suggest to the parties to settle the case by the Respondents paying RMB 250 million to the Applicants. The Tribunal appointed Pan Junxin (XAC's Secretary General) and Zhou Jian (an arbitrator) to contact the parties with this suggestion. Pan and Zhou were appointed because they were based in Xian, whereas Jiang Ping and Liu Chuntian (the other 2 arbitrators) were based in Beijing.

(2) Pan's office communicated the suggestion to Kang Ming, a lawyer acting for the Applicants.

(3) Pan and Zhou contacted Zeng Wei and asked him to meet them at the Xian Shangri-la hotel over dinner. Zeng Wei is a shareholder of Angola. Zeng was contacted because he was regarded as friendly with the Respondents. During the arbitration, Zeng through a mutual acquaintance had sought to get in touch with Pan. Zeng had described himself at this time as "a person related to" (關係人) the Respondents. But Pan had initially refused the request. When the Tribunal came up with its RMB 250 million proposal, Pan remembered Zeng's request and Zeng's description of himself. Pan then asked Li Tao for Zeng's contact number.

(4) The persons at the Xian Shangri-la hotel dinner were Pan, Zeng and Zhou Jian. Pan told Zeng about the Tribunal's RMB 250 million proposal and asked Zeng "to work on" the Respondents.

(5) The Respondents refused to pay RMB 250 million to the Applicants.

(6) The Applicants subsequently informed the Tribunal that the Applicants were not prepared to settle the dispute with the Respondents for RMB 250 million.

23. I shall refer to the foregoing summary of what happened as "the minimalist version".

24. Zeng gave evidence before me as to what happened in the Shangri-la Hotel. He said:-

> (1) At the Shangri-la hotel dinner, Pan informed Zeng that the Tribunal had decided on a "result". That "result" would be that the Share Transfer Agreements were valid, but the Respondents should pay the Applicants a compensation of RMB 250 million. Pan asked Zeng to "do some work on [the Respondents] to get them to accept this result".
>
> (2) Pan asked that the Respondents transfer the compensation of RMB 250 million into a bank account to be specified by the XAC.
>
> (3) Zhou told Zeng that the "result" would be published once Liu Chuntian returned from a trip to Taiwan.
>
> (4) Zhou further told Zeng that Ma Maogen (a potential purchaser of the Applicants' interest in the Changlebao coal mine) had asked Pan for "assistance" in the arbitration.

25. Zeng's evidence was that he passed what he had been told by Pan and Zhou on to Zhang Xin Tian (a representative of the Respondents). Zeng says that Zhang could not accept the "result" which Pan had indicated. Zhang thought that RMB 250 million was too much to pay the Applicants. But Zeng warned Zhang of the possibility (apparently threatened by Pan) that the Respondents could end up with "something worse" in the arbitration.

26. Zeng also deposed that he met Ma Maogen in April 2010. Ma is alleged to have told Zeng that, even if the Respondents paid RMB 250 million to the Applicants, Ma would "not be completely satisfied with the result". This was because Ma's ultimate purpose was "to obtain the interest of the coal mine ... which was partially held by Baijun". Ma (according to Zeng) had observed that he could use other means, including influencing the XAC's Review Committee or the Shaanxi police, to obtain what he wanted.

27. Zeng claims that Ma additionally demanded the sale of Angola's interest in the Changlebao coal mine to Ma. Ma (Zeng says) commented that, although the Share Transfer Agreements would be upheld as valid, the eventual Award "would contain wording that the share transfer was grossly unfair, and that for this reason it was possible to litigate in Hong Kong".

28. At the second arbitration hearing in May 2010, no specific complaint was made about the conduct of Pan and Zhou.

29. When the Award was published in June 2010, the actual outcome was different from that which the Respondents allege had been intimated to Zeng by Pan and Zhou at the Shangri-la hotel. The Award dismissed the Respondents' claim in its entirety and revoked the Share Transfer Agreements. The Tribunal "recommended" that the Respondents "shall take the initiative to pay RMB 50,000,000 as the economic compensation to [the Respondents] in order to end the disputes between the parties". However, this recommendation was "based on the fairness and reasonableness arbitration principles, it is not binding and not included in the arbitral matters".

30. In their appeal against the Award to the Xian Intermediate Court, the Respondents contended that this difference in outcome was because Pan had manipulated the outcome of the arbitration and the Tribunal had shown "favouritism and malpractice".

31. In respect of "favouritism", Zeng claimed in his evidence to this Court that he had confronted Zhou after the Award. Zhou is said to have replied to Zeng that "originally the 'result' was fixed". But the Respondents (Zhou is alleged to have said) did not accept the "condition" of RMB 250 million. Zhou apparently explained to Zeng that "Pan ... gave some pressure on the Arbitral Tribunal" so in the end "the Arbitral Award was different from the original 'result' ".

32. The Xian Court dismissed the Respondents' appeal on 19 October 2010. In relation to Pan, the Court held (in translation):-

> "Regarding whether the participation of [Pan] in mediating this case violated the arbitration rules and whether he manipulated this case: according to Article 37 of Arbitration Rules of [XAC], 'Mediation may be chaired by the Arbitral Tribunal or the presiding arbitrator. Upon approval of the parties, relevant units or persons may be invited to help the mediation or chair the mediation as a mediator.' The mediation work performed by [Pan] in respect of this case complies with the Rules abovementioned. From the evidence provided to this court by [the Respondents], it is not sufficient to prove that [Pan] had manipulated the arbitral award of this case. Therefore, this ground for setting aside application submitted by [the Respondents] cannot be established and is not supported by this Court."

33. Much of Zeng's evidence, including that summarised in paras. 24 to 27 and 31 above, is an embellishment on the minimalist version. Although Zeng gave evidence before the Xian Court in the Respondents' appeal against the Award, Zeng did not mention a significant part of what he deposed before me (for example, the evidence in paras. 24 to 27 and 31 above).

34. In those circumstances, as Mr. Edward Chan SC (appearing for the Applicants) submits, I am unable to accept Zeng's evidence as reliable insofar as it goes beyond the minimalist version. I note that the minimalist version is accepted as correct by the Applicants because that version of events is what Pan and Zhou told Lan Yongqiang. For the purposes of the trial before me, Lan filed an affirmation stating that the minimalist version had been vouched to him by Pan and Zhou.

35. As for Zeng's evidence of what he had been told by Ma in April 2010 or by Zhou after the Award had been made, Zeng not having mentioned such matters to the Xian Court, I equally cannot accept that material as reliable. In any case, that evidence is essentially a mixture of allegation and hearsay emanating from Ma and Zhou. I would not be able to place any evidential weight on such material.

36. For the purposes of the discussion in Section III of this Judgment, I shall therefore confine myself to a consideration of the implications (if any) of the minimalist version of what happened at the Xian Shangri-la Hotel.

III. DISCUSSION

A. Issue (1): What happened on 27 March 2010 at the Xian Shangri-la hotel

37. I have dealt with this issue in the course of setting out the Background in Section II of this Judgment.

38. It is the Applicants' case that the minimalist version of events amounted to an abortive mediation. The Arbitration Tribunal (the Applicants say) tried mediation because the parties had indicated at the end of the first arbitration sitting that they were willing to resolve their dispute through mediation. The mediation (the Applicants submit) was carried out pursuant to Art. 37 of the XAC's Arbitration Rules.

39. The Respondents deny that the dinner on 27 March 2010 constituted any sort of mediation initiative. Instead, the Respondents contend that the dinner among Pan, Zhou and Zeng was a none-too-subtle attempt to pressure the Respondents into paying RMB 250 million to the Applicants in return for a decision in the Respondents' favour upholding the validity of the Share Transfer Agreements.

40. The Xian Court appears to have accepted that what happened on 27 March 2010 was part of an unsuccessful mediation by the Arbitration Tribunal. I shall also proceed on that basis, albeit with serious reservations.

41. I have reservations because the procedure followed by the Tribunal was not strictly in accordance with Article 37.

42. First, neither the Tribunal as a whole nor the Tribunal's presiding officer (Jiang Ping) conducted the mediation attempt. Instead the mediation was conducted by Zhou and Pan.

43. Second, there is no evidence that the parties were ever asked to approve Pan being invited to act in the mediation as a third party. Instead, Pan simply appears to have been asked by the Tribunal to become involved along with Zhou.

44. Third, it is unclear that the time and place of the mediation (dinner at the Xian Shangri-la hotel on 27 March 2010) were ever confirmed or consented to by the parties. Instead, Pan simply contacted Kan Ming with the proposed settlement at RMB 250 million. Kan Ming was not the lead lawyer acting for the Applicants.

45. One might have expected Pan to have first gotten in touch with Lan Yongqiang (not Kan Ming) to obtain consent or confirmation to a mediation initiative taking place, in the absence of the Applicants or their representatives, at a dinner in the Shangri-la hotel.

46. Even more curious is the fact that, although Pan contacted Li Tao to ask for Zeng's contact details, Pan does not seem to have asked for Li Tao's confirmation or consent to mediation being conducted through Zeng. Instead Zeng (who was not even involved as the Respondents' lawyer, but was only interested as a shareholder in Angola) was told to meet Pan and Zhou at the Shangri-la Hotel with little or no indication to Zeng or the Respondents of what was supposed to happen there.

47. Fourth, apparently of their own initiative, Pan and Zhou put forward a proposal for settlement at RMB 250 million. The evidence is that such proposal was advanced without authorisation from the Applicants. The Applicants in fact eventually rejected the RMB 250 million proposal as inappropriate.

48. There is no evidence as to how a figure of RMB 250 million was decided on by the Arbitration Tribunal or by Pan for the purposes of a mediation proposal. The figure has no apparent bearing with (being 5 times greater than) the RMB 50 million recommended in the Award as the compensation which ought in all fairness to be paid to the Respondents.

49. Nor does it seem to me to be "putting forward a mediation resolution plan for the parties' reference" to ask a third party (Zeng) to "work on" the Respondents to accept the proposal.

50. Fifth, mediations are normally conducted in some formal venue, typically, an office or conference room. It is odd to be conducting a mediation in the course of a dinner at a hotel restaurant (on Zeng's evidence, in a private room) with only one of the parties represented.

51. I shall return to my reservations below.

B. Issue (2): Does what happened show bias or apparent bias?

52. The minimalist version is an insufficient basis for finding actual bias.

53. The real issue is whether the minimalist version gives rise to an apprehension of apparent bias. In my view, the minimalist version would cause a fair-minded observer to apprehend a real risk of bias.

54. In particular, what happened at the Shangri-la would give the fair-minded observer a palpable sense of unease. The fair-minded observer would (I believe) be concerned that the underlying message being conveyed to Zeng at the dinner with Pan and Zhou was that the Tribunal favoured the Applicants. Such underlying message was obviously not spelled out at the dinner. But, against the background of the reservations I have mentioned, there would be more than ample justification for the fair-minded observer's apprehension.

55. The problem is that there are many awkward, unanswered questions arising out of the way in which Pan and Zhou proceeded.

56. First, why was Zeng the person to whom the proposal was made, rather than the directors or officers of the Respondents or the Respondents lawyers? Why (for example) was no mention made of the proposal to Li Tao, even though the latter was contacted by Pan for the purpose of obtaining Zeng's contact details?

57. Pan's alleged explanation for the unorthodox approach (namely, that Zeng had previously attempted to contact Pan and had introduced himself then as a "related party") is unconvincing. Why would one engage in a supposed mediation with "related parties" rather than the parties or their legal representatives themselves?

58. The impartial observer would fear that Zeng was chosen as an intermediary because he was perceived as a person wielding influence with the Respondents who could press the proposal of paying the Applicants RMB 250 million.

59. Second, what did Pan and Zhou mean when, having made the proposal of RMB 250 million, they asked Zeng "to work on" the Respondents to accept the proposal? Why would Pan and Zhou be asking Zeng to "work on" the Respondents when Pan and Zhou were supposed to be the mediators? If anyone, the persons who ought properly to be exploring with the Respondents whether the dispute could be settled at RMB 250 million ought to have been Pan and Zhou themselves

60. The expression "work on" has overtones of Pan and Zhou actively pushing for settlement at RMB 250 million.

61. The fear is that Pan and Zhou were actively pushing their proposal, rather than merely communicating a plan in neutral fashion and leaving it to the Respondents to decide whether to accept the same.

62. Third, why was a figure of RMB 250 million proposed by Pan and Zhou, without authorisation from the Applicants or inkling as to whether the Applicants were prepared to accept the same? Surely, the first thing to have done was to check with the Applicants that the proposal was acceptable to them. If it was not a workable proposal, what was the point of asking Zeng to "work on" the Respondents?

63. The impression conveyed, rightly or wrongly, is that Pan and Zhou were acting on their own on an initiative which favoured the Applicants.

64. Fourth, there is no explanation for the lack of correspondence or proportionality between RMB 50 million (said in the Award to be the fair compensation payable to the Respondents) and RMB 250 million (said at the Shangri-la to be what ought to be paid to the Applicants in return for the Share Transfer Agreements being treated as valid). Precisely how did Pan and Zhou come up with the figure of RMB 250 million?

65. Lan Yongqiang's evidence was that he had privately told the Arbitration Tribunal that the Applicants had rejected an offer of RMB 180 million and were only prepared to consider "above RMB 200 million". Assume Lan's evidence to be true. It does not explain how Pan and Zhou justified RMB 250 million (25% more than the Applicants' declared bottom line). On what basis did Pan and Zhou deem the Applicants' bottom line to be an appropriate starting point?

66. Again the impression conveyed, rightly or wrongly, is that Pan and Zhou were favouring the Applicants.

67. Fifth, the setting for the mediation was odd. A private dinner in a hotel has a connotation of "wining and dining" a person to make a difficult proposal palatable. The fear is that Pan and Zhou had chosen the venue in order to push their RMB 250 million solution to Zeng.

68. Sixth, the proof of the pudding is in the eating. What would clinch the fair-minded observer's conclusion of apparent bias is that eventually, RMB 250 million not having been paid by the Respondents, the Award went in the Applicants' favour and merely recommended (but did not require) a payment to the Respondents of RMB 50 million.

69. I stress that in the foregoing analysis I am solely concerned with the appearance of bias. I have made no finding of actual bias. Justice requires that decision-makers are not only impartial, but seen to be such.

70. Pan and Zhou engaged in med-arb.

71. There is nothing wrong in principle with med-arb. For instance, the UNCITRAL Model Law (July 2006 version) enacted as law in Hong Kong under the new Arbitration Ordinance (Ord. No. 17 of 2010) expressly allows med-arb with the parties' agreement. That possibility under the Model Law, however, is subject to safeguards. For example, a mediator M who is to act as arbitrator must, before resuming arbitral proceedings, disclose to all the parties as much of the confidential information obtained by M in the mediation as M considers "material to the arbitration proceedings" (see new Ordinance s.33(4)). The Model Law will come into effect here later this year.

72. From the point-of-view of impartiality, the med-arb process runs into self-evident difficulties. The risk of a mediator turned arbitrator appearing to be biased will always be great.

73. The potential for an appearance of bias arises because of important differences between the mediation and arbitration processes.

74. For example, a mediator typically meets individually with the parties to explore the concerns of the latter and the possible settlement plans which the latter may broach. An arbitrator, on the other hand, must avoid unilateral dealings with the parties.

75. Further, the mediator who acts as arbitrator obtains confidential information in the course of one-on-one meetings with a party. That information may consciously or sub-consciously influence the mediator when sitting as arbitrator. It would be unfair on the other party for the mediator turned arbitrator to act upon the confidential information without first disclosing the same and affording that other party a chance to comment on any prejudicial impact of the confidential information.

76. Thus, the mediator who may be sitting as arbitrator in the same case must be particularly careful not to convey to one party or the other the impression of bias. This means that, in a mediation session with one party A, the mediator when conveying settlement suggestions apparently benefitting the other party B to the dispute, must be sensitive to the need not to appear to A as if the mediator favoured B's case.

77. The problems inherent in med-arb are such that many arbitrators decline to engage in it. They view the risk of apparent bias arising from their participation in med-arb as an insurmountable difficulty.

78. Mr. Chan submits that whatever happened at the Shangri-la hotel was tantamount to a mediation which the parties had authorised at the end of the first sitting of the arbitration. As such (Mr. Chan suggests) it was open to Pan and Zhou as mediators to put forward a possible solution to the dispute between the parties.

79. That may be. But labelling a process as mediation does not mean that anything goes. There are appropriate and inappropriate ways of conducting mediations. The would-be mediator must ensure at all times, especially when one might act as arbitrator later on, that nothing is said or done in the mediation which could convey an impression of bias.

80. In this case, even on Mr. Chan's assumption that what happened was a mediation, for the reasons which I have given, I do not think that the med-arb process was conducted in a way which avoided the problem of apparent bias.

C. Issue (3): Was bias waived by continuing with arbitration

81. A party to an arbitration who wishes to rely on non-compliance with the rules governing an arbitration shall do so promptly and shall not proceed with the arbitration as if there has been compliance with a relevant rule, keeping the point of non-compliance up one's sleeve for later use. See *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.* [1991] 1 HKLRD 665 (CFA), at 690b (Sir Anthony Mason NPJ).

82. The Respondents did not specifically complain about what happened at the Shangri-la Hotel to the Arbitration Tribunal. Instead they put in Supplemental Submissions on 13 May 2010 and proceeded with the second sitting of the arbitration on 31 May 2010.

83. In their Supplemental Submissions, the Respondents stated (in translation):-

> "6. The Arbitration Tribunal should dismiss the counterclaim of Xie and Gao according to law. Concerning the consideration of the share transfer, our company is willing to participate in mediation conducted by the Arbitration Tribunal. However, in light of [the Applicants'] personality, they will behave improperly whenever they have some money. We sincerely hope the Arbitration Tribunal gives [the Applicants] no more than RMB 60 million during mediation. We consider the offer very favourable given [the Appplicants] are playing 'Karate'. He will laugh and wake up at midnight! Concerning people who don't know [the Applicants] and helped them to fight the lawsuits, we are willing to pay for all the costs they incurred. On 5th February this year in the afternoon, Xie Heping at a Hong Kong solicitors firm said that he had spent costs of about RMB 7 million in the Xian Arbitration Tribunal case. We are willing to pay for that too."

84. The Applicants' argument is that, not having complained about what happened at the Shangri-la hotel, but having instead proceeded with the arbitration, the Respondents must be deemed to have waived any right to raise bias.

85. I am unable to accept the suggestion of waiver.

86. As Mr. Patrick Fung SC (appearing for the Respondents points out), following the approach to Zeng, the Respondents were placed in a dilemma.

87. If they were to complain about bias, they would certainly risk antagonising the Arbitration Tribunal and turning the Tribunal against the Respondent's case. If they were to complain about bias and if the Arbitration Tribunal were actually biased, their complaint would be rejected and they would lose everything.

88. Under the XAC's Rules, the Chairman of the XAC is empowered to deal with challenges against an arbitrator's appointment. However, the Chairman is empowered to delegate such function to XAC's Secretary-General. Pan being Secretary-General, there was a risk that Pan would be determining the question of bias even though Pan was himself a participant in what happened at the Shangri-la hotel.

89. The Respondents appear to have chosen what, with the benefit of hindsight, was a clumsy compromise solution. They appear in their Supplemental Submissions to have attacked the Applicants' integrity and then tried to bargain the RMB 250 million proposed by Pan and Zhou down to RMB 60 million plus costs.

90. Consequently, although inept as an attempt to get out of their predicament, I do not think that I can regard the Supplemental Submissions and the Respondents' continuation in the arbitration as a waiver.

91. I also refer to my observation about the "proof of the pudding" as far as a fair-minded observer was concerned. To a certain extent, it would not be until the Award was published that a fair-minded observer might feel that one's uneasiness over the conduct of the mediation process was more than the product of an over-active imagination. The actual decision, juxtaposed against what was said and done in the Shangri-la hotel, would lead the fair-minded observer to feel that one's concerns were valid and vindicated.

D. Issue (4): Does the Xian Court's decision give rise to estoppel

92. In *Hebei* (at 688I-689E) Sir Anthony Mason observed that, where the public policy ground is invoked, the Court charged with enforcing an award considers the question of enforcement by reference to its own public policy. The fact that the Court supervising the conduct of the arbitration refuses to set aside an award as contrary to that Court's public policy, does not give rise to an estoppel.

93. A party which unsuccessfully challenges an award before the supervising Court on ground X, is not precluded from raising the same ground X before the enforcing Court. The party can still submit that enforcement should be refused as a matter of public policy by reason of the very ground X.

94. But Sir Anthony Mason also stated (at 689D-E):-

> "What I have said does not exclude the possibility that a party may be precluded by his failure to raise a point before the court of supervisory jurisdiction from raising that point before the court of enforcement. Failure to raise such a point may amount to an estoppel or want of bona fides such as to justify the court of enforcement in enforcing an award... Obviously an injustice may arise if an award remains afoot but cannot be enforced on a ground which, if taken, would have resulted in the award being set aside."

95. There is no question here of estoppel in the sense that Sir Anthony Mason has mentioned.

96. Before the Xian Intermediate Court as the court of supervisory jurisdiction, the Respondents accused the Arbitration Panel and Pan of bias. The Xian Court rejected the submission. That does not prevent the Hong Kong Court from considering the question of bias from the viewpoint of Hong Kong public policy. This is because Hong Kong public policy may well be different from public policy in Xian. The Hong Kong Court is not bound by a finding of the Xian Court relating to Xian public policy. Nor is there any obvious injustice or evidence of a lack of bona fides since the point of partiality on the part of the tribunal was never abandoned by the Respondents before the Xian Court.

E. Issue (5): Should the enforcement of the Award be set aside on the public policy ground

97. There are 2 competing public policy considerations at play in this case.

98. First, there should be finality to litigation. Where the parties have opted to go to arbitration, they should be held to their choice and the resultant award should normally be enforced by this Court.

99. Second, it would, however, be wrong to uphold an award tainted by an appearance of bias. Upholding such an award will have the consequence that justice would not be seen to be done. Enforcement of such award would be an affront to this Court's sense of justice. See generally *A v. R* HCCT No. 54 of 2008 (30 April 2009) on when the public policy ground may be invoked.

100. If a Hong Kong award were tainted by the appearance of bias, I have no doubt that, purely as a matter of justice and fairness, the Court should refuse enforcement of the same. In other words, as a matter of Hong Kong public policy, the second consideration which I have described must override the first. Otherwise, it would bring justice into disrepute if the Court were to allow an award with the appearance of bias to be enforced in the same way as a judgment of the Court. The Court's judgments (including awards enforced as such) must always be (and be seen to be) impartial.

101. In general terms, I do not think that it should make a difference to the principle just stated where an award is that of a foreign tribunal (whether of the Mainland or elsewhere). In the absence of good reason, the award of a foreign tribunal should normally receive no more favourable treatment (as far as public policy is concerned) than that accorded to a Hong Kong arbitration award by the Hong Kong Court.

102. In those circumstances, as a matter of public policy, I should refuse enforcement of the Award here.

IV. CONCLUSION

103. The Order of Saunders J giving leave to enforce the Award as a judgment of this Court will be set aside.

104. There will be an Order Nisi that the Applicants pay the Respondents costs of the application to set aside. Costs are to be taxed, unless agreed. There will be certificate for 2 counsel.

105. Before concluding, there is one matter that I should record. What happens in a mediation is confidential. In some cases involving mediation, there is sometimes a question of the degree to which the Court can look into what happened during the mediation. But, in the present case, there was no issue between the parties as to the confidentiality of what took place in the Shangri-la hotel. Both parties were content for the Court to look into what occurred. Both parties adduced evidence on that question. Neither claimed confidentiality in relation to what happened.

(A. T. Reyes)
Judge of the Court of First Instance
High Court

Mr. Edward Chan, SC, Mr. Peter Ng, SC, Mr. Laurence Li & Mr. Eric Chow, instructed by Messrs C.L. Chow & Macksion Chan, for the Applicants

Mr. Patrick Fung, SC and Mr. Calvin Cheuk, instructed by Messrs Li & Partners, for the Respondents

Please refer to CACV79/2011 for the relevant appeal(s) to the Court of Appeal.