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The Public Policy Exception in Hong Kong: The Cultural Sliding Scale

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THE PUBLIC POLICY EXCEPTION IN HONG KONG: THE CULTURAL SLIDING SCALE

*David Heller*¹

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INTRODUCTION

*Gao Haiyan v. Keeneye Holdings Ltd*² is a recent Hong Kong case from the Court of Appeals (“C.A.”) concerning the enforcement of Mainland Chinese awards in Hong Kong under the public policy exception. This case involved the use of an arbitration-mediation procedure, which the respondents contended should have been grounds for refusing enforcement under the public policy exception in the Arrangement Concerning the Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong Special Administrative Region (“The Arrangement”).³ In Hong Kong, the public policy exception is an oner-

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² *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] 1 H.K.L.R.D. 627 (C.A.).

³ *See id.*; Arrangement Concerning the Mutual Enforcement of Arbitral Awards Between the Mainland and Hong Kong Special Administrative Region, P.R.C.-H.K.S.A.R., Jun. 21, 1999.

ous standard of proof; *Gao Haiyan* illustrates the need for a cultural understanding of the place of arbitration when considering grounds for refusing enforcement in Hong Kong.⁴ In addition to narrowly construing the exception, Hong Kong courts consider cultural aspects of the situs of arbitration, thus further constraining the use of this exception.⁵

A mere violation of the enforcing jurisdiction's arbitration regulations will not give rise to the exception; rather enforcement "must violate the most basic notions of morality and justice."⁶ *Gao Haiyan* introduced a cultural sliding scale to this analysis by reinforcing the preclusion of apparent bias as grounds for refusing enforcement under the public policy exception. Hong Kong's political and cultural position makes this decision both desirable and necessary. But, for foreign businesses operating in China, it may reduce the chances of a favorable outcome in an enforcement action. Accordingly, these parties should take advantage of the local rules and laws of both Hong Kong and Mainland China in carefully drafting arbitration agreements to nullify these risks.

As China's prominence in the global economy grows, arbitration proceedings concerning commercial disputes in China are becoming more common. Enforcement of these Mainland awards is frequently sought in Hong Kong.⁷ However, many parties seek to resist enforcement based on public policy grounds.⁸ Thus, practitioners must be aware of Hong Kong's political and cultural realities when seeking to

⁴ See *id.* at 659 (stating that while a mediation may have been conducted differently in Hong Kong, it is important to consider how mediation is normally conducted in the place it is conducted).

⁵ E.g., *Hebei Import and Export Corp. v. Polytek Eng. Co.*, [1999] 1 H.K.L.R.D. 665 (C.F.A.).

⁶ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] 1 H.K.L.R.D. 627, 646 (C.A.).

⁷ See, e.g., *Xiamen Xinjingdi Group Ltd. v. Eton Properties Ltd.*, [2009] 4 H.K.L.R.D. 353 (C.A.) (granting enforcement of a CIETAC award); *China Nanhai Oilfield Service Corporation Shenzhen Branch v. Gee Tai Holdings Co.*, [1995] 2 H.K.L.R.D. 215 (H.C.) (granting enforcement of a CIETAC award); *Shandong Textiles Import and Export Corp. v. Da Hua Non-Ferrous Metals Co.*, [2002] 2 H.K.L.R.D. 844 (C.F.I.) (granting enforcement of a CIETAC award).

⁸ E.g., *Xiamen Xinjingdi Group Ltd.* 4 H.K.L.R.D. at 359, 361 (holding that impossibility cannot be a public policy ground when the impossibility of performance is self inflicted); *Paklito Investment Ltd. v. Klockner East Asia Ltd.*, [1993] 2 H.K.L.R. 39, 49 (H.C.) (holding the public policy exception will not be considered when failure to present a case is sufficient); *A v. R.*, [2009] 3 H.K.L.R.D. 389, 397 (C.F.I.) (holding that the liquidated damages argument was not contrary to public policy because it was not raised before the tribunal).

resist Mainland awards on public policy grounds.⁹ Practitioners must particularly consider the differences between the judicial systems of Hong Kong and the Mainland.¹⁰

Hong Kong's legal code varies from that of Mainland China. While Hong Kong is not a separate country from the People's Republic of China ("PRC"), it constitutes a Special Administrative Region ("SAR"). Accordingly, the Arrangement, rather than the New York Convention ("the Convention"), governs the enforcement of such awards. However, both the Arrangement and the Convention contain similar provisions allowing enforcing jurisdictions to refuse enforcement based on public policy.¹¹

The Chinese court system is a unitary system with four levels of courts.¹² The final court is the Supreme People's Court; below it are the high courts at the provincial level, the intermediate courts at the prefecture and the major municipality levels, and, the lowest courts, the basic people's courts at the county level.¹³ For the purposes of international arbitration, the intermediate courts are the most important because the

⁹ Hong Kong was part of China until 1857, when it was handed over to the United Kingdom for 150 years. Consequently, Hong Kong developed a common law system based on the English tradition, importing important concepts and considerations from that system. It is to be expected that this would create some tension after 1997, when the United Kingdom handed Hong Kong back over to the Mainland. The "One Country, Two Systems" paradigm emerged as a solution to ease this transition.

¹⁰ *Id.*

¹¹ The New York Convention provides that "enforcement may be refused . . . [when] . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country." Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5, *opened for signature* Jun. 10, 1958, 330 U.N.T.S. 3. The Arrangement provides that "[t]he enforcement of [an] award may be refused if the court of the Mainland holds that the enforcement of the arbitral award in the Mainland would be contrary to the public interests of the Mainland, or if the court of the HKSAR decides that the enforcement of the arbitral award in Hong Kong would be contrary to the public policy of the HKSAR." Arrangement Concerning the Mutual Enforcement of Arbitral Awards Between the Mainland and Hong Kong Special Administrative Region, P.R.C.-H.K.S.A.R., Jun. 21, 1999 (hereinafter the Arrangement).

¹² Zhou Jian, *Judicial Intervention in International Arbitration: A Comparative Study of the Scope of the New York Convention in U.S. and Chinese Courts*, 15 PAC. RIM & POL'Y J. 403, 407 (2006).

¹³ *Id.*

confirmation of awards is sought in those courts.¹⁴ Moreover, these courts maintain original jurisdiction for any disputes that involve significant foreign elements.¹⁵ In contrast, Hong Kong has a common law system. Its hierarchal structure is similar to that of other common law jurisdictions. At the top is the Court of Final Appeal (“C.F.A.”), then the High Court, and below that the district courts. The High Court includes both the Court of First Instance (“C.F.I.”) and the Court of Appeals (“C.A.”).

The case involved a mediation-arbitration (“med-arb”) procedure. In contrast to an arbitration proceeding, med-arb is a process by which a mediator is appointed to resolve the dispute before an arbitration proceeding is commenced.¹⁶ The Hong Kong legislature has codified the use of these procedures, whereas Western institutions regard med-arb procedures with suspicion.¹⁷ The exposure of confidential information is a major concern in med-arb procedures. An arbitrator, acting as a mediator, may become exposed in unilateral communications to confidential information not available to the other side, or otherwise become sympathetic to another party.¹⁸ It is questionable as to whether any arbitrator can neutralize that risk, and, as a consequence, many arbitrators will refuse to mediate.¹⁹ Further complicating this process, many of these mediation clauses have serious drafting issues.²⁰

Nevertheless, mediation has a celebrated history in Chinese culture, which is reflected by the extensive use of mediation in both civil judicial

¹⁴ Zhonghua Renmin Gongheguo Zhongcaifa (中华人民共和国仲裁法) [The Arbitration Law of the People’s Republic of China] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 1994, effective Jan. 01, 1995) art. 58.

¹⁵ Civil Procedure Law of the People’s Republic of China (adopted by the Standing Comm. Nat’l People’s Cong., April 9, 1991) art 19.

¹⁶ Kun Fan, The New Arbitration Ordinance in Hong Kong, *Journal of Int’l Arb*, 715, 718 (Kluwer Law Int’l 2012 Volume 29 Issue 6).

¹⁷ Hong Kong Arbitration Ordinance, Cap. 609, (2011) §§ 32–33.

¹⁸ Carlos de Vera, *Arbitrating Harmony: “Med Arb” and the Confluence of Culture and the Rule of Law in the Resolution of International Commercial Disputes in China*, *Colum. J. ASIAN L.* 150, 156–58 (2004).

¹⁹ *Gao Haiyan v. Keeneye Holdings Ltd*, [2011] H.K.E.C. 514. ¶ 77 (C.F.I.) (overturned) by *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] 1 H.K.L.R.D. 627 (C.A.).

²⁰ *Hyundai Eng. & Const. Co. v. Vigour Ltd.*, [2005] 3 H.K.L.R.D. 723, 734 (C.A.) (holding a mediation and conciliation contractual clause unenforceable because it amounted to an agreement to agree without specified timetables).

proceedings and arbitration. Mediation is rooted in Confucian values.²¹ During China's dynastical phase, the concepts of *li* and *fa* competed for dominance in China.²² The *li* concept gained favor, and under traditional Chinese law, the courts expected Chinese society to take care of civil disputes—characterized as “minor matters”—by itself.²³ This notion gave rise to the need for mediators in villages. The Chinese thus have a strong inclination to mediate rather than to litigate, as litigation is deemed as a breach of social harmony.²⁴ Additionally, the advantages of mediation in China are numerous. *Guanxi*, or one's relations with other people, is a central concept in Chinese culture. It is favorable to preserve positive relations with others whenever possible. Mediation can allow parties to save “face”, essentially their reputation before the community, and it allows for the preservation of business relationships by minimizing conflict in the dispute resolution process.²⁵

Previously, mediation was an extrajudicial process, however it became court-sponsored and tied to the legal system during Mao Zedong's reign. Court-sponsored mediation rose to importance, particularly in the context of divorces.²⁶ Mao's China was quick to draw a contrast between what was regarded as a corrupt moral structure in the West and Chinese values.²⁷ An interventionist approach was taken on divorce, using mediation as a process to preserve marriages.²⁸ This use of court sponsored mediation consequently shaped the whole judicial system.²⁹

Today, China boasts a network of professional mediators with more than 6,800,000 members.³⁰ While mediation is more common in the

²¹ E.g., Benjamin L. Read, *Mediating the Mediation Debate: Conflict Resolution and the Local State in China*, 152 J. CONFLICT RESOL., 725, 740 (2008).

²² *Li* represented the Confucian values of social harmony, and encouraged disputes to be resolved amicably. In contrast, the more formalistic *fa* approach was embodied in legalism, which advanced that the state should have a predominant role in life. Vera, *supra* note 17 at 166–67. Vera, *supra* note 17 at 162, 166–67.

²³ Jeiren Hu, *Grand Mediation in China*, 51 Asian Surv., 1065 (2006).

²⁴ Phillip C. Huang, *Court Mediation in China, Past and Present*, 32 Modern China, 275, 279 (2006)

²⁵ Vera, *supra* note 17, at 166–67.

²⁶ Huang, *supra* note 23, at 287.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ Read, *supra* note 20, at 738.

countryside, it is also pervasive throughout the court system.³¹ One study found that a high proportion of Chinese trial judges regard themselves as interventionists and will engage in mediation proceedings.³² In many proceedings, an initial attempt at mediation is required before the dispute will move forward.³³ Judges conduct many of these mediations in a context similar to med-arb.³⁴ Similar to judges in court proceedings, Chinese arbitrators often switch hats and become mediators, and then go back to the role of arbitrator, sometimes on the presumption that mediation is desired by the parties to preserve their relationship.³⁵ In fact, med-arb is a traditional method used at the China International Economic and Trade Arbitration Commission (“CIETAC”), the only arbitral commission authorized to deal with foreign-related disputes.³⁶

Hong Kong courts strongly value finality to litigation and comity. This valuation is even more important in the case of the Mainland, given the two jurisdictions’ common cultural history and political connections. This article will examine how several Hong Kong legal doctrines allow it to reinforce those policy considerations. When resisting the enforcement of a Mainland award based on public policy, the doctrines of waiver and estoppel coupled with notions of fundamental justice and morality are critical considerations for any party. *Gao Haiyan* has made it clear that with regards to med-arb, a common procedure in the Mainland, concepts such as the role of counsel and the appropriateness of a med-arb procedure will be judged on a sliding cultural scale. The sliding scale is only subordinated by instances of fraud, corruption, or other universal public policies that would be fatal to an award.

I. Prior and Current Law

A. The Substantive Law & The Arrangement

Both the Arrangement and the Convention contain similar provisions allowing enforcement jurisdictions to refuse enforcement based

³¹ *Id.* at 739.

³² Huang, *supra* note 23, at 303.

³³ Vera, *supra* note 17, at 173.

³⁴ *Id.* at 181.

³⁵ *Id.* at 185.

³⁶ Lu Song, *The New CIETAC Arbitration Rules of 2012*, 29 J. INT’L ARB, 299, 309 (2012).

on public policy.³⁷ It provides that enforcement may be refused in the Mainland if its enforcement would be contrary to the “public interests of the Mainland” and, likewise, enforcement may be refused in Hong Kong based on “public policy.”³⁸

The arbitration of the principal case was conducted in China in accordance with the PRC’s Arbitration Law (“the Law”). The Law provides for the establishment of arbitration commissions throughout the provinces, which must be registered with the judicial department or municipalities directly under the Central Government.³⁹ The Law additionally provides that an arbitrator must withdraw from a case when that person “meets a party or his agent in private, accepts an invitation for dinner by a party or his representative or accepts gifts presented by any of them,”⁴⁰ or where the arbitrator has a relationship that may affect impartiality.⁴¹ Article 35 provides that a party may submit a complaint for the withdrawal of an arbitrator after the first hearing only if reasons for the withdrawal become known after the start of the first hearing.⁴² The law further provides for a med-arb procedure if the parties consent voluntarily.⁴³ The award may be set aside if the composition of the tribunal or the procedure is contrary to law,⁴⁴ or if the award is contrary to the social and public interests.⁴⁵

³⁷ The New York Convention provides that “enforcement may be refused . . . [when] . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country.” Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 5, *opened for signature* Jun. 10, 1958 330 U.N.T.S. 3. The Arrangement that “[t]he enforcement of [an] award may be refused if the court of the Mainland holds that the enforcement of the arbitral award in the Mainland would be contrary to the public interests of the Mainland, or if the court of the HKSAR decides that the enforcement of the arbitral award in Hong Kong would be contrary to the public policy of the HKSAR.” The Arrangement, P.R.C.-H.K.S.A.R., Jun. 21, 1999 (hereinafter the Arrangement).

³⁸ The Arrangement, P.R.C.-H.K.S.A.R., Jun. 21, 1999, art. 7.

³⁹ The Arbitration Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 1994, effective Jan. 01, 2000) art. 10.

⁴⁰ *Id.* at art. 34 (4).

⁴¹ *Id.* at art. 34 (3).

⁴² *Id.* at art. 35.

⁴³ *Id.* at art. 51.

⁴⁴ The Arbitration Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 1994, effective Jan. 01, 2000) art.58(3).

⁴⁵ *Id.* at art. 58(6).

In Hong Kong, according to the Arbitration Ordinance, the enforcement of an award may be refused when a party is unable to present their case,⁴⁶ or it would be contrary to public policy to enforce the award.⁴⁷ Both Convention and awards under the Arrangement may be refused enforcement on identical grounds.^{48 49}

PRC contract law governed the underlying contract, which gave rise to the dispute in *Gao Haiyan*.⁵⁰ Under PRC law, contracts that “are manifestly unfair at the time the contract was concluded” or “concluded by one party against the other party’s true intention through the use of fraud, coercion, or exploitation of the other party’s precarious position” will allow the injured party “to request the people’s court or an arbitration institution to modify or revoke it.”⁵¹

B. The Public Policy Exception in Hong Kong

The public policy exception is drawn narrowly in Hong Kong, and can only be relied upon when “enforcement would be contrary to fundamental conceptions of morality and justice.”⁵² The enforcement of an award obtained by fraud is one example of such a narrow standard.⁵³ In Hong Kong, when relying on the public policy exception as a defense, it is important to raise it early, preferably during the arbitration. Where an aspect of a public policy defense is not available in another jurisdiction, Hong Kong courts will not apply the doctrine of estoppel to that particular defense. The issues of waiver and estoppel are often present.

1. Hebei Import and Export Corp v. Polytek Engineering

The seminal case in Hong Kong for the enforcement of Mainland awards on public policy grounds is *Hebei Import and Export Corp v. Polytek Engineering Co.*, which addresses waiver in a case of not raising

⁴⁶ Arbitration Ordinance, (2011) Cap. 609 § 86(c)(ii).

⁴⁷ *Id.* at § 86(2)(b).

⁴⁸ *Id.* at §§ 89(2)(c)(ii), (3)(b).

⁴⁹ *Id.* at §§ 95(2)(c)(ii), (3)(b).

⁵⁰ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] 1 H.K.L.R.D. 627, 632 (C.A.).

⁵¹ *Id.* at 635.

⁵² *Karaha Bodas Co. v. Perushan Pertamina Minyak Dan Gas Bam Negara*, [2009] H.K.C.F.A.R. 84, 100 (C.F.A.) (holding that fraud is contrary to Hong Kong’s fundamental notions of morality and justice). *See also*, *J.J. Agro Indus. Ltd. v. Texuna Int’l Ltd.*, [1994] 1 H.K.L.R. 89, 93 (H.C.) (holding the kidnapping of a witness amounts to fraud under the public policy exception).

⁵³ *Karaha Bodas Co.* H.K.C.F.A.R. at 100.

a defense before the Intermediate Courts of the PRC.⁵⁴ The applicants of this case sought to enforce a CIETAC award in Hong Kong, and the respondents relied on public policy exception to resist enforcement.⁵⁵ There, a chief arbitrator was present during the assessment of goods with only the experts and in the absence of the sellers of the goods or the other arbitrators.⁵⁶ This defense was not raised in the arbitral proceedings nor at the Beijing Intermediate Court.

Ultimately, the court enforced the award. Speaking on behalf of majority, Sir Anthony Mason identified four issues: first, whether the respondents waived the defense by failing to raise it in the Beijing Intermediate Court; second, whether the respondents could now resist enforcement of the award because of the Chief Arbitrator's communications; third, whether the Respondents were unable to present their case; and finally, whether public policy was violated.⁵⁷ The court stressed that comity and finality, subject to certain conditions, are critical policy considerations in Hong Kong.⁵⁸ Regarding the issue of waiver, the court noted that a failure to raise a public policy issue in a proceeding to set aside an award in the supervisory jurisdiction does necessarily constitute waiver.⁵⁹ The court held that different jurisdictions have different public policy interpretations and often public policy grounds are unavailable in the supervising jurisdiction, so they may be raised in the enforcement

⁵⁴ *Heibei Import and Export Corp. v Polytek Eng'g Co.*, [1999] H.K.L.R.D. 665 (C.F.A.).

⁵⁵ *Id.* at 669.

⁵⁶ The seller was not able to examine the experts at the time of the meeting. However, the sellers had the opportunity to challenge the experts' opinions, and had ample time later to present its case. *Id.*

⁵⁷ *Id.* at 686.

⁵⁸ *Id.* at 688. See also *Shantou Zeng Ping Xu Yueli Shu Kua Trading Co. v Wesco Polymers Ltd*, [2002] H.K.E.C. 76, ¶ 17 (invoking comity as a consideration for the enforcement of an award attacked on the illegality of the underlying contract, which had been found valid by the Beijing Intermediate Court); *Qinghuangdao Tongda Ent. Dev. Corp. v Millan Basic Co.*, [1993] 1 H.K.L.R. 173, 176 (H.C.) (holding that finality is an important public policy consideration in Hong Kong, and courts will not reexamine disputes of fact).

⁵⁹ *Heibei Import and Export Corp. v Polytek Eng'g Co.*, [1999] H.K.L.R.D. 665, 688 (C.F.A.).

jurisdiction.⁶⁰ However, as in *Hebei Import and Export Co.*, Hong Kong courts will not tolerate parties keeping procedural defects “up the sleeve” as to frustrate later enforcement actions.⁶¹

In his concurring opinion, Presiding Judge Litton noted that the public policy exception is narrow, and the standards in an international arbitration should exceed those for setting aside domestic awards.⁶² He also noted that while Hong Kong courts will not overlook cases of actual bias, mere apparent bias is insufficient to trigger the public policy exception. If the proceedings were conducted in such a manner that the respondents were unable to present their case, then it would be unnecessary to rely on the public policy ground primarily because a separate basis exists for resisting enforcement.⁶³ This is a preferable ground for refusing enforcement because of the desire to construe the public policy exception as narrowly as possible.

2. Waiver & Estoppel

Another example of a case where waiver played a role in the outcome is *Xiamen Xinjingdi Group Ltd. v. Eton Properties Ltd.*⁶⁴ In *Xiamen Xinjingdi Group Ltd.*, the applicants sought to enforce a CIETAC award which granted the specific performance of a contract.⁶⁵ The respondents relied on both impossibility and public policy argu-

⁶⁰ See *id.* See also *Shanghai City Foundation Works Corp. v. Sunlink Ltd.*, [2001] H.C.C.T. No. 83 of 200 (C.F.I.) (holding it is unusual to refuse enforcement on public policy grounds when the supervising jurisdiction has upheld the award because it leads to unusual injustice as the winning party may not seek a new arbitration in the supervising jurisdiction).

⁶¹ *Hebei Import and Export Corp.*, H.K.L.R.D at 688. See also *A v. R.*, [2009] 3 H.K.L.R.D. 389, 397 (C.F.I.) (holding that a failure to raise a point concerning liquidated damages, and not participating in the arbitration regarding that issue amounted to a waiver); *Paklito Investment Ltd v. Klockner Asia Ltd.*, [1993] 2 H.K.L.R. 39 (H.C.) (granting enforcement partially because respondents had not taken steps to set aside the award in the supervising jurisdiction); *Pacific China Holdings Ltd. v. Grand Pacific Holdings Ltd.*, [2007] 3 H.K.L.R.D. 741, ¶ 15 (C.F.I.) (holding a case of waiver had been made out where an award was attacked for apparent bias because questionable communications between the arbitrators had not been objected to at the arbitration).

⁶² *Hebei Import and Export Corp.*, H.K.L.R.D at 675.

⁶³ *Id.* at 676.

⁶⁴ *Xiamen Xinjingdi Group Ltd. v. Eton Properties Ltd.*, [2009] 4 H.K.L.R.D. 353, 356-57 (C.F.A.).

⁶⁵ *Id.*

ments before the C.A.;⁶⁶ however, they did not raise the issue before CIETAC,⁶⁷ but instead filed an application that they later withdrew with the Beijing Intermediate Court.⁶⁸ The court held that a waiver had been made out, as the respondents could have raised the defense at either the first or second arbitration in the dispute, and here the impossibility claim seemed like it had been self-inflicted.⁶⁹

Waiver can also play a role in an attack on an arbitrator or a challenge to the composition of the tribunal. In *China Nanhai Oil Joint Service Corp. Shenzhen Branch v. Gee Tai Holdings Co.*, the defendants objected to the default appointment of an arbitrator.⁷⁰ They raised the objection to the Shenzhen sub-commissioner and were overruled.⁷¹ They did not pursue the available avenues of contacting the Chairman or Vice Chairman of C.I.E.T.A.C.⁷² Furthermore, they did not raise the issue before the full tribunal, but only brought up the defense with one member.⁷³ The court held that good faith considerations are relevant to determining whether a party is estopped by the Mainland intermediate courts, and had the defendants won, they would not have issued this specific complaint.⁷⁴

3. Bias & Med-Arb

With respect to the issue of bias, Hong Kong courts are reluctant to find that technical violations automatically give rise to bias *per se*. For example, in *Pacific China Holdings*,⁷⁵ each party nominated an arbitrator, and the arbitrator who was nominated by the applicants contacted the applicants' attorney, their solicitor, unilaterally, thus giving rise

⁶⁶ *Id.* at 359.

⁶⁷ *Id.* at 360.

⁶⁸ *Id.*

⁶⁹ *Xiamen Xinjingdi Group Ltd. v. Eton Properties Ltd.*, [2009] 4 H.K.L.R.D. 353, 360-61 (C.F.A.).

⁷⁰ *China Nanhai Oil Joint Service Corp. Shenzhen Branch v. Gee Tai Holdings Co.*, [1995] 2 H.K.L.R. 215 (H.C.).

⁷¹ *Id.* at 217.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 225-26.

⁷⁵ *Pacific China Holdings Ltd. v. Grand Pacific Holdings Ltd.*, [2007] 3 H.K.L.R.D. 741 (C.F.I. 2007).

to a question of bias.⁷⁶ The court held that unilateral communications between an arbitrator and a party do not give rise to bias per se.⁷⁷

With regard to voluntary med-arb proceedings, the relevant contractual clauses must be drafted with care in Hong Kong. In *Hyundai Engineering and Construction Co. v. Vigour Ltd.*, an arbitration clause included a provision mandating the parties attempt conciliation.⁷⁸ Upon failing to reach an agreement, the contract sent the dispute to a third party mediation procedure.⁷⁹ The contract also included a clause that provided “no party shall serve the other.”⁸⁰ Due to the lack of certainty, the negotiation and mediation provisions were unenforceable and were merely agreements to agree.⁸¹ Moreover, a timetable of the dispute resolution process is required.⁸² This rendered the whole agreement unenforceable, opening the door to litigation.⁸³

4. English and Singaporean Jurisprudence

The United Kingdom and Singapore legal systems provide useful comparisons. Hong Kong’s legal structure is rooted in the common law of the U.K, and Singapore is likewise a common law jurisdiction with significant Chinese cultural influence. The seminal case from the U.K. is *Minimetals Germany GmbH v. Ferco Steel* which, like *Gao Haiyan*, concerned a Mainland award.⁸⁴ However, in *Minimetals Germany GmbH*, the New York Convention governed the enforcement action.⁸⁵ The underlying dispute regarded a contract for the sale of steel, and the case was brought under an issue concerning the quality and dimensions of that steel.⁸⁶ The arbitral tribunal issued an award for the plaintiffs

⁷⁶ *Id.* at ¶¶ 4-6.

⁷⁷ *Id.* at ¶ 5 (holding that the unilateral communications did not give rise to apparent bias because the solicitor did not complain about the communications, and that a fair minded observer must find the communication as unfair or lack transparency).

⁷⁸ *Hyundai Engineering and Construction Co. v. Vigour Ltd.*, [2005] 3 H.K.L.R.D. 723, 726 (C.A.).

⁷⁹ *Id.* at 728.

⁸⁰ *Id.* a 730.

⁸¹ *Id.* at 732.

⁸² *Id.* at 734.

⁸³ *Hyundai Engineering and Construction Co. v. Vigour Ltd.*, [2005] 3 H.K.L.R.D. 723, 735 (C.A.).

⁸⁴ *Minimetals Germany GmbH v. Ferco Steel*, (1999), C.L.C. 647, 648 (Comm.).

⁸⁵ *Id.* at 656.

⁸⁶ *Id.* at 649.

on a subcontract.⁸⁷ The defendants applied to the Beijing Intermediate Court to revoke the award on grounds that the defendants were unable to make a case because they did not have the opportunity to challenge the arbitrator's reliance on a sub-sale award, breaching Article 58 of CIETAC rules.⁸⁸ The Beijing Intermediate Court ruled in favor of the plaintiffs.⁸⁹

Enforcement was sought in the United Kingdom. The defendants relied on a theory of breach of natural justice, an improper application of CIETAC rules, and that enforcement of the award would be contrary to public policy.⁹⁰ In determining whether the defendants had been denied the opportunity to present their case, the court held that the initial Beijing Court determination for resumed arbitration was to allow the defendants to confront the original reliance on the sub-sale award.⁹¹ Counsel felt that there was no jurisdiction for this decision, and therefore did not confront this reliance.⁹² The court held that a clear waiver had been made out.⁹³ Furthermore, the court held that to establish a defense under the public policy exception, a party must show that an award was arrived at by means "contrary to substantial justice".⁹⁴ Relevant to public policy considerations are the availability of local remedies and the reasonableness of a party's omission of using them. When considering the enforcement of a Convention award, the court will examine the nature of the procedural breach, whether the supervising jurisdiction's local remedies were invoked, whether the remedy sought was unavailable under that jurisdiction, whether the supervisory jurisdiction conclusively upheld the award, and, if a party failed to invoke a defense, the extent to which that decision was reasonable.⁹⁵ Under this fact pattern, the court found that a substantial breach of justice had not been shown.⁹⁶ These considerations are similar to Hong Kong's notion of requiring a breach of fundamental notions of justice.

⁸⁷ *Id.* at 649–50.

⁸⁸ *Id.* at 650.

⁸⁹ *Minimetals Germany GmbH v. Ferco Steel*, (1999), C.L.C. 647, 653 (Comm.).

⁹⁰ *Id.* at 654.

⁹¹ *Id.* at 657.

⁹² *Id.* at 657, 661.

⁹³ *Id.* at 659.

⁹⁴ *Minimetals Germany GmbH v. Ferco Steel*, (1999), C.L.C. 647, 659 (Comm.)

⁹⁵ *Id.* at 661.

⁹⁶ *Id.* at 662.

In Singapore, the public policy exception and allegations of procedural defects are similarly disfavored. In *Soh Beng Tee v. Fairmound Development Ltd.*, a dispute arose concerning the timely completion of a construction project.⁹⁷ There, the court refused to set aside a domestic award, but the court noted that the analysis would be the same as in an international arbitration proceeding.⁹⁸ Singapore's Arbitration Act provides that an award may be set aside by the court if there is a breach of natural justice which occurs in the making of the award which prejudices one of the party's rights—a ground similar to the public policy exception.⁹⁹ To establish such a breach, a party must show which rule was breached, how it was breached, in what way the breach was connected to the making of the award, and how the breach prejudiced that party's rights. Elaborating on these principles, the court cited several relevant factors, including whether arbitrators observed the rules of natural justice and equal treatment, whether there was a failure for the opportunity to present a case, whether there was opportunity to rebut the opponent's argument, whether there was extraneous information in the hearing that was considered, and whether the requirement for actual prejudice had been met.¹⁰⁰ The court emphasized a restrictive view of public policy.¹⁰¹ The court stressed that one of Singapore's major public policy concerns is an interest in efficiency of the alternate dispute resolution process. The arbitrators' judgment will not necessarily be disturbed, even if it strikes a middle path where one party thinks it is wholly in the right.¹⁰² This establishes a large degree of deference towards the arbitral decision, and is directly related to the purpose of the Arbitration Act, finality.¹⁰³

⁹⁷ *Soh Beng Tee v. Fairmound Development Ltd.*, [2007] 3 SLR(R) 86, 100.

⁹⁸ *Id.* at 102.

⁹⁹ *Id.* at 102.

¹⁰⁰ *Soh Beng Tee* [2007] 3 SLR(R) at 113. *See also*, *PT Asurmansi Jasa Indonesia (Persero)*, [2006] S.G.C.A. at 617, 619, 622 (holding that a party had the opportunity to present an argument, albeit possibly only informally, therefore enforcing the award to promote finality to litigation)(emphasizing a narrow scope to the public policy exception to enforcement)

¹⁰¹ *Soh Beng Tee* [2007] 3 SLR(R) at 116.

¹⁰² *Id.* at 120. *Cf. Anwar Siraj v. Ting Kong Chung*, [2003] 2 S.L.R. (R) 287, 296 (holding that challenges to an arbitrator's bias and competence are evaluated by whether the misconduct amounts to a substantial miscarriage of justice, *and* that this is determined under an objective test, dismissing a subjective lack of confidence by one of the parties).

¹⁰³ *Soh Beng Tee* [2007] 3 SLR(R) at 130.

II. Gao Haiyan v. Keeneye Holdings

A. The Underlying Facts

The underlying dispute between the Respondents and Applicants involved the validity of a Shareholder Transfer Agreement (“Shareholder Agreement”) under the law of the PRC.¹⁰⁴ The applicants were husband and wife, Gao and Xie, who owned stock in a company that was invested in a mining venture.^{105 106} The Respondents were a group of British Virgin Island (“BVI”) companies,¹⁰⁷ which acquired the applicants’ interest in the mining venture through a share transfer agreement.¹⁰⁸ The governing contract contained an arbitration clause, providing for arbitration at the Xi’An Arbitration Commission (“XAC”) in the PRC.¹⁰⁹

The applicants sought to revoke the Shareholder Agreement on the PRC legal ground that it was entered into by taking advantage of people in a “precarious position.”¹¹⁰ When the Shareholder Agreement was concluded, the Applicants had been incarcerated for six months and suffered miserable conditions during their detention.¹¹¹ According to the arbitral award, the detainment was due to a management dispute between the applicants and the commissioner of the mining venture, which led to minor injuries.¹¹² Furthermore, during their detainment, the applicants’ family members reached out to Liu Jian Shen, a “person of

¹⁰⁴ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] H.K.L.R.D 627, 633 (C.A.).

¹⁰⁵ The name of their company was Baijijun. *Id.* at 632.

¹⁰⁶ Baijun and Angola, a BVI company and a respondent in the case, each owned 50% in the “Zhongxin” venture, which operated a coalmine in Changlebao. *Id.* at 633.

¹⁰⁷ *Id.*

¹⁰⁸ Under The Agreement, the Applicants agreed to transfer all of their shares in Baijun to the first Respondent, *Gao Haiyan*, [2012] 1 H.K.L.R.D. at 633. Later, by a supplemental agreement, the second Respondent was added as a transferee, such that the first Respondent received 62% of the transferred shares and the second received 38%. *Id.* Finally, the Respondents transferred shares to Daynew and Far Orient Holdings, two other BVI companies. *Id.*

¹⁰⁹ *Gao Haiyan v. Keeneye Holdings Ltd.*, 1 [2012] H.K.L.R.D 627, 633 (C.A.).

¹¹⁰ *Gao Haiyan*, [2012] 1 H.K.L.R.D. at 635.

¹¹¹ *Id.* at 633

¹¹² *Id.*

influence”,¹¹³ in order to “save persons”.¹¹⁴ According to the Applicants, this situation led to the Shareholder Agreement. As proof that it was the result of improper pressure, the applicants cited the difference between the share prices and the actual capital contributed, as the valuations did not reflect the value of the mining venture.¹¹⁵ The applicants initiated proceedings with the XAC.

As is the case in many CIETAC arbitrations and civil proceedings, a mediation process was interwoven with the proceedings.¹¹⁶ The Applicants alleged that there was agreement to mediate, whereas the respondents alleged that there was no such agreement, only that they had indicated a willingness to mediate.¹¹⁷ However, the Respondents did not object to the mediation during the arbitral proceedings.¹¹⁸ The tribunal consisted of one arbitrator nominated by the Applicants, one by the Respondents, and a Chief Arbitrator.¹¹⁹ While not an arbitrator in the case, Pan Jun Xin, the Secretary General of the XAC, became a principal actor in the subsequent aborted mediation.¹²⁰ Zeng Wei, a shareholder in Angola, one of the BVI companies, represented the respondents at the mediation.¹²¹

Zhou and Pan were appointed to communicate a 250 million RMB settlement offer to the Respondents. Pan sent the suggestion to a lawyer for the applicants.¹²² They then arranged to meet with Zeng, as opposed to respondents’ counsel.¹²³ They met for dinner at the Xi’an Shangri-la Hotel, an informal setting, where Pan and Zhou asked Zeng to “work

¹¹³ Liu Jian Shen was the president of the Xia Yizhilin Group, and a member of the National People’s Congress. He was also the controller of the Kaiyuan Holding Company, and was alleged to be a controller of Keeneye Holdings, Dew Purple, and Fair Orient. *Id.*

¹¹⁴ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] H.K.L.R.D 627, 638 (C.A.). The Applicants evidently believed that Liu could secure their release, an assertion disputed by the Respondents. *Id.* at 633.

¹¹⁵ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] 1 H.K.L.R.D. at 636.

¹¹⁶ *Id.* at 640.

¹¹⁷ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2011] H.K.E.C. 514, ¶ 18 (C.F.I.).

¹¹⁸ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] H.K.L.R.D 627, 645 (C.A.).

¹¹⁹ The Applicants nominated Zhou Jian as an Arbitrator, and The Respondents nominated Liu Chun Tian. The Chief Arbitrator was Jiang Ping. *Id.* at 636.

¹²⁰ *Id.*

¹²¹ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] 1 H.K.L.R.D. at 636.

¹²² *Id.*

¹²³ *Id.*

on” the respondents with regards to the settlement offer.¹²⁴ According to Zeng’s testimony, Pan told Zeng the result of the arbitration would be a valid contract, but that the Respondents would compensate the Applicants 250 million RMB.¹²⁵ When the Respondents learned of the offer, they rejected it. Subsequently, the XAC issued an award invalidating the contracts, and recommended that the Applicants pay the Respondent’s 50 million RMB, which was a nonbinding provision of the award.¹²⁶

The Respondents then appealed to the Beijing Intermediate Court.¹²⁷ At the Intermediate Court, the Respondents advanced a theory that the arbitrators had become tainted with bias because of Pan’s influence, which had not been raised during the arbitral proceedings.¹²⁸ The Intermediate Court held that Pan’s actions were justified under the XAC rules, and that the award was otherwise valid.¹²⁹ The Intermediate Court ruled in favor of the Applicants.¹³⁰ The Applicants sought enforcement in Hong Kong, and were granted leave to enforce the judgment.¹³¹

B. The Decisions of the Court of the First Instance (C.F.I.) and the Court of Appeals (C.A.)

Judge Reynolds, writing for the C.F.I., set aside the leave to enforce the judgment on public policy grounds.¹³² Vice President of the Court of Appeals Tang (“V.P. Tang”), writing for the C.A., overturned.¹³³ The primary legal issue before the courts was whether the meeting at the Shangri-la Hotel, cast as a mediation, violated the public policy of Hong Kong. Both decisions analyzed the issue in the context of waiver,

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] H.K.L.R.D 627, 639 (C.A.).

¹²⁷ *Id.* at 636, 639.

¹²⁸ Bias refers to the principle that judges and arbitrators, must not only avoid actual bias, but the appearance of bias to protect the integrity of the judicial system. *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] H.K.L.R.D 627, 639, 641, 659 (C.A.).

¹²⁹ The Xi’An Intermediate Court held that the Chief Arbitrator was empowered to act as a mediator because Article 37 of the X.A.C. Rules provides “mediation may be chaired by the Arbitral Tribunal or the presiding arbitrator. *Gao Haiyan*, 1 H.K.L.R.D. at 640–41.

¹³⁰ *Gao Haiyan*, 1 H.K.L.R.D. at 641.

¹³¹ *Id.* at 631.

¹³² *Id.* at 632.

¹³³ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] 1 H.K.L.R.D 627, 660 (C.A.).

estoppel, and the relationship between apparent bias and the public policy exception in Hong Kong.¹³⁴

1. Waiver

The XAC rules state that:

a party shall be deemed to have waived his or her right to object where he or she knows or should know that the Commission, the arbitral tribunal, the counter party and other persons have failed to comply with any provision of, or requirements under the Rules, and yet participates in or proceeds with the arbitration.¹³⁵

Applying the lead case *Hebei Import and Export Co. v. Polytek Engineering Ltd.*, the C.F.I. found that a case of waiver had not been established.¹³⁶ The waiver theory is primarily concerned with the possibility of litigants “holding complaints up their sleeve at the arbitration in order to deny or delay relief.”¹³⁷ Judge Reynolds was concerned the tribunal may have become prejudiced against the Respondents if they had complained.¹³⁸ The matter was complicated further because under XAC rules, Pan would have determined any allegation of bias against him.¹³⁹ The C.F.I. held that one cannot “hold a complaint up their sleeve” in a case where complaining to the tribunal is useless or may prejudice that party.

The C.A., however, strongly disagreed with this analysis. V.P. Tang, wrote that the Respondents had waived the public policy defense because they had kept an alleged irregularity up their sleeve for later use.¹⁴⁰ The fear of prejudicing the tribunal against the Respondents was an insufficient reason for not complaining, and it effectively barred the tribunal, which was better positioned to rule on such a matter, from remedying

¹³⁴ Waiver refers to the doctrine that a party to an arbitration should raise procedural issues and defenses before the Tribunal, or otherwise forgo the defense in later proceedings whereas estoppel refers to the doctrine that once the supervising jurisdiction renders a decision, it should be respected by the enforcing jurisdiction absent compelling circumstances. *Hebei Import & Export Corp. v. Polytek Eng'g Corp.*, [1999] 1 H.K.L.R.D. 665, 687 (C.F.I.).

¹³⁵ *Gao Haiyan*, 1 H.K.L.R.D. at 645-46.

¹³⁶ *Gao Haiyan*, [2011] H.K.E.C. 514, ¶ 81 (C.F.I.).

¹³⁷ *Id.*

¹³⁸ *Id.* at ¶ 87.

¹³⁹ *Id.* at ¶¶ 87,88.

¹⁴⁰ *Gao Haiyan*, 1 H.K.L.R.D. at 650.

the alleged defect.¹⁴¹ He went on to say that there would have been no complaint had the tribunal accepted the Respondents suggestion.¹⁴²

2. Estoppel

The C.F.I. similarly found that Intermediate Court's decision did not constitute estoppel because in applying the public policy exception, the enforcing court looks to the public policy of its own law, and not the supervising jurisdiction's.¹⁴³ On the issue of estoppel, Tang agreed with the C.F.I., but also held that more weight should have been accorded to the judgment of the Intermediate Court.¹⁴⁴ He found that where a supervisory jurisdiction has refused to set aside an award, and the enforcing jurisdiction refuses to enforce it, the result could be highly unjust.¹⁴⁵ The plaintiffs are then deprived of seeking another arbitration and may not enforce the present decision.¹⁴⁶ A court of Hong Kong is ill-placed to decide what constitutes as taking advantage of people in precarious positions under PRC law, especially considering there is no analogous concept under Hong Kong law, and a Mainland court is better suited to make such judgments.¹⁴⁷ Correspondingly, the supervising court will be in the best position as to what may constitute bias under that law.¹⁴⁸ The C.A. explained that estoppel would only give way when the supervisory courts are limited in their jurisdiction to interfere, or when they will not interfere because of corruption.¹⁴⁹

3. Apparent Bias & Public Policy

Judge Reynolds held that while a case for actual bias could not be made out, one for apparent bias could be.¹⁵⁰ The standard for apparent bias is whether the circumstances would cause a fair-minded observer to apprehend a real risk of bias. Concerning the mediation at the Shangri-la Hotel, Judge Reynolds cited several disconcerting facts supporting his

¹⁴¹ *Id.* at 649.

¹⁴² *Id.* at 648–49.

¹⁴³ *Gao Haiyan*, [2011] H.K.E.C. 514 ¶¶ 92, 93 (C.F.I.).

¹⁴⁴ *Gao Haiyan*, [2012] 1 H.K.I.R.D. at 645.

¹⁴⁵ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] 1 H.K.L.R.D. 627, 645 (C.A.).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 657.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 645.

¹⁵⁰ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2011] H.K.E.C. 514, ¶ 91 (C.F.I.).

judgment.¹⁵¹ He was concerned that Pan and Zhou, instead of acting as neutral mediators, acted as advocates.¹⁵² To support this contention, Judge Reynolds examined the award and found that the total awarded was 25% greater than the applicant's bottom line.¹⁵³ Furthermore, Judge Reynolds found no real calculation of damages for the settlement request of 250 million RMB.¹⁵⁴ Judge Reynolds held that these facts constituted apparent bias.¹⁵⁵

Regarding the med-arb process as a whole, Judge Reynolds commented that the Model Law, much of which is imported into the Arbitration Ordinance, has safeguards against med-arb. He elaborated that med-arb is infected with self-apparent problems regarding bias, and the disclosure of sensitive information may be used in the following proceedings.¹⁵⁶ He further emphasized that many arbitrators will decline to act as mediators in the same dispute because they must take great pains to eliminate any impression of bias.¹⁵⁷

Judge Reynolds then examined whether the public policy exception to enforcement applies. Here, there were two competing public policy concerns, finality to litigation and the wrongfulness of upholding an award tainted by bias.¹⁵⁸ Given the recent merger between domestic and international arbitration in Hong Kong, he compared this award

¹⁵¹ Pan never asked for the Respondents' counsel permission to contact the Respondents, and said Respondent's counsel was not present at the purported mediation. The mediation was held in a highly informal venue, and there was a sense of pressure on the Zeng manifested through the phrase "work on." He also was concerned that there was no evidence that Pan was approved by either party. *Id.* at ¶¶ 22, 44, 46.

¹⁵² *Gao Haiyan* H.K.E.C. at ¶ 61.

¹⁵³ The Applicants' bottom line was RMB 200,000. *Gao Haiyan*, [2012] 1 H.K.L.R.D. 627, 658 (C.A.).

¹⁵⁴ *Gao Haiyan*, [2011] H.K.E.C. at ¶ 48.

¹⁵⁵ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2011] H.K.E.C. 514, ¶ 91 (C.F.I.).

¹⁵⁶ *Id.* at ¶¶ 71, 72, 75, 76.

¹⁵⁷ *Id.* at ¶ 77.

¹⁵⁸ *Id.* at ¶ 100.

to domestic standards.¹⁵⁹ Under Hong Kong public policy, a domestic award tainted with apparent bias is unenforceable, and Judge Reynolds reasoned that international awards should receive no more favorability than domestic ones.¹⁶⁰

The C.A. strongly disagreed. It held that only when enforcing an award would violate Hong Kong's fundamental principles and notions of moral justice that an award will be refused under the public policy ground. It can only be relied on in exceptional cases, such as corruption.¹⁶¹ The main question is whether the party's opportunity to be heard by an impartial and independent tribunal is violated and whether that party's rights are prejudiced. The C.A. held such as case had not been reached here.¹⁶²

The point of the New York Convention and the Arrangement is to promote enforcement of awards. Refusal of enforcement will typically be extraordinary, and enforcement should not be denied on the grounds of technical defects in the rules.¹⁶³ Framing the conduct of mediation in such a way, the C.A. allowed for some cultural flexibility and an understanding that divergent legal systems will have very different ways of looking at things.¹⁶⁴ The C.A. was not concerned that Zeng, as opposed to counsel, was contacted given the circumstances of the case.¹⁶⁵ As to

¹⁵⁹ Hong Kong merged the domestic and international regimes in order to simplify the administration of arbitration. Here, the CFI imported domestic public policy into the context of international agreements. *Gao Haiyan v. Keeneye Holdings Ltd.*, [2011] H.K.E.C. 514, ¶ 100 (C.F.I.). *But see Hebei Import & Export Corp. v. Polytek Eng. Co.* [1999] H.K.L.R.D. 605, 675 (citing *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth Inc.*, 473 U.S. 614 (1985), for the proposition that public policy grounds in international commercial arbitration are held to a higher standard than purely domestic arbitrations).

¹⁶⁰ *Gao Haiyan*, H.K.E.C. at ¶ 101..

¹⁶¹ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] 1 H.K.L.R.D. 627, 660 (C.A.).

¹⁶² *Id.* at 660.

¹⁶³ *Id.* at 646.

¹⁶⁴ *See id.* For example, the decision below partially relied on the absence of Respondents' counsel. *Gao Haiyan*, H.K.E.C. at ¶ 46. Tang retorted that a Mainland Court is better suited to determine the role of a Mainland lawyer, and it is important to consider how mediations are typically conducted in the place the contract designates. *Gao Haiyan*, 1 H.K.L.R.D. at 659.

¹⁶⁵ He noted that the Respondents had never actually complained it was Zeng, and not counsel was contacted. Moreover, there was a great deal of confusion as to controlled the Respondents, and based on Zeng's testimony for the Respondents, he found that Zeng had authority to negotiate based on his agreement to let two of the Respondents to pay more money to settle. *Id.* at 654.

the discrepancies in the valuation of the Award, the C.A. noted that it was not in a position to comment on its correctness.¹⁶⁶

To emphasize his point on cultural flexibility, he noted that while some may be concerned by the informal manner of the mediation, whether the court should treat such informality with judicial hostility depends on how mediations are normally conducted in the place designated by the arbitration agreement, introducing a cultural sliding scale by which awards are examined under the public policy exception.¹⁶⁷

III. Gao Haiyan v. Keeneye Holdings in Context

While the C.A. did not elaborate, it found that a case of waiver had been made out.¹⁶⁸ In comparison to previous case law, this ruling reinforces the presumption that if an issue concerning the impartiality of an arbitrator or a procedural defect arises during the course of the proceedings and is not objected to, that defense is waived. *Hebei Import and Export Co.* is distinguishable from *Gao Haiyan* in this regard. While both address the propriety of an arbitrator's conduct, in *Hebei Import and Export Co.*, the applicants did not rely on the breach of "fundamental notions of morality and justice" or a public policy ground before the Beijing Intermediate Court.¹⁶⁹ Therefore, taking *Hebei Import and Export Co.* and *Gao Haiyan* together, the immediate effect of the holding in *Gao Haiyan* with regards to waiver, is to stress that waiver can be made by not raising an issue before the supervising jurisdiction, or the arbitral tribunal.

Other cases illustrate the importance of waiver when seeking enforcement on public policy grounds in Hong Kong. For example, in *Xiamen Xinjingdi*, the respondents' waiver played a role in the denial of their claim. While the respondents did not go before the Intermediate Court in that case, the fact that they could have raised their claim in

¹⁶⁶ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] 1 H.K.L.R.D. 627, 657 (C.A.). The C.A. also noted that people connected to the Respondents were in fact trying to raise R.M.B. 250,000,000 when the Award was made reinforcing its validity. *Id.* See also *A v. R* [2009] 3 H.K.L.R.D. 389, 397 (C.F.I.) (granting enforcement where a liquidated damages provision was not litigated before the arbitral tribunal).

¹⁶⁷ *Gao Haiyan*, 1 H.K.L.R.D. at 659

¹⁶⁸ *Id.* at 645.

¹⁶⁹ *Hebei Import and Export Corp. v. Polytek Eng'g Co.*, [1999] H.K.L.R.D. 665, 669 (C.F.I.).

either the first or second arbitration was central to the case's holding.¹⁷⁰ Practitioners must also be aware of the necessity to raise the complaint formally before the tribunal, as simply unilaterally complaining to a single arbitrator will not suffice.¹⁷¹ It is necessary to make an effort to exhaust local remedies to the fullest extent possible.¹⁷² However, with the use of waiver, not all factual defenses are treated equally. It remains an open question whether a party can waive a defense based on the illegality of a contract.¹⁷³

An issue analogous to waiver is the weight put on the supervising jurisdiction's decision, at instant the intermediate courts. A party is faced with two choices when a Mainland award is granted against it. They may simply wait and resist the award at enforcement, risking waiver for not exhausting local remedies and keeping defenses "up the sleeve,"¹⁷⁴ or raise the issue before the Intermediate Court and risk estoppel by that court.¹⁷⁵ The primary concern is whether the arguments were withheld in good faith, or whether it is a tactical decision to delay the applicant from enjoying the fruits of the award.¹⁷⁶ Under Hong Kong public policy, there is a very strong public policy consideration for upholding the decisions of supervising jurisdictions. This is primarily to reinforce principles of comity,¹⁷⁷ and ensure that plaintiffs are not barred from

¹⁷⁰ *Compare Xiamen Xinjingdi Grp. Ltd.*, [2009] 4 H.K.L.R.D. 353, 360 (C.A.), with *Pacific China Holdings Ltd. v. Grand Pacific Holdings Ltd.*, [2007] 3 H.K.L.R.D. 741 (C.F.I.) (refusing enforcement where the applicants' did not complain of unilateral communications between an arbitrator and the respondents). *See also A v. R* [2009] 3 H.K.L.R.D. 389, 397 (C.F.I.) (holding where a party does not complain about liquidated damages before the arbitral tribunal, those damages are presumed reasonable).

¹⁷¹ *China Nanhai Oil Joint Service Corp. Shenzhen Branch*, [1995] 2 H.K.L.R. at 217, 223 (H.C.).

¹⁷² *See id.*

¹⁷³ *Shandong Textiles Import and Export Corp. v. Da Hua Non-Ferrous Metals Co.*, [2002] H.K.F.C. 844, 852 (C.F.I.).

¹⁷⁴ *Hebei Import and Export v. Polytek Eng'g Co.*, [1999] H.K.L.R.D. 665, 688 (C.F.I.). *See also, Xiamen Xinjingdi Group Ltd.*, [2009] 4 H.K.L.R.D. at 358. *See also, China Nanhai Oil Joint Service Corp. Shenzhen Branch*, [1995] 2 H.K.L.R. 215 at 223, 224 (H.C.) (enforcing a CIETAC award because the defendants did not exhaust local remedies, and would not have complained if they had won).

¹⁷⁵ *See Gao Haiyan*, [2012] 1 H.K.L.R.D. 627 (C.F.I.).

¹⁷⁶ *Hebei Import and Export*, H.K.L.R.D. at 690.

¹⁷⁷ *A v. R* [2009] 3 H.K.L.R.D. at 393.

relief by being unable to reconvene an arbitration or enforce the current award.¹⁷⁸

Gao Haiyan reinforces these policy considerations. The C.A. expressly stated that it felt the C.F.I. did not accord proper weight to the decision of the Intermediate Court,¹⁷⁹ and that by refusing enforcement substantial injustice could ensue.¹⁸⁰ The C.A. and Hong Kong courts generally tend to value the decision of the supervising jurisdiction unless an extreme case arises. For example, in *Shantou Seng Ping Xu Yueli Shu Kuaot Trading Co. v. Wescro Polymers Ltd.* the respondents attacked an award on the basis of an illegal contract.¹⁸¹ The Beijing Intermediate Court rejected this argument, and the C.F.I. held that it would enforce the award as a matter of comity.¹⁸²

The C.A. reinforced these principles, but this should not deter parties from applying for relief in the intermediate courts of China. There are cases where the supervising jurisdiction's decision will be granted significantly less weight, particularly in cases where fraud or corruption are used to procure an award.¹⁸³ Furthermore, some public policy defenses are not subject to estoppel defenses. Hong Kong courts will not ignore actual bias,¹⁸⁴ as opposed to the appearance of bias in the principal case.¹⁸⁵ However, claims based simply on factual disputes will not trigger the public policy exception.¹⁸⁶ Also, depending on the nature of the contract, contracts which are unenforceable often preclude the

¹⁷⁸ *Gao Haiyan*, [2012] 1 H.K.L.R.D. at 645.

¹⁷⁹ *Gao Haiyan*, [2012] 1 H.K.L.R.D. at 650.

¹⁸⁰ *Id.* See also *Shanghai City Foundation Works Corp. v. Sunlink Ltd.*, [2001] H.C.C.T. no. 83 of 200 (H.C.).

¹⁸¹ *Shantou Seng Ping Xu Yueli Shu Kuaot Trading Co. v. Wescro Polymers Ltd.*, [2002] H.K.E.C. 76, ¶ 14 (C.F.I.).

¹⁸² *Id.* at ¶ 17. See also, *Kunming Factory of Prestressed Vibrohydropressed Concrete Pipe v. True Stand Investments*, [2006] H.K.E.C. 2267, ¶ 13 (C.F.I.) (enforcing an award where the Beijing Intermediate Court had ruled against the Respondents on an issue of the procedure used to constitute the arbitral body).

¹⁸³ *Shandong Textiles Import and Export Corp. v. Da Hua Non-Ferrous Metals Co.*, [2002] H.K.F.C. 844, 860 (C.F.I.). See also, *JJ Agro Industries Ltd. v. Texuna Ineternational Ltd.*, [1994] 1 H.K.L.R.D. 89 (C.F.I.) (kidnapping of a witness held to be fraud and contrary to public policy).

¹⁸⁴ *Hebei Import and Export v. Polytek Eng'g Co.*, [1999] H.K.L.R.D. 665, 676 (C.F.I.).

¹⁸⁵ *Gao Haiyan*, [2012] 1 H.K.L.R.D. at 660.

¹⁸⁶ *Shantou Seng Ping Xu Yueli Shu Kuaot Trading Co.* [2002] H.K.E.C. at ¶ 18.

estoppel defense.¹⁸⁷ A failure to raise a public policy ground will not fail for estoppel where the public policy of the enforcing and supervisory jurisdictions are so disparate that the defense being asserted was not available at the supervisory jurisdiction.¹⁸⁸

The instant case does not change these principles. The breach described was never raised at the arbitral tribunal, and because the C.A. found that the Respondents were effectively holding an argument up their sleeve on a possible technical breach of the rules, the claim failed.¹⁸⁹ The Respondents claim did not rise to the level of fraud, corruption, or a failure to present their case. In fact, the Respondents emphasized they were not even complaining of actual bias, but apparent bias.¹⁹⁰ These sorts of technical violations are the exact sort that the narrow construction of the public policy exception seeks to avoid.

The C.A. held that an appearance of bias cannot give rise to a public policy claim, but rather that actual bias was required.¹⁹¹ Apparent bias is established if the fair-minded observer would have a real apprehension that an arbitrator may favor a party. It is a lower bar than required for actual bias, though if the case for apparent bias is strong enough, it can lead to an inference of actual bias.¹⁹² When confronted with a procedural breach that may give rise to apparent bias in Hong Kong courts, a party must assert that claim before the tribunal in order to have a chance of substantiating it and succeeding on an inference of actual bias in enforcement actions before Hong Kong courts. Furthermore, in cases that involve the potential impropriety of an arbitrator, this must result in actually prejudicing the respondents' case.¹⁹³ *Gao Haiyan* emphasizes this point, even if indirectly. Nothing in the Respondents' argument claimed that Pan's conduct amounted to actual bias, which was a strong

¹⁸⁷ *Hyundai Engineering and Construction Co.*, [2005] 3 H.K.L.R.D. at 735 (holding a mediation and conciliation clause's ambiguity rendered the whole contract unenforceable). *But see Shantou Seng Ping Xu Yueli Shu Kuaot Trading Co. v. Wesco Polymers Ltd.*, [2002] H.K.E.C. 76 (C.F.I.) (holding that an allegedly illegal contract for incapacity could be enforced because the issue had not been raised at the tribunal, and the issue was merely a dispute of fact).

¹⁸⁸ *See Hebei Import and Export v. Polytek Eng'g Co.*, [1999] 1 H.K.L.R.D. 665, 688 (C.F.I.).

¹⁸⁹ *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] 1 H.K.L.R.D. 627, 645, 660 (C.F.I.).

¹⁹⁰ *Id.* at 660.

¹⁹¹ *Id.*

¹⁹² *Id.* at 661.

¹⁹³ *Qinhuangdao Tongda Enterprise Development Corp. v. Million Basic Co.*, [1993] 1 H.K.L.R. 173, 176–77 (C.F.I.).

consideration in the C.A. decision.¹⁹⁴ Practitioners who wish to rely on the misconduct of the arbitrator therefore must specifically demonstrate how the communications, or here the mediation, actually prejudiced them. This is largely to avoid allowing abuse of process.¹⁹⁵

As previously discussed, the public policy exception is narrow in Hong Kong, and where a court can rely on another ground to deny enforcement, such as failure to present a case, the court will do so.¹⁹⁶ Preclusion from presenting a case is a common alternative ground in cases involving the arbitrators' impropriety. This ground is available both under PRC law¹⁹⁷ and Hong Kong law.¹⁹⁸ However, relying on this ground is very sensitive to whether whatever violation alleged to take place is objected to at the tribunal,¹⁹⁹ and whether this alleged breach was determinative in some way of the outcome.²⁰⁰ Cases of extreme deprivation of due process, such as being denied the opportunity to cross examine a witness or challenge evidence, will also trigger a denial of enforcement without regard to waiver or estoppel.²⁰¹ In the principal case, this ground was not relied on, but rather the Respondents chose to rely on the public policy exception exclusively. However, it should be noted this is likely because of their failure to object at the tribunal. This alternate ground of relief should provide some comfort to those advocating a broader public policy exception.

Hong Kong has a strong public policy emphasis on the finality to litigation, and like other leading jurisdictions narrowly construes the public policy exception. Here, there were strong interests in comity

¹⁹⁴ See *Gao Haiyan v. Keeneye Holdings Ltd.*, [2012] 1 H.K.L.R.D. 627, 659 (C.A.).

¹⁹⁵ See, e.g., *A v. R* [2009] 3 H.K.L.R.D. 389, 397 (C.F.I.) (where the court found that Respondents committed an abuse of process because they did not raise the liquidated damages issues before the arbitral tribunal).

¹⁹⁶ See *Paklito Investment Ltd. v. Klockner East Asia Ltd.*, [1993] 12 H.K.L.R. 39, 49 (H.C.).

¹⁹⁷ The Arbitration Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Jan. 01, 2000) Art. 70, 71.

¹⁹⁸ Arbitration Ordinance, (2011) Cap. 609 § 95(2)(c)(ii).

¹⁹⁹ See *Xiamen Xinjingdi Group Ltd.*, [2009] 4 H.K.L.R.D. at 360. See also, *China Nanhai Oil Joint Service Corp. Shenzhen Branch*, [1995] 2 H.K.L.R. at 226; *A v. R* [2009] 3 H.K.L.R.D. at 397.

²⁰⁰ *Shandong Textiles Import and Export Corp.*, [2002] H.K.F.C. at 854 (holding that an expert report did not put the defendant at a disadvantage, and errors of procedure do not necessarily give rise to a failure to present a case).

²⁰¹ *Paklito Investment Ltd.*, [1993] 12 H.K.L.R. at 49.

at issue. If the C.A. had refused enforcement on the basis of apparent bias, where the Respondents agreed there were no allegations of actual bias,²⁰² the decision would have opened wide avenues of attack on Chinese arbitral and civil judgments. Mediation is tightly intertwined with the entire Chinese judicial process, and as the Mainland's economy grows, there will be more and more cases that will involve med-arb procedures conducted in China. It is not in Hong Kong's public policy interests to offer such a wide range of attack. In fact, considering the pervasiveness of mediation in Sinic culture, a contrary decision would have undermined the pro-enforcement bias of both the Convention and the Arrangement.

Parties are not without recourse if they are unwilling to mediate in China. First, in the principal case it seems there was at least an indication that the parties assented to a mediation.²⁰³ And while party's at times may find themselves unwilling participants in mediations, the new CIETAC rules allow for severing the mediation and arbitration processes.²⁰⁴ While Chinese parties will press for CIETAC arbitration, foreign parties now may apply for the use of other arbitral rules, such as UNICTRAL or the rules of the ICC in CIETAC arbitrations.²⁰⁵ These safeguards, along with careful drafting, should allow a party to mitigate the negative effects of mediation procedures in the PRC.

The decision of the C.A. given Hong Kong's cultural and legal traditions, and political situation, is understandable. However, it presents several difficulties for businesses by precluding apparent bias under the public policy exception, and more importantly, introducing cultural considerations to the roles of fiduciaries, such as lawyers and agents, and the context of a mediation. The concept of *guanxi* and the inconsistency of CIETAC, the arbitral tribunal authorized to resolve foreign related disputes, provide serious challenges.

Corruption in the Chinese judicial system is well documented, and a source of frustration for many businesses.²⁰⁶ Arbitration through CIETAC is the primary dispute resolution mechanism employed when

²⁰² *Gao Haiyan*, [2012] 1 H.K.L.R.D. at 107.

²⁰³ *Gao Haiyan*, [2011] H.K.E.C. at ¶ 18.

²⁰⁴ Song, *supra* note 35, 311.

²⁰⁵ CIETAC Rules Article 4 (3).

²⁰⁶ Terrence F. McaLaren, *Eckstrom's Licensing in Foreign and Domestic Operations*, § 11:11 Dispute Settlement—overview, Part II: Business Environment for Joint Ventures in Selected Countries, China. (Thomson Reuters 2012).

a dispute concerns a foreign related matter or foreign party.²⁰⁷ However, many investors have found arbitration through CIETAC to be unreliable and inconsistent.²⁰⁸ Given that many of the mediations conducted through CIETAC are conducted by the very same arbitrators who preside over the tribunals, the same issues regarding consistency and corruption arise. Exacerbating the issue is the Chinese cultural concept of *guanxi*, defined as a process by which an individual may assist another in the resolution of a problem in exchange for further assistance, which is particularly influential in business.²⁰⁹ It plays a prominent role in state level corruption, particularly considering China's political structure which was "rule by men instead of rule by law[.]"²¹⁰ *Guanxi* acts as the principle which marries money and power in state organs.²¹¹ This *guanxi* driven corruption extends to the judicial system.²¹² *Gao Haiyan's* elimination of apparent bias as a grounds for refusal under the public policy doctrine, while understandable given Hong Kong's cultural and political position in the world, presents a serious problem for foreigners doing business in China. Whereas apparent bias is determined from an objective perspective, actual bias requires a higher threshold. Because of *guanxi's* forward looking design of trading benefits, it may be much more difficult to detect and prove in court.²¹³ While these obstacles are not insurmountable, they are significant. The best safeguard against them when seeking to resist or potentially enforce an Mainland Chinese award in Hong Kong is careful contract drafting.

The Arbitration Law of China provides for *optional* conciliation.²¹⁴ Conforming with these provisions, CIETAC Rules provide that

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Ying Fan, *Guanxi's Consequences: Personal Gains at Social Cost*, 38 No. 4 J. BUS. ETHICS 371, 372, 374 (2002).

²¹⁰ *Id.* at 376.

²¹¹ *Id.* at 377.

²¹² *Id.* at 378.

²¹³ The standard for a finding of actual bias has never been clearly enunciated by the Hong Kong courts. *Hebei Import and Export Corp.* held that "[a]ctual bias would be more than our courts could overlook even where the award concerned is a convention award." *Hebei Import and Export Corp. v. Polytek Eng'g Co.*, [1999] 1 H.K.L.R.D. 665,676 (C.F.I. 1999) (distinguishing apparent bias and actual bias).

²¹⁴ Zhonghua Renmin Gongheguo Zhongcaifa (中华人民共和国仲裁法) [The Arbitration Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Jan. 01, 1995) art. 58.

conciliation may be provided by the arbitral tribunal,²¹⁵ but if the parties elect to have the dispute mediated outside of the tribunal, “CIETAC may, with the consent of both parties, assist the parties to conciliate the dispute in a manner and procedure *it* considers appropriate (emphasis added).”²¹⁶ Chinese laws are intentionally drafted with broad language in order to encourage varying interpretations, and the emphasized language provides little comfort to those who wish to engage in mediation through CIETAC while sanitizing the process of potential corruption, apparent bias, and estoppel issues. There is another option. CIETAC recently changed its rules and provides that:

Where the parties agree to refer their dispute to CIETAC for arbitration but have agreed on a modification of these Rules or have agreed on the application of other arbitration rules, the parties’ agreement shall prevail unless such agreement is inoperative or in conflict with a mandatory provision of the law as it applies to the arbitration proceedings. Where the parties have agreed on the application of other arbitration rules, CIETAC shall perform the relevant administrative duties.²¹⁷

This is a major advantage. It allows for the parties to functionally abrogate Article 45(8) and replace it with a more stringent procedure. For example, the parties could agree to terms which set out strict timetables, incorporate ICC Rules or UNICTRAL Rules, and nominate in advance members of CIETAC’s Panel of Arbitrators. While the negotiation cost may be an issue, this would eliminate the risk of apparent bias by walling off the arbitrators in the tribunal. Furthermore, a contractual provision providing for the use of HKIAC Rules as interpreted by Hong Kong courts, as consistent with the Chinese Arbitration Law, may reduce the risk of estoppel. Regardless of any contractual provision included, it is important that the interested party does not waive its rights through its actions or express waiver. This provides protection against estoppel, not waiver.

²¹⁵ China International Economic and Trade Arbitration Commission Arbitration Rules (revised and adopted by the China Council for the Promotion of International Trade/China Chamber of International Commerce, Feb. 3, 201, effective May 1, 2012) art. 45(1).

²¹⁶ *Id.* at art. 45(8).

²¹⁷ *Id.* at art. 4(3).

Should a nominated arbitrator be unavailable, there is additional recourse. CIETAC provides an abundant source of foreign arbitrators. The Arbitration Law of China requires that arbitration commissions use arbitrators from its Panel of Arbitrators, which consists of 998 arbitrators. 44 are from Hong Kong, and 218 are foreign arbitrators.²¹⁸ In order to qualify as an approved arbitrator the prospective candidate must meet one of several conditions.²¹⁹ But when a paneled arbitrator is unavailable to serve as a mediator, CIETAC Rules allow for the nomination of arbitrators to serve as mediators who are not on CIETAC's Panel of Arbitrators.²²⁰ The selected prospective mediators would still have to conform with the mandatory requirements of Article 15 of the China Arbitration Law.

There is one final avenue to ensure protection, and its utilization depends on the negotiating strengths of the respective parties. CIETAC Rules provide:

Where the parties have agreed on the place of the arbitration, the parties' agreement shall prevail, [but] [w]here the parties have not agreed on the place of arbitration or their agreement is ambiguous, the place of arbitration shall be the domicile of CIETAC or its sub-commissioner [or] center administering the case. CIETAC may also determine the place of arbitration to be another location having regard to the circumstances of the case.

This would allow for a CIETAC administered arbitration to take place in Hong Kong. This would presumably subject CIETAC arbitrations to the supervising jurisdiction's mandatory law, in Hong Kong

²¹⁸ CIETAC Implements New Panel of Arbitrators, CIETAC.org, <http://www.cietac.org/index/news/477265d85773bc7f001.cms> (last visited March 27 2013).

²¹⁹ The proposed arbitrator must have "been engaged in arbitration work for at least eight years, worked as a lawyer for at least eight years, served as a judge for at least eight years, have been engaged in legal research or legal education, possessing a senior professional title, *or* to have acquired the knowledge aw, engaged in the professional work in the field of economy and trade, etc., possessing a senior professional title or having an equivalent professional title." (internal punctuation omitted). The Arbitration Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 31, 1994, effective Jan. 01, 1995) art. 13 (1)-(5).

²²⁰ China International Economic and Trade Arbitration Commission Arbitration Rules (revised and adopted by the China Council for the Promotion of International Trade/China Chamber of International Commerce, Feb. 3, 2011, effective May 1, 2012) art. 23(2).

the Arbitration Ordinance. In the context of a med-arb proceeding, the Hong Kong Arbitration Ordinance provides significant safeguards. If an arbitrator is to act as a mediator, the parties must consent to such a proceeding in writing.²²¹ Moreover, if an arbitrator gains access to confidential information and no settlement is reached, the arbitrator must “disclose to all other parties as much of that information as the arbitrator considers is material to the arbitration proceedings.”²²² Lastly, the prospective award would be subject to confirmation in the courts of Hong Kong.

CONCLUSION

Although med-arb proceedings have inherent problems, the CA’s decision reflected cultural and political realities. If the CA had opened the scope of attack in the context of med-arb, because of the role mediation plays in the PRC, this would prejudice a large number of awards and decisions rendered in the PRC. Given Hong Kong’s narrow interpretation of the public policy exception, and its close cultural and historical relationship with the PRC, this was the most sensible decision in the case. To buttress the potential pitfalls of this decision, foreign parties should expend more in negotiating process in order to ensure a fair and impartial resolution of their potential disputes through contract drafting which takes advantage of CIETAC’s rules and the local arbitration laws of China and Hong Kong.

²²¹ Hong Kong Arbitration Ordinance, Cap. 609, (2011) § 33 (1).

²²² *Id.* at § 33 (4).