由此

CACV 79/2011

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 79 OF 2011

(ON APPEAL FROM HCCT 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

---

Before: Hon Tang VP, Fok JA and Sakhrani J in Court

Date of Hearing: 2 November 2011

Date of Judgment: 2 December 2011

JUDGMENT

Hon Tang VP:

Introduction

1. The Applicants, husband and wife, were granted leave by Saunders J on 2 August 2010 to enforce the Arbitral Award by the Xi'an Arbitration Commission No. 2232 of 2009 dated 3 June 2010 against the 1st and 2nd Respondents ("the Award") in the same manner and to the same effect as a judgment of the High Court as follows:

> "Judgment be entered for a Declaration that the Share Transfer Agreement between the 1st and 2nd Applicants and the 1st Respondent dated 15 July 2008 and the Supplemental Share Transfer Agreement between the 1st and 2nd Applicants and the 1st and 2nd Respondents dated 27 August 2008 are revoked;"

2. By a summons dated 16 September 2010, the 1st and 2nd Respondents applied to set aside leave granted by Saunders J complaining, *inter alia*, of collusion between the Applicants and the arbitrators, and one Mr Pan Jun Xin (潘俊星) ("Pan"), the General Secretary of the Xi'an Arbitration Commission[1].

3. That application was heard by Reyes J on 30 March 2011. By his judgment dated 12 April 2011, he set aside leave to enforce the Award. He held that although the Respondents had not made any relevant complaint to the Arbitral Tribunal, they had not waived their right to do so[2]. He further held:

> "102. … as a matter of public policy[3], I should refuse enforcement of the Award here."

---

[1] Chan Choi Hung's affirmation, 16 September 2010, para. 16(2)

[2] Para. 85 of the Judgment

[3] pursuant to section 40E(3) of the Arbitration Ordinance (Cap. 341)

4. Reyes J explained:

> "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."

5. It is important to note that the learned Judge's conclusion was based on what he called the minimalist version of the facts (see para. 42 below) and that:

> "52. The minimalist version is an insufficient basis for finding actual bias.
>
> 53. … In my view, the minimalist version would cause a fair-minded observer to apprehend a real risk of bias."

6. This is the Applicants' appeal. The Applicants were represented by Mr Edward Chan, SC, Mr Laurence Li and Mr Eric Chow. Mr Patrick Fung, SC and Mr Calvin Cheuk appeared for the Respondents.

Background

7. The background is complicated and murky. Much of it comes from one-sided assertions and have to be taken for what they are worth.

8. The Share Transfer Agreement and the Supplemental Share Transfer Agreement (dated 15 July 2008 and 27 August 2008 respectively) concern shares in a Hong Kong company called Bai Jun Tian Cheng Limited ("Baijun") in which the Applicants were equal shareholders. Baijun in turn owned 50% of the shares in another Hong Kong company called Zhong Xin Ore-Material Holding Co. Ltd. (Hong Kong) ("Zhong Xin"). The other 50% was held by a company called Angola Limited (Hong Kong) ("Angola"), a Hong Kong company.

9. Under the Share Transfer Agreement, the Applicants agreed to transfer all the shares they held in Baijun ("the Baijun shares") to the 1st Respondent (Keeneye).

10. Clause 3 of Article 1 of the Share Transfer Agreement provided that:

> "3. The transfer price shall be separately negotiated. Failing agreement, the share transfer price shall be the amount of (the 1st and 2nd Applicants') actual amount of capital contribution/investment in the operation in the company."

11. Article 6 of the Share Transfer Agreement provided for arbitration at the Xi'an Arbitration Commission.

12. By the Supplemental Share Transfer Agreement, the 2nd Respondent (New Purple) was added as a transferee such that the 1st Respondent would be transferred 62% of the shares in Baijun and the 2nd Respondent 38%.

13. The Baijun shares have been transferred to the 1st and 2nd Respondents in July and August 2008, who have in turn transferred then to Daynew Assets Management Limited ("Daynew") and Far Orient Holdings Limited ("Far Orient") in October 2008[4].

14. Clause 2 of the Supplemental Share Transfer Agreement referred to ongoing/remaining litigations and disputes between Baijun and Angola over Angola's interests in Zhong Xin. There were litigations in Hong Kong as well as in the Mainland. It appears that these proceedings have been settled[5].

---

[4] HCA 1315/2009 was brought by the 1st and 2nd Applicants on 2 July 2009 for, *inter alia*, the return of the shares against the 1st and 2nd Respondents (as 1st and 2nd Defendants), Wang Li (as the 4th Defendant), and Daynew and Far Orient (as the 6th and 7th Defendants). According to Wang Li's 2nd affirmation filed in HCA 1315/2009 (affirmed on 9 July 2009 on behalf of all the Defendants): "12. … (he) worked for New Purple under the instructions of Mr Zhou Xue Shuan ('Zhou'). Zhou is the shareholder of both new Purple and Keeneye." However, Wang Li was described in the Award (at page 96) as the subordinate of Liu. References to the Award unless otherwise stated, are to the translation.

[5] The Award, page 100. A matter of separate complaint by the Applicants.

Zeng Wei ("Zeng") is a shareholder in Angola. He is a witness for the Respondents in these proceedings.

15. Zhong Xin and Shaanxi Yulin Changle Industrial and Trading Company ("Changle") incorporated Changlebao Mining Corporation Limited ("Changlebao") which owned and operated a coal mine near Yulin as a joint venture. It appears that under the joint venture, Zhong Xin was required to contribute RMB49.7 million and Changle RMB21.3 million, and that they were entitled to respectively 70% and 30% of the shares or interest in Changlebao respectively. On such basis, the Baijun shares represented a 35% interest in Changlebao[6].

16. Zhang Xintian（張新田） ("Zhang") was the General Manager of Changlebao. Zhang played a part in the Arbitration and in the affairs of the 1st and 2nd Respondents.

17. The Share Transfer Agreement and the Supplemental Share Transfer Agreement were entered into when both the 1st and 2nd Applicants were under detention in Yulin. They were detained for about 6 months from 22 May 2008. According to the Award, it was as a result of the Applicants' dispute with Zhang in 2008 over the management of the coalmine or Changlebao, which allegedly resulted in Zhang and two others suffering minor injuries[7] and which led to the detention of the 1st and 2nd Applicants.

18. In the Statement of Claim filed by the Applicants in HCA 1315/2009, they claimed that, one Liu Jian Shen ("Liu") （劉建申）:

> "5. … was and is the controller of Xian Kaiyuan Holding Company Limited（西安開元控股集團股份有限公司）, a company listed on the Shenzhen Stock Exchange; the president and controller of

[6] The Award, page 53.
[7] The Award, page 74.

> Xian Yizhiliu Group（西安一枝劉集團）; a member of the National People's Congress, and a person of influence in Shaanxi Province, PRC".

19. The 1st and 2nd Applicants went on to allege that:

> "19. The conditions of (their) detention were dismal. Their health deteriorated and (the 2nd Applicant's) life was in danger. They and their family were desperate for help from any person with influence who could secure their release."

which led to the contact with Liu and the Share Transfer Agreement and Supplemental Share Transfer Agreement. It appeared to be common ground that the 1st and 2nd Applicants were released in November 2008 without charge[8].

20. In the HCA 1315 Defence, the Defendants admitted that:

> "7(2) … Liu is and was one of the controllers of Keeneye, New Purple, Daynew and Far Orient. However, Liu did not participate in the day to day management of these companies. In particular, Liu did not participate in the two transfers of Baijun's shares before the commencement of these proceedings."

21. Wang Li also said in his 2nd affirmation in HCA 1315/2009 that:

> "13. It is true that Liu had control of Keeneye and New Purple …"[9]

22. Both the Share Transfer Agreement and the Supplemental Share Transfer Agreement are governed by PRC law.

23. Article 5 of the Share Transfer Agreement provided:

> 「第五条 合同的变更与解除
>
> 1、 发生中国《合同法》规定合同的变更与解除的事由，合同得以解除；」 and as translated

---

[8] Statement of Claim in HCA 1315/2009 at D752, para. 41; and Defence at D770, para. 27. However, it was the Respondents' case that the Applicants were released because they were able to pay compensation (RMB6 million), provided by the Respondents, to the injured persons. HCA 1315 Defence, paras. 27 and 28

[9] The Award, page 96 stated: "Keeneye and New Purple were actually controlled by (Liu) …."

> "1. This Agreement shall be cancelled at the occurrence of any events specified in the Contract Law of the PRC for contract amendment and cancellation;"

24. Article 54 of the PRC Contract Law provides:

> "A party shall have the right to request the people's court or an arbitration institution to modify or revoke the following contracts:
>
> (I) those concluded as a result of serious misunderstanding;
>
> (II) those that are manifestly unfair at the time when the contract is concluded.
>
> If a contract is 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, the injured party shall have the right to request the people's court or an arbitration institution to modify or revoke it."
>
> 「《中华人民共和国合同法》第五十四条规定：下列合同，当事人一方有权请求人民法院或者仲裁机构变更或者撤销：
>
> （一） 因重大误解订立的；
>
> （二） 在订立合同时显失公平的。
>
> 一方以欺诈、胁迫的手段或者乘人之危，使对方在违背真实意思的情况下订立的合同，受损害方有权请求人民法院或者仲裁机构变更或者撤销。」

25. By summons dated 9 July 2009, the 1st and 2nd Respondents applied to stay HCA 1315/2009 for arbitration at the Xi'an Arbitration Commission. On 7 July 2009, the 1st Respondent applied to the Xi'an Arbitration Commission for arbitration and for confirmation of the validity of the Share Transfer Agreement and the Supplemental Share Transfer Agreement. That application was accepted by the Xi'an Arbitration Commission on 17 July 2009. On 24 August 2009, the Applicants counterclaimed for revocation of these Agreements on the ground that:

> "… there was exploitation of the precarious position upon the signing of such agreements with Keeneye and New Purple and there were

> manifestly unfair, and further added New Purple as the defendant of the counterclaim. …"[10]

26. The Arbitral Tribunal consisted of Jiang Ping (Chief Arbitrator), Zhou Jian (nominated by the Applicants) and Liu Chuntian (nominated by the Respondents). The Applicants were represented by Lan Yongqiang, and the Respondents Li Tao.

27. The Award was delivered on 3 June 2010. It upheld the Applicants' claim. The Award is 59 pages long in its original Chinese; and the certified translation, 111 pages. For convenience's sake, I have used the certified translation of the various Chinese documents except when it is necessary to look at the Chinese originals. Sometimes the translation is easier to follow when one knows what the original says.

28. It is not for this Court to express any opinion on the correctness or otherwise of the decision of the Arbitral Tribunal. Indeed, the concept of exploitation of the other person's precarious position "乘人之危", with its possible undertone of "巧取豪奪"[11], probably does not have an equivalent under our law. We are only concerned with whether enforcement of the Award should be refused if it has been proved that:

> "… it would be contrary to public policy to enforce the award". Section 40E(3) Arbitration Ordinance.

29. As the Award recorded at page 12, the Applicants alleged that::

> "… The share value of Baijun was much higher than the 'actual amount of capital contributions' set forth in the Share Transfer Agreement. There was about 10 odd times difference between the two values. …"

On the other hand, the Respondents contended:

---

[10] The Award, page 88.

[11] which may be translated as "secure by force or trickery".

> "… The value of the mining right of Changlebao was not relevant to the transfer price in this case, …"[12]

30. Amongst the evidence produced in the Arbitration by the Applicants, was an assessment report which gave the value of Changlebao at "over RMB1.6 billion … 35% thereof will be more than RMB0.6 billion"[13].

31. Despite the objection of the Respondents, the Arbitrators appointed independent assessors under Article 33 of the Arbitration Rules. The Award at page 105 stated:

> "After the joint assessment by Shaanxi Mingjian Judicial Accounting and Surveying Firm and Shaanxi Qindi Mining Right Asset Valuation Co. Ltd., as of the date of the Supplemental Share Sale Agreement, the concluded assessment result on the value of such coal mine was RMB1,712,924,000. The Arbitral Tribunal holds that although the value of the company's assets does not equal to the value of shares of the company, its effect on the share value is obvious."

32. The Award under "Background on the Execution of (the Agreements)[14]" stated that in February 2008, Baijun had commenced HCA 1987/2005, in Hong Kong against Angola and complained that Angola had failed to contribute the necessary capital according to the joint venture agreement. On 31 March 2008, Angola, as a shareholder of Zhong Xin, and Ng Chi Kong, a director of Zhong Xin, commenced a civil action in Yulin City Intermediate People's Court against the 1st and 2nd Applicants for misappropriation of funds of Changlebao. However, the 1st and 2nd Applicants won and obtained final judgment. Then on 17 July 2008, Changle commenced a civil action claiming that Baijun's capital contribution was invalid. Angola and Changlebao were the third parties in that proceeding. At the first instance, Changlebao lost, but the matter was under appeal.

---

[12] The Award, Page 63.
[13] The Award, page 53.
[14] The Award, page 72.

33. The Award then referred to a Notice of No Prosecution issued on 21 November 2008 by Yuyang District People's Procuratorate, Yulin City, which led to the release of the 1st and 2nd Applicants.

34. The evidence which was placed before the Arbitral Tribunal on behalf of the 1st Applicant included what was referred to as Evidence Group 2. The Chinese version included this passage:

> 「1、签订转让协议书时，高海燕处于可能被刑事处罚的危险境地。客观上存在民法上所谓的‘乘人之危’的‘危’的情形；2、高海燕方面实际参与签订转让协议书的亲属及代理人的目的是为了‘救人’，而‘救人’即要支付受害人赔偿金，且想通过陕西的全国人大代表刘健申疏通相关部门，因‘救人’心切不计代价与后果而签订显失公平的转让协议书情有可原，这从王李的说法中多次得到验证：先是高琳找到王李提议贷款，後来又有高海英、包俭参与演变为签订转让协议书；3、在建毅控股看来，是把签订转股协议书作为‘救人’的先决条件的。」[15]

35. As translated:

> "… The above evidence was to prove that 1) when the Transfer Agreement was executed, Gao was in the danger of being sentenced, the 'precarious position' in 'exploitation of other person's precarious position' as stated in the Civil Law was objectively present; 2) Gao's relatives and agents who actually took part in the execution of the Transfer Agreement aimed to 'save persons', which meant to pay compensations to victims, and to communicate with the relevant departments through Liu Jianshen, a representative of the National People's Congress in Shaanxi province. It was understandable and excusable to sign a manifestly unfair Transfer Agreement at all cost in order to 'save persons'; this can be proved several times by Wang Li's statement: firstly, Gao Lin proposed to borrow from Wang Li; subsequently, Gao Haiying and Bao Jian turned the borrowing to executing a Transfer Agreement; 3) from Keeneye's point of view, execution of the Transfer Agreement was the condition precedent for 'saving persons'."[16]
>
> "No objection to the authenticity and legality of Evidence 6, but there is objection to the relevancy as to the subject to be proved. The Plaintiff and the Defendant have different views about the subject to be proved by that evidence."

---

[15] Award, 27
[16] Award, 51

36. The Respondents denied that there was any coercion or that they had ever indicated that Liu could procure the release of the 1st and 2nd Applicants and contended that the 1st and 2nd Applicants:

> " … all along had lawyers and could receive express advice from their lawyers that it was impossible to procure their release based on Liu Jianshen's representation of his influence to certain person in the People's Procuratorate."[17]

37. Apart from upholding the Applicants' counterclaim, the Award went on to say, in respect of the Respondents, who had not counterclaimed for the return of any payments which they might have had made in respect of or in connection with the transfer of the Baijun shares:

> "III. For the issues whether the RMB 13,000,000 paid by Keeneye and New Purple is the transfer price of shares and the issue of compensation
>
> From the evidence submitted by the parties, RMB 6,000,000 was the borrowing as described by Gao Haiying for the compensation of the victims in the criminal case involving Xie and Gao. There were several sums of Hong Kong legal costs were for Baijun's litigation in Hong Kong. There were also two sums of legal costs of Mainland lawyers without the description on the payment reason. Therefore, the said amounts cannot be confirmed as the transfer price of the shares.
>
> However, during the detention of Xie and Gao, Keeneye and New Purple provided financial assistance to their families, which enabled them to compensate the victims in the criminal case and got released finally. Moreover, since Keeneye and New Purple paid the litigation fees of Baijun cases in Hong Kong after the acquisition of Baijun's shares, and designated Wang Li and Lu Ying to carry out certain work for the operation and management of the company, the Arbitral Tribunal holds that, based on the principle of fairness, Xie and Gao shall make economic compensation to Keeneye and New Purple in certain amount. Since, under the actual condition of this Case, Keeneye and New Purple had not made the arbitral request for economic compensation to be paid by Xie and Gao and the specific amount thereof should Share Transfer Agreement is revoked, the parties had not argued on this matter. Nevertheless, Keeneye and New Purple should have the right under the laws to obtain economic compensation when the Share Transfer Agreement is revoked. The Arbitral Tribunal noted that Xie and Gao had made a mediation

[17] The Award, page 77.

> proposal of paying RMB 30,000,000 to Keeneye and New Purple during the mediation proceedings held at the first hearing by the Arbitral Tribunal, and the Arbitral Tribunal also takes into accounts that the parties shall coordinate, cooperate and also pay certain expenses in transferring the shares back after the revocation of Share Transfer Agreement. Therefore, the Arbitral Tribunal recommends that Xie and Gao shall take the initiative to pay RMB 50,000,000 as the economic compensation to Keeneye and New Purple in order to end the disputes between the parties. Such recommendation is based on the fairness and reasonableness arbitration principles, it is not binding and not included in the arbitral matters."

38. Subsequent to the Award, the Respondents applied to the Xian Intermediate People's Court of Shaanxi ("the Xian Court") to set aside the Award. 4 grounds were advanced in support[18]. The following complaint under the 2nd ground is particularly relevant and should be noted:

> "4. Pan Jun Xin, the Secretary General of the Xian Arbitration Commission manipulated the arbitration of this case. At the beginning of April 2010, Pan Jun Xin arranged for Zhou Jian, the Arbitrator, to inform the Angolan shareholder, a material person of the case, to go to Xian. The Angolan shareholder hosted a feast for Pan Jun Xin and Zhou Jian at the Shangri-La Hotel in Gao Xin District of Xian. Pan and Zhou told the Angolan shareholder that the result by joint discussion was out, the contract would not be cancelled and Keeneye Holdings Limited and New Purple Golden Resources Development Limited would compensate the Respondents 250 million. Subsequently, because the person behind the Respondents definitely required the cancellation of the contract, Pan Jun Xin manipulated again the Arbitration Tribunal to cancel the transfer agreement of this case.
>
> Pan Jun Xin was not one of the arbitrators of this case and he was not entitled to look into the case. However, in order to control and manipulate the case, he especially went to Jiang Ping's home to participate in the joint discussion of the case when the Arbitration Tribunal jointly discussed it in Jiang Ping's home in Beijing, the then (he) told the result of joint discussion to other person. Pan Jun Xin's control and manipulation of this case has seriously contravened the law and the arbitration rules."

---

[18] Including complaints that the Arbitral Tribunal had appointed assessors and/or taken the assessment into account. The complaints were rejected. Page 14 of the Xian Court decision. It may be noted that the application did not contain any complaint that it was Zeng rather than some other more appropriate person who was contacted. Nor was any such complaint made in the witness statements filed by Zeng and Zhang in the Xian Court or in their oral evidence before the Xian Court. In Zeng's oral evidence he said: "I only do mediation work." Page 7 of Transcript of 20 September 2010. On the other hand Zhang in his oral evidence said: "I know the situation about the arbitration, but I am not a party of the case." Transcript of 20 September 2010, page 8. In Chinese: "仲裁的情况我了解，但是我不是案件當事人。"

39. In its determination the Xian Court said:

> "V. Regarding whether the participation of Secretary General of the Commission in mediating this case violated the arbitration rules and whether he manipulated this case: according to Article 37 of Arbitration Rules of Xi'an Arbitration Commission, '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 Secretary General of the Commission in respect of this case complies with the rules abovementioned. From the evidence provided to this court by Keeneye and New Purple, it is not sufficient to prove that Secretary General of the Commission had manipulated in the arbitral award of this case. Therefore, this ground for the setting aside application submitted by Keeney and New Purple cannot be established and is not supported by this Court.
>
> To conclude from above, all the grounds for the application of Keeneye and New Purple for setting aside the arbitral award cannot be established, and are not supported by this Court. Pursuant to Article 70 of Arbitration Law of the People's Republic of China and Article 258 of Civil Procedure Law of the People's Republic of China, …"

These Proceedings

40. Enforcement of the Award in Hong Kong was resisted under section 40E(3) of the Arbitration Ordinance.

41. The learned Judge said:

> "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."

42. The learned Judge went on to hold:

"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."

43. Although Zeng gave evidence before the learned Judge and that his evidence went beyond the minimalist version, the learned Judge said:

> "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."

44. Mr Patrick Fung, SC, submitted that the learned Judge was wrong in finding that there was no dispute over the minimalist version. But more importantly, he said that the learned Judge was wrong in not accepting Zeng's evidence that at the Shangri-la hotel dinner, Pan had informed him that the Tribunal had decided on a "result"[19]. The "result" was that the Share Transfer Agreements were valid, but the Respondents should pay the Applicants a compensation of RMB 250 million.

45. Mr Fung submitted that the learned Judge was wrong because the learned Judge had mistakenly thought that Zeng had not said in the proceedings in the Xian court that at the Xian Shangri-la meeting, Pan had informed him that the Arbitral Tribunal had decided on a result. Mr Fung relied in particular on

---

[19] According to Lan Yongqiang (the Applicants' Mainland lawyer), Pan denied telling Zeng that the Arbitral Tribunal had arrived at a result. Lan Yongqiang's 1st affirmation, page 7, para. 27(4).

paras. 35-36 of the Judgment. But, with respect, it is clear from those paragraphs that the learned Judge rejected Zeng's evidence over and above the minimalist version not because none of it had been mentioned in the Xian proceedings, rather, the learned Judge said:

> "33. … 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)." [My emphasis]

46. That is why the learned Judge was:

> "34. … unable to accept Zeng's evidence as reliable insofar as it goes beyond the minimalist version. …"

47. I do not believe the learned Judge had overlooked the fact that Zeng had told the Xian court that Pan told him at Shangri-la meeting that the Arbitral Tribunal had reached a result.

48. As for the finding of the minimalist version, the learned Judge relied on the evidence adduced on behalf of the Applicants as well as the evidence on behalf of the Respondents from which, he was entitled to conclude that they constituted common ground between the parties.

Section 40E

49. Section 40E is, for present purposes, indistinguishable from section 44 which covers the refusal of enforcement of Convention Awards. The leading authority in Hong Kong is *Hebei Import & Export Corp v. Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, which was also concerned with a Mainland Award[20].

---

[20] Sir Anthony Mason NPJ said in *Hebei* at 133: "Article 45 of the Arbitration Rules provides that a party who knows or should have known that a provision of the Rules has not been complied with yet proceeds without raising his objection in a timely manner shall be deemed to have waived his right to object. Article 45 gives effect to an important principle, not confined to Chinese law, namely that a party to an arbitration who wishes to rely on a non-compliance with the rules governing an arbitration shall do so promptly and shall not proceed with the arbitration as if there had been no non-compliance, keeping the point up his sleeve for later use after an award is made, should that course prove to be expedient."

50. Sir Anthony Mason NPJ said in his judgment (with the agreement of Li CJ, Ching and Bokhary PJJ) at 139:

> "However, the object of the Convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced (*Scherk v. Alberto-Culver Co.* (1974) 417 U.S. 506; *Imperial Ethiopian Government v. Baruch-Foster Corp.* (1976) 535 F. 2d 334 at p.335). In order to ensure the attainment of that object without excessive intervention on the part of courts of enforcement, the provisions of Article V, notably Article V. 2(b) relating to public policy, have been given a narrow construction. It has been generally accepted that the expression 'contrary to the public policy of that country' in Article V. 2 (b) means 'contrary to the fundamental conceptions of morality and justice' of the forum. (*Parsons & Whittemore Overseas Co. Inc. v Societe General De L'Industrie Du Papier (RAKTA)* (1974) 508 F 2d 969 at p.974 (where the Convention expression was equated to 'the forum's most basic notions of morality and justice'); see A.J. van den Berg, *The New York Convention of 1958*, (kluwer, 1981) at page 376; see also *Renusagar Power Co. Ltd.* v *General Electric Co.* (Yearbook Comm. Arbitration XX (1995) page 681 at pages 697-702)).
>
> The question then is whether the two matters of which the respondent complains, namely the alleged refusal of a hearing and the communications to the chief arbitrator were contrary to the fundamental conceptions of morality and justice of Hong Kong. In this respect, the opportunity of a party to present his case and a determination by a impartial and independent tribunal which is not influenced, or seen to be influenced, by private communications are basic to the notions of justice and morality in Hong Kong."

51. Litton PJ in a separate judgment said at 118:

> "The expression *public policy* as it appears in s.44(3) of the Ordinance is a multi-faceted concept. Woven into this concept is the principle that courts should recognise the validity of decisions of foreign arbitral tribunals as a matter of comity, and give effect to them, unless to do so would violate the most basic notions of morality and justice. It would take a very strong case before such a conclusion can be properly reached, when the facts giving rise to the allegation have been made the subject of challenge in proceedings in the supervisory jurisdiction, and such challenge has failed."

Waiver[21]

52. Article 5 of the Xi'an Arbitration Commission Arbitration Rules ("Xian Rules") provides 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." Article 5 of the Xian Rules is similar in effect to Article 45 of the Rules under consideration in *Hebei*.

53. Sir Anthony Mason NPJ also made clear in his judgment, the court may refuse assistance where:

> "… the factual foundation for the public policy ground arises from an alleged non-compliance with the rules governing the arbitration to which the party complaining failed to make a prompt objection, keeping the point up its sleeve, at least when the irregularity might be cured.
>
> Whether one describes the respondent's conduct as giving rise to an estoppel, a breach of the *bona fide* principle or simply as a breach of the principle that a matter of non-compliance with the governing rules shall be raised promptly in the arbitration is beside the point in this case. …" page 138.

54. In the *Handbook of ICC Arbitration Commentary, Precedents, Materials* (2nd Edition), Bühler and Webster, a footnote at page 172 states:

> "Failure to raise an issue will result in waiver under many if not most national legal systems."[22]

55. With respect, Reyes J has correctly stated the principle as follows:

> "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

[21] Although the conduct of the Respondents has been called waiver it does not greatly matter whether it is waiver strictly so called.

[22] The footnote went on to give examples in France, Switzerland, England (citing Locabail (UK) Ltd v. Bayfield Properties Ltd [2000] QB 451) and the United States, where: "(waiver 'extends even to questions such as arbitrator bias, that go to the very heart of arbitral fairness');"

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)."

56. Subsequent to the Xian Shangri-la meeting, the Respondents submitted to the Arbitral Tribunal (though not served on the Applicants) a Supplemental Submission dated 13 May 2010 where they made, amongst others, the point that the Share Transfer Agreements were not manifestly unfair nor made contrary to the Applicants' genuine intention, and concluded as follows:

"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 Gao and Xie's personality, they will behave improperly whenever they have some money. We sincerely hope the Arbitration Tribunal gives Gao and Xie no more than RMB60 million during mediation. We consider the offer very favourable given Gao and Xie are playing 'Karate'. He will laugh and wake up at midnight! Concerning people who don't know Gao and Xie 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 solicitor's 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."

57. There was also a hearing before the Arbitral Tribunal on 31 May 2010.

58. Reyes J was of the view that there had been no waiver. He said:

"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."

59. With respect to the learned Judge, I do not believe it was the Respondents' case that they had no apprehension of bias or impropriety, real or apparent, prior to the making of the Award. Indeed Mr Fung's submission summarised by the learned Judge at paras. 86 and 87 of the Judgment shows otherwise. The Respondents were hoping for a satisfactory conclusion but feared that, should they antagonise the Arbitral Tribunal by complaining, that might result in an unfavourable or less favourable result.

60. The learned Judge referred to the lack of complaint as "a clumsy compromise" (para. 89). With respect, I do not agree with the characterization. It is true that the Respondents attacked the Applicants' integrity in their supplemental submissions as they have done throughout the arbitral proceedings,

but that is not a substitute for a complaint about impropriety or bias, apparent or real, against the Arbitral Tribunal or Pan.

61. With respect, the learned Judge's description of the offer of RMB60 million as an attempt "to bargain the RMB250 million proposed" is understandable, but that is entirely consistent with waiver. Indeed, in the joint judgment of Lord Bingham CJ, Lord Woolf MR and Sir Scott VC in *Locabail (UK) Ltd v. Bayfield Properties Ltd* [2000] QB 451, their Lordships said at para. 69 it is not open to a litigant to wait and see how his claims turn out before pursuing his complaint of bias.

62. In the present case, presumably there would have been no complaint if the Arbitral Tribunal had accepted the Respondents' suggestion and "awarded" RMB60 million or maybe even RMB250 million to the Applicants.[23]

63. One mischief in keeping silent was identified by Sir Anthony Mason. He said at page 137 that it precluded "an ascertainment in the arbitration" of the Respondents' complaint.

> "… Moreover, had the question been raised, it is possible that action may have been taken by the Tribunal to remedy the situation, assuming that such action was necessary or desirable. …"

64. That is very much the case here. The Applicants were handicapped by, for example, Pan and Zhou's refusal to testify in Hong Kong. Moreover, the Arbitral Tribunal and the Xian Court would have been in a much better position to ascertain the facts and to decide whether those facts established a case of actual or apparent bias. Such finding, though not binding, is entitled to serious consideration by our court.

---

[23] Zeng and Zhang's evidence before the Xian Court was that they were in the course of raising RMB250 million when the Award was made.

65. It is also relevant to note that, where, as here, the court with the supervisory jurisdiction has refused to set aside the Award and has upheld its validity, the result of a refusal to enforce the Award, can be extremely unjust. Litton PJ in *Hebei* at page 118.

66. I have referred to the Respondents' unsuccessful attempt to set aside the Award before the supervisory court. The learned Judge has rightly decided that no estoppel arises from the decision of the Xian Court. However, that is not the end of the matter. The fact that the Xian Court has refused to set aside the Award for bias[24] is relevant to the enforcement court's decision on enforcement of the Award.

67. *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647 was concerned with application by Ferco not to enforce a (China International Economic and Trade Arbitration Commission) CIETAC award on the basis, *inter alia*, that it was unable to present its case, CIETAC had breached its procedural rules and because enforcement would be contrary to English public policy. There was also an unsuccessful application to the supervisory court (Beijing) to set aside the award. The court was concerned with Article 45 of the CIETAC Rules which is similar in effect to Article 5 of the Xian Rules. Coleman J said at page 661:

> "… In international commerce a party who contracts into an agreement to arbitrate in a foreign jurisdiction is bound not only by the local arbitration procedure but also by the supervisory jurisdiction of the courts of the seat of the arbitration. If the award is defective or the arbitration is defectively conducted the party who complains of the defect must in the first instance pursue such remedies as exist under that supervisory jurisdiction. That is because by his agreement to the place in question as the seat of the arbitration he has agreed not only to refer to all disputes to arbitration but that the conduct of the arbitration should be subject to that particular supervisory jurisdiction. Adherence to that part of the agreement must, in my judgment, be a cardinal policy consideration by an English court considering enforcement of a foreign award.

[24] I have used bias as shorthand for the Respondents' complaint.

> In a case where a remedy for an alleged defect is applied for from the supervisory court, but is refused, leaving a final award undisturbed, it will therefore normally be a very strong policy consideration before the English courts that it has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand. Just as great weight must be attached to the policy of sustaining the finality of international awards so also must great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction. I use the word 'normally' because there may be exceptional cases where the powers of the supervisory court are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so. However, outside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be re-investigated by the English courts on an enforcement application is to be most strongly deprecated."

68. I believe Reyes J should have given more weight to the decision of the Xian Court.

69. With great respect to the learned Judge, I cannot agree with his conclusion that the Respondents had not waived their right to complain about what happened in the Shangri-la Hotel. I believe a clear case of waiver has been made out. On this basis, I would allow the appeal and set aside the learned Judge's order.

Apparent Bias

70. In case I am wrong about waiver, I turn to consider the learned Judge's view that a case of apparent bias has been established.

71. On the basis of the minimalist version, the learned Judge held that a case of apparent bias has been made out. Although with serious reservations, he accepted the Xian court's conclusion that what happened on 27 March 2010 was part of an unsuccessful mediation by the Arbitral Tribunal. He had

reservations because the procedure followed by the Tribunal was not strictly in accordance with Article 37 of the Arbitration Rules. He explained:

> "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."

72. The learned Judge also said:

"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."

73. The learned Judge emphasised at para. 69 he was solely concerned with an appearance of bias. He made no finding of actual bias. He said

> "69. … Justice requires that decision-makers are not only impartial, but seen to be such."

74. Earlier, at para. 53, he said the minimalist version would cause a fair-minded observer to apprehend a real risk of bias.

75. As noted, the learned Judge accepted, though with serious reservations, that what happened on 27 March 2010 at the Shangri-la Hotel was part of an unsuccessful mediation by the Arbitral Tribunal. The learned Judge went on to say:

> "54. … 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."

76. I turn to deal with the more important concerns raised by the learned Judge.

77. Why was Zeng contacted? It may be helpful to consider the Respondents' complaint about the Shangri-la meeting. It does not appear to have been the Respondents' complaint before the Xian Court that Zeng was contacted as opposed to someone else. Given the lack of clarity over the control of the Respondents the absence of complaint is hardly surprising. Indeed, in Li Tao's submission to the Xian Court on behalf of the Respondents, he said rather cryptically that:

> "(1) the evidence given by Zeng Wei and Zhang Xintian is effective, whom Pan first informed was the shareholder, …"[25]

78. It appears from para. 3 of the minimalist version that Zeng, had during the arbitration, sought to get in touch with Pan through a mutual acquaintance. That has been denied by Zeng in Hong Kong. But Zeng's role in the Arbitration cried out for clarification. Zeng said in his statement to the Xian Court dated 11 September 2010 that he had carried out "coordination work regarding the arbitration". He said he was in Beijing when he was told by Li Tao, the lawyer for the Respondents, that Pan wanted to talk to him in Xian "the details not known"[26]. He then went to Xian on 27 March 2010. There was no suggestion that he was surprised that it was he, rather than someone else, who was contacted.

---

[25] Xian transcript of 13 September 2010, page 522, in Chinese: "曾卫和张新田提供证据是有效的，潘先通知的是股东。" page 467.

[26] Xian transcript of 20 September 2010, page 5.

79. Also, in Zeng's oral evidence before the Xian Court he said when Pan mentioned the figure of RMB250 million at the Xian Shangri-la meeting,

> "… I thought the price of compensation was too high. Pan said that he found me was to let me to do work on other parties, to make all parties accept the result. He said the result was basically fixed. Therefore I agreed, let Keeneye, New Purple pay a bit more money to settle the matter. I then told this situation to Wang Li, the agent of Liu Jianshen who is the actual controller of Keeneye and New Purple. I heard that Liu had sold the shares to Zhang Xintian, thus the actual controlling shareholder should be Zhang. …"[27]

80. I find it difficult to imagine that Zeng could have said:

> "Therefore I agreed, let Keeneye, New Purple pay a bit more money to settle …"

if he had gone to meet Pan without the agreement or authority of the persons behind the Respondents, whoever they were.

81. Zeng also explained that when he said in his witness statement before the Xian Court that he would mobilise the other shareholders to raise RMB250 million, he was referring to the shareholders of (the 1st and 2nd Respondents), including shareholders of Angola, who were willing to pay and settle the case.[28]

82. On the other hand, in the Xian proceedings, Zhang described himself as the actual controller of the Respondents (in his statement to the Xian court of the 8 September 2010). In the same statement, he said he had asked Liu to raise RMB250 million with him.

83. In Zeng's oral evidence when asked about Zhang's connection with the arbitration, Zeng said[29]:

---

[27] Xian transcript of 20 September 2010, page 5.
[28] Xian transcript of 20 September 2010, page 6.
[29] Xian transcript of 20 September 2010, page 6.

"Zeng: … I only know Liu and (Zhang) are together. [我只知道刘、张是一体的。]

Lan[30]: Is Zhang related to this case?"

Zeng: I don't know. I heard that when Liu was going to transfer shares to Zhang, Zhang had paid deposit. I only do mediation work."[31]

84. In Zhang's oral evidence[32] he said:

"Zhang: I know the situation about the arbitration, but I am not a party of the case. …

? Any question?

Kang (lawyer for the 1st Applicant): Is your identity the actual controller of Keeneye or not? When did you involve in this case?

Zhang: I am actually an initiating person, like an agent. Keeneye transferred Baijun's shares to Day New, New Purple transferred the shares to Far Orient company, I am the agent of Day New and Far Orient, the two companies are both BVI companies in Hong Kong.

Kang: When were you transferred the shares from Liu?

Zhang: About July, August 2009, I cannot remember the exact date, there was agreement.[33]

Kang: In July, August 2009, you were already transferred Baijun's shares, why you still ask Liu to raise money in March 2010?

Zhang: The procedure has not yet finished. I therefore asked Liu to raise money with me.

Lan: Does Witness have any dispute with Gao, Xie?

Zhang: Yes, there is dispute.

? Did you contact Pan Junxin during the arbitraton?

---

[30] Lawyer for the 2nd Applicant.

[31] However, in his 2nd affirmation filed in these proceedings, Zeng said that he was: " … never given any authority to act on behalf of (the Respondents) in relation to the Xian Arbitration or any alleged mediation."

[32] Xian transcript of 20 September 2010, page 8.

[33] In HCA 1315/2009, Defence filed on 8 December 2009, (see footnote 4 and para. 14 above), there was no mention of Zhang being involved with the Respondents or Daynew or Far Orient. It may be noted that it was as a result of an assault on Zhang, the General Manager of Changlebao, the 1st and 2nd Applicants were detained between May and November 2009. It appears from Zhang's evidence, if true, that during the 1st and 2nd Applicants' detention, Zhang had, indirectly, acquired the Applicants' shares in Baijun.

> Zhang: I did not contact Pan, I only heard from Liu Jianshen and Zeng Wei."[34]

85. The learned Judge was also much exercised by what he regarded to be the disparity between the suggestion that the Respondents should pay the Applicants of RMB250 million, and the suggestion in the Award that the Applicants should pay the Respondents RMB50 million. He said:

> "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."

86. With respect, I doubt whether it is meaningful to compare the figures. Whether a payment of RMB250 million is reasonable will depend to an extent on the likelihood of the Applicants' succeeding in the arbitration.[35] A court in Hong Kong is not in a position to express any view on the likelihood of Share Transfer Agreement and Supplemental Share Transfer Agreement being set aside under Article 54 of the PRC Contract Law. Also, much may depend on the view which the Arbitral Tribunal may form on the facts or the circumstances of the case.[36]

87. Furthermore, the amount to be paid may also depend on the value of the shares. The assessment obtained by the Arbitral Tribunal (which was available before the Shangri-la meeting) valued the coal mine at RMB1,712,924,000. As the Award says:

---

[34] Transcript, 20 September 2010, page 9

[35] For all we know, as a matter of PRC law, the setting aside of the Share Transfer Agreement and Supplemental Share Transfer Agreement might have been highly likely. Indeed, as will be seen below, the Applicants rejected the suggested payment of RMB250 million and the Respondents were actively trying to raise RMB250 million when the Award was made.

[36] I should say in passing that Mr Fung relied on the judgment of Chung J given on 23 July 2009, in interlocutory proceedings in HCA 1315/2009, where he, when setting aside certain *ex parte* orders for material non-disclosure, said that the Share Transfer Agreement and the Supplemental Share Transfer Agreement were valid and binding (para. 26 of Chung J's judgment). Whether that is so under Hong Kong law is beside the point.

> "… The Arbitral Tribunal holds that although the value of the company's assets does not equal to the value of shares of the company, its effect on the share value is obvious."[37]

88. I am not in a position to comment on the correctness or otherwise of the valuation. I note, however, that the Applicants had rejected the suggestion of settlement at RMB250 million[38]. On the other hand, the evidence of Zeng and Zhang showed that they were in the course of raising RMB250 million when the Award was made.

89. Such evidence cannot show that the shares were worth anything like RMB250 million. But they also support the view that the figure of RMB250 million is not itself evidence of bias in favour of the Applicants.

90. As for RMB50 million, one only needs to look at what the Arbitral Tribunal said in the Award quoted in para. 37 above to see that that figure bears no relation to the RMB250 million suggested to be paid to the Applicant. Rather, RMB50 million was a suggested "compensation" for the Respondents who had expanded RMB30 million in the acquisition of the Baijun shares, and in relation to which they had not claimed repayment in the Arbitration.

91. So, with respect, I cannot agree that the difference between RMB250 million and RMB50 million would give rise to an apprehension by the fair-minded observer of apparent bias.

92. I turn to some of the other concerns expressed by the learned Judge.

93. The learned Judge, in para. 59, asked rhetorically what Pan and Zhou meant when,

---

[37] The Award, page 105.

[38] Lan Yongqiang's 1st affirmation, para. 23.

> "59. … having made the proposal of RMB 250 million, they asked Zeng 'to work on' the Respondents to accept the proposal? …"

94. In para. 60, he said:

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

95. The expression "work on" ("做工作") is a common expression in the Mainland. It appeared three times in the Chinese original of Zeng's witness statement of 11 September 2010 in the Xian Court as follows.

> 「…潘秘书长提出让我做一做其他股东的工作。我听了虽然觉得补偿价格太高，但为了彻底了结这个官司，表示会尽力做一下工作，争取满足这个要求，大家和和气气结束一切纠纷。后来，我分别做了其他股东方的工作，动员他们凑钱，要接受仲裁庭这个结果。…」

> "… Pan, the General Secretary, proposed that I did work on other shareholders. Although I felt that the amount of compensation was too high, for the sake of concluding this litigation, I expressed that (I) would try my best to do the work to seek to satisfy the request so that all the parties could end all disputes peacefully. Later on, I did work on other shareholders and mobilised them to raise the money (required) and to accept this result of the Arbitration Tribunal. …"

96. There is no indication from Zeng or Zhang's evidence that Zeng had ever "pushed" the other shareholders.

97. In para. 47 of the Judgment, the learned Judge said that the proposal of settlement at RMB250 million was advanced without the authorization of the Applicants. That is so. Indeed, the evidence was that the Arbitral Tribunal had earlier been told that the Applicants had "demanded a minimum of RMB200 million, but that (the Applicants) had changed (their) mind and wanted the shares in Baijun back."[39]

98. The learned Judge went on to say although the meeting at the Shangri-la Hotel was a mediation process,

---

[39] Lan Yongqiang's 2nd affirmation, para. 10.

> "79. … 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."

99. As for holding a mediation over dinner in a hotel, in my view, a Mainland court is better able to decide whether that is acceptable. I note, also that no complaint about the venue had been made to the Xian Court.

100. Nor do I agree that there was any wining and dining by Pan (see para. 67 of the Judgment quoted in para. 72 above). The evidence was that it was Zeng who paid for the dinner.

101. As for why Pan had contacted Zeng rather than the Respondents' Mainland lawyers, what role a Mainland lawyer may be expected to play in such circumstances is better understood in the Mainland.

102. With respect, although one might share the learned Judge's unease about the way in which the mediation was conducted because mediation is normally conducted differently in Hong Kong, whether that would give rise to an apprehension of apparent bias, may depend also on an understanding of how mediation is normally conducted in the place where it was conducted. In this context, I believe due weight must be given to the decision of the Xian Court refusing to set aside the Award.

103. In any event, it appears that the clincher for the learned Judge's decision on apparent bias is the lack of correspondence or proportionality between the figure of RMB250 million and the figure of RMB50 million. That,

together with others of the learned Judge's concerns which I do not support, enable me to decide whether in the circumstances of these cases, a case of apparent bias has been made out.

104. After careful consideration, my conclusion is that no case of apparent bias has been established. Certainty not such that would lead me to refuse enforcement of the Award.

105. It is clear from the observations in the judgments of Sir Anthony Mason NPJ and Litton PJ quoted in paras. 50 and 51 above, enforcement of an award should only be refused if to enforce it "'would be contrary to the fundamental conceptions of morality and justice' of the forum". It does not mean, for example, if it is common for mediation to be conducted over dinner at a hotel in Xian, an award would not be enforced in Hong Kong, because, in Hong Kong, such conduct, might give rise to an appearance of apparent bias.

106. In the circumstance of this case, I am not satisfied that a sufficient case of apparent bias, contrary to the fundamental conceptions of moral and justice in Hong Kong, has been established such that it would be right for our court to refuse to enforce the Award.

Actual bias required?

107. Mr Chan also submitted that enforcement may not be refused for apparent bias. He relied on what Bokhary PJ had said in *Hebei*, at page 124:

> "In the present context, I think that a distinction can and should be made between the effect of actual bias and that of apparent bias. (When I say 'bias' I mean a lack of the impartiality required of judges and arbitrators.) Actual bias would be more than our courts could overlook even where the award concerned is a Convention award. But short of actual bias, I do not think that the Hong Kong courts would be justified in refusing enforcement of a Convention award on public policy grounds as soon as appearances fall short of what we insist upon in regard to impartiality where domestic cases or

> arbitrations are concerned. Our stance must be that something more serious even than that is required for refusing such enforcement. In adopting such a stance, we would be proceeding in conformity with the stance generally adopted in regard to Convention award enforcement by the commercial jurisdictions whose decisions from around the globe have been cited to us by leading counsel for the buyer.
>
> Leading counsel for the seller cited the decision of the House of Lords in *R v Bow Street Magistrate, ex p Pinochet (No 2)* [1999] 2 WLR 272. In particular, he places reliance on Lord Nolan's statement (at p. 288A) that 'where the impartiality of a judge is in question the appearance of the matter is just as important as the reality'. That was said in the context of a judge's position where the question was whether a former head of state whose extradition was sought for crimes against humanity could resist liability to such extradition by a plea of immunity based on his having been a head of state at the time of the alleged crimes. In a context like the present, however, I think that the courts cannot avoid the question of whether or not there was *actual* bias. They must decide the matter upon the answer to that question, thorny as such a question can be. I do not think that this is asking too much. After all, where the appearance of bias is strong enough, it can lead to an inference that actual bias existed. Moreover, if things had been so unsatisfactory that the party against whom enforcement is sought had been unable to present his case, that would have provided him with a separate basis for resisting enforcement."

108. Also, in *Arbitration of Commercial Disputes, International and English Law and Practice* (Andrew Tweeddale and Keren Tweeddale), the learned authors expressed the view that:

> "where bias is alleged then the party making the allegation must show that that the arbitral tribunal has acted in a way where its impartiality has been compromised ('actual bias'). It is generally not enough for the party making the allegation to show that the circumstances of the case give rise to an imputation of bias or a lack of impartiality ('imputed bias'). As a general rule courts will only refuse to enforce international arbitration awards where actual bias can be proved." Para 13.55

109. Mr Fung, on the other hand, relied on the statement by Sir Anthony Mason NPJ (see para. 50 above) that:

> "… a determination by a impartial and independent tribunal which is not influenced, or *seen to be influenced*, by private communications are basic to the notions of justice and morality in Hong Kong." [My emphasis]

110. I do not believe there is any conflict between these views. What Bokhary PJ was emphasising was that one should not be too ready to refuse to enforce an award on the basis of one's notion on what may amount to apparent bias. There is nothing in Sir Anthony Mason's judgment which contradicted that.

Disposition

111. For the above reasons, I would allow the appeal and set aside Reyes J's order. I would also make an order *nisi* that the Applicants should have the costs both here and below.

Hon Fok JA:

112. I agree with the judgment of the learned Vice-President.

Hon Sakhrani J:

113. I agree with the judgment of Tang VP and have nothing to add.

(Robert Tang) Vice-President	(Joseph Fok) Justice of Appeal	(Arjan H Sakhrani) Judge of the Court of First Instance

Mr. Edward Chan, 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