# Arb-Med in Hong Kong: Corrected Position Or Enduring Suspicion?

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## Abstract

In *Gao Haiyan and another v Keeneye Holdings and another*[3] (**Gao v Keeneye**), the Hong Kong Court of Appeal upheld the validity of arb-med in Hong Kong, reversing the first instance decision. While this decision allows commercial parties to breathe a sigh of relief, strong views about the fallibility of arb-med still permeate the Hong Kong judiciary. Whereas arb-med is an entrenched method of alternative dispute resolution in Europe and in other parts of Asia, in the bustling commercial world of Hong Kong suspicions endure about the practice. In this article we explore whether those suspicions have been eradicated by the Court of Appeal's decision or whether deep-seated distrust for arb-med endures.


## Introduction

It is beyond question that arb-med[4] (or med-arb)[5] is internationally acknowledged as an effective means of alternative dispute resolution. Its origins are rich in their antiquity, its use in Europe and in parts of Asia extensive and its success rate high, making it an attractive option for parties seeking to resolve their dispute with as little aggression as possible.

## What is arb-med?

The phrase 'arb-med' refers to the practice of combining the two processes – arbitration and mediation – into one. In China, for example, mediation's long history draws on lineage traceable to Confucianism, emphasising conciliation and harmony and rejecting the exercise of sovereign force.[6] In Japan, arb-med is enshrined in Japan's Arbitration Law 2003 and the Japan Commercial Arbitration Association Arbitration Rules.

Arb-med flourishes in civil law countries where dispute resolution is not grounded in an adversarial regime. For example, Taiwan, Singapore, Germany and Switzerland have long embraced arb-med.[7]

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3 [2012] 1 HKC 335

4 This configuration of the phrase refers to the process initiated as an arbitration in which the conversion of the same process from an arbitration to a mediation is permitted, hence its name 'arb-med'.

5 This configuration of the phrase refers to the process initiated as a mediation in which conversion of the same process from a mediation to an arbitration is permitted, hence its name 'med-arb'.

6 See Gabrielle Kaufman-Kohler and Fan Kun, *Integrating Mediation into Arbitration: Why It Works in China* (2008) 25 Journal of International Arbitration 4.

Similarly, Bermuda's international commercial arbitration legislation expressly incorporates arb-med.

In Asia in particular, however, the acceptability of arb-med seems to be linked to whether the legal system in the country of a would-be arbitrating party is civil law or common law. While there is a suggestion that civil law jurisdictions are more accepting of arb-med, common law jurisdictions tend to approach the process more cautiously. The decision-maker's impartiality – a cornerstone of the common law – may be called into question if they participate in arbitration then actively engage in the resolution of that same dispute by mediation, as they will be receiving confidential information about the strengths and weaknesses of each party's case.

Although variations on the process exist, in its most usual form arb-med involves the appointment of one person as an arbitrator, with the power for that person to move to acting as a mediator. This usually occurs after the conclusion of the hearing and after the award has been written, but prior to the handing down of the arbitral award.[8]

The advantage of arb-med is that the outcome of the arbitration is guaranteed. The hearing has been held and the award has already been written, but the parties have a final opportunity of reaching an amicable resolution of the dispute prior to the imposition of an award.

The downside to arb-med lies in the fact that the same person may achieve a partial resolution by mediation and if he or she is then required to return to the role of arbitrator to wholly resolve the dispute, their views will inevitably be coloured by the mediation proceedings.[9] Critics say such a result is antithetical to impartial justice.

Even with those so-called shortcomings, arb-med has been in use very effectively for a long time in various parts of the world in the resolution of commercial arbitrations.

Adherents to arb-med include the following arb-med benefits over the adversarial system inherent the common law:

- the mediation phase of the arbitration can be commenced at any time during the hearing of the arbitration;
- the mediation can be undertaken once all parties have tested their evidence on key issues and once the parties have a good basis for assessing their strengths and weaknesses on key issues;
- in commercial cases, the monetary amount that will resolve the dispute is ascertained much more quickly;
- in certain arb-med situations, the mediation can be held on an issue-by-issue basis, so that once the evidence on each issue is heard, but prior to a determination being made on that issue, the parties have an opportunity to resolve that issue before turning to the next issue; and
- importantly, the parties can save face, a point particularly relevant in an ongoing commercial relationship.

7 See the comments of Teresa Cheng SC, *Possibilities for Combining Arbitration and Mediation: The Perils and Opportunities* www.ciarb.org/south-east/possibilities-for-combining-arbitration-and.php

8 See Renate Dendorfer and Jeremy Lack, *The Interaction between Arbitration and Mediation: Vision v Reality* (2007) 1 Dispute Resolution Journal 73, 87.

9 Op cit at 88.





Those who are opposed to arb-med cite the following as drawbacks to it:

- the person arbitrating the dispute forms views about the party's respective cases and then that same arbitrator, still labouring under those impressions, seeks to reach a mutually advantageous resolution of the dispute knowing full well, for example, that a key witness may not be a witness of truth;
- confidential information (possibly highly damaging information) is exchanged between the mediator and a party during the mediation phase then the mediator, seized of that information, later resumes the role of arbitrator still carrying with him or her a view about that confidential information; and
- if the parties are sensitive about the mediator being unable to put out of his or her mind the confidential information exchanged at the mediation phase, the parties will be less inclined to be open and forthright about resolution during the mediation phase.

## Arb-med in Hong Kong

Hong Kong's approach to arb-med represents something of a curiosity. Geographically adjacent to Mainland China (self evidently, a non-common law country), yet steeped in western formalities by reason of its long-term English connection, Hong Kong is a common law legal system. For decades Hong Kong has been reticent about embracing arb-med,[10] even though Hong Kong's *Arbitration Ordinance* has been in operation for some time and notwithstanding the high volume of arbitrations dealt with in Hong Kong under China International Economic and Trade Arbitration Commission, UNCITRAL, the New York Convention and other regimes. Unlike in Singapore, Taiwan, Japan and China, Hong Kong has not enthusiastically adopted arb-med as a legitimate tool in its dispute resolution armoury.

## The *Gao v Keeneye* litigation – the factual setting

The efficacy of arb-med in Hong Kong was brought into sharp focus by long-running litigation of *Gao v Keeneye*, at first instance[11] and on appeal.[12] The Vice President of the Court of Appeal described the facts of the case as 'complicated and murky'[13] – and with good reason.

The case concerned a fight over the shareholding in a Hong Kong company called Bai Jun Tian Cheng Ltd (**Baijun**). The applicants (**the Gaos**) owned 50% of the shares in Baijun. Baijun owned shares in other companies that had derived very significant wealth from coal mining, including Angola Ltd.

While being held in detention in Yulin, the Gaos entered into a share transfer agreement (and later a supplemental share transfer agreement) with Keeneye for the transfer of their 50% interest in Baijun. It appears that the Gaos and the coal mining operator fell into disagreement about the running of the coal mine. The Gaos alleged they entered into the share agreements at a time when they were in very poor

10 See www.allenovery.com/publications/en-gb/Pages/The-dangers-of-arb-med-.aspx

11 [2011] HKCFI 240 (Reyes J).

12 [2012] 1 HKC 335 (Tang VP, Fok JA and Sakhrani J).

13 [2012] 1 KHC 335 at [7] (Tang VP)

health and their lives were in danger. Under the share transfer agreements the price of the shares in Baijun were to be separately valued or, failing agreement, the price was to be the amount of the Gaos' actual capital contribution or investment in Baijun. People's Republic of China Contract Law governed the share agreements, article 54 of which permitted a party to request arbitration in respect of a contract that was 'concluded as a result of a serious misunderstanding' or in respect of a contract that was 'manifestly unfair when it was concluded'.

## At arbitration

Keeneye applied to the Xi'an Arbitration Commission (**XAC**) on 7 July 2009, seeking confirmation of the validity of the two share transfer agreements. The Gaos counterclaimed to XAC, contending that the share transfer agreements should be revoked on the ground that they were manifestly unfair and there was exploitation of the Gaos' precarious position when signing the agreements.[14]

XAC convened a three-member arbitral tribunal consisting of the chief arbitrator (Jiang Ping), an arbitrator appointed by the Gaos and one appointed by Keeneye. The arbitration was duly convened, and in December 2009 XAC's arbitral tribunal produced an award. The arbitrators determined the value of the shares in Baijun. The Gaos disputed the award saying that the true value of the shares was tenfold greater than the value attributed to them by the arbitrators. Keeneye sought to enforce the award. The Gaos challenged the enforcement of the award under section 40E(3) of the Hong Kong *Arbitration Ordinance*, contending that it would be contrary to public policy to enforce the award.

## The application before Saunders J – leave to enforce the award

This was the factual setting for the point of present relevance, namely arb-med. Keeneye's application to enforce the award was made ex parte and Saunders J granted leave to enforce the award.[15] On 16 September 2010 the Gaos brought an inter partes summons seeking to set aside the ex parte orders. On 8 November 2010 Saunders J ordered that summons to be heard nine days later. In the course of fixing directions, Saunders J undertook the unusual task[16] of pronouncing detailed reasons[17] for his decision to refer the matter to another judge for the hearing of the application to set aside the enforcement order. In the course of his reason Saunders J addressed the claim by the Gaos that the arbitral tribunal had behaved improperly and that section 40E of the *Arbitration Ordinance* was thereby contravened as it would be contrary to public policy to enforce the award.

Saunders J summarised the allegations of impropriety in the following way:

14 [2012] 1 HKC 335 at [25].
15 On 2 August 2010
16 We say 'unusual task' because Saunders J was dealing with a limited and discrete application, scarcely calling for a detailed examination of s 40E of the Arbitration Ordinance. Yet the reasons of Saunders J give a good insight into the views held by that judge about aspects of arb-med. The views of Saunders J on point align with the views of Reyes J yet the views of those two judges are at odds with the views on the same point of the judges who comprised the Court of Appeal. That divergence of view underpins our basic contention in this article that views still divide the judiciary of Hong Kong on the issue of arb-med.
17 [2010] HKCFI 980





- the substantive arbitral hearing took place on 21 December 2009;
- before completion of the hearing and prior to the delivery of the award, one of the arbitrators made contact with Zeng Wai, an intermediary of the Gaos, stating that the Secretary General of the XAC had 'something for him';
- Zeng flew to Xian on 27 March 2010 and met with that arbitrator at the Shangri-La Hotel;
- Zeng was told that the arbitral tribunal had considered the case and determined that the share transfer agreements were valid but that Keeneye had to make a compensation payment of RMB 250 million;
- the arbitration was reconvened on 31 May 2010; and
- the arbitral tribunal published its final award on 3 June 2010.

Applying the observations of Sir Anthony Mason NPJ[18] of the Hong Kong Court of Final Appeal in *Hebei Import & Export Corp. v Polytek Engineering Co. Ltd.*,[19] Saunders J held that the expression 'contrary to public policy' in section 40E of the Hong Kong *Arbitration Ordinance* meant 'contrary to fundamental conceptions of morality and justice', and that at 'first sight it was an extraordinary proposition that a member of the Tribunal, in the course of an arbitration, could be involved in a mediation process'[20] Saunders J observed that 'basic notions of morality and justice in Hong Kong would not permit *ex parte* communications between a member of a tribunal and party once an arbitration process has commenced'.[21]

## The referral to Reyes J

Rather than dismissing the Gaos summons in accordance with the request of Keeneye, Saunders J referred the summons for hearing before Reyes J on 30 March 2010.

Reyes J said his task was to address section 40E of the Arbitration Ordinance.

After reserving judgment for a less than a fortnight, on 12 April 2011 Reyes J gave judgment.[22] His Honour set aside the ex parte leave to enforce the award that Saunders J granted.

The reasons of Reyes J reflected a more detailed examination of the events at the Shangri-La[23] and were determinative in Reyes J's decision to set aside the leave given by Saunders J to enforce the award.

Reyes J said that after the first segment of the arbitration, the tribunal decided to suggest that a settlement could be achieved if Keeneye paid the Gaos RMB 250 million. The tribunal appointed Pan Junxin (XAC's Secretary General) and one of the arbitrators, Zhou Jian, to contact the parties with that suggestion. Pan's office made contact with the Gaos' legal representative, Kang Ming. Pan and Zhou also made

18 Sir Anthony Mason sat as a Justice then later as the Chief Justice of the High Court of Australia between 1972 and 1995, 23 years in total. He is hailed one of Australia's greatest jurists.
19 (1992) 2 HKCFAR 111
20 [2010] HKFCI 980 at [14]
21 [2010] HKFCI 980 at [16]
22 [2011] HKCFI 240
23 [2011] HKCFI 240 at [22] to [27].

contact with one Zeng Wei, a person friendly to Keeneye and a shareholder in Angola, one of the 50% shareholders of Baijun. A dinner was arranged at the Shangri-La. Present were Pan, Zeng and Zhou Jian. Pan suggested that Keeneye pay the Gaos the sum of RMB 250 million and Pan suggested that Zeng should 'work on' Keeneye. Before Reyes J, Zeng gave evidence that Pan told those at the dinner that the arbitral tribunal had decided on a 'result', being the validity of the share transfers and a compensation payment of RMB 250 million. Zeng told Reyes J that Pan said at the dinner that Keeneye could end up with something worse in the arbitration (inferentially, if the proposal was not accepted). Zeng gave evidence that he passed on what he had been told by Pan to a representative of Keeneye. Subsequently, Keeneye refused to pay the sum Pan suggested and the arbitration continued, there being no complaint about the conduct of Pan or Zhou at the Shangri-La.

When in June 2010 the arbitral tribunal published its award, the 'result' was different to the one Pan foreshadowed. The arbitrators dismissed Keeneye's claim in its entirety, revoked the share transfer agreements and recommended that Keeneye make economic compensation to the parties of RMB 50 million.

## Was the dinner at the Shangri-la a 'mediation'?

In reaching his conclusion with what he called 'serious hesitation',[24] Reyes J held that the dinner was in fact a mediation,[25] despite it being unsuccessful and not following the procedure prescribed by Article 37 of the XAC's *Arbitration Rules*.[26] Reyes J recited Keeneye's description of the dinner as a 'none-too-subtle attempt to put pressure' on Keeneye into paying the Gaos a vast sum of money in return for a decision in Keeneye's favour about the validity of the share transfer agreements. In amplifying his reservations about the propriety of the dinner as a mediation, Reyes J said, first, the discussions at the Shangri-La were not conducted by the whole tribunal (but instead were conducted by Pan and Zhou); second, Pan (a third party) was not authorised to act as a mediator; third, the time and place for the discussions were not consented to by all parties; and fourth, the proposal expressed by Pan and Zhou did not come from Gaos but rather it was devised and conveyed by Pan and Zhou.

Reyes J gave lukewarm and much qualified support for arb-med.[27] 'There is nothing wrong in principle with med-arb … From the point of view of impartiality the med-arb process runs into self-evident difficulties. The risk of the mediator turned arbitrator appearing to be biased will always be great.'[28] Or, later, 'The problems inherent in med-arb are such that many arbitrators decline to engage in it. They view the risks of apparent bias arising from their participation in med-arb as an insurmountable difficulty.'[29]

24 [2011] HKCFI 240 at [40].
25 [2011] HKCFI 240 at [40].
26 [2011] HKCFI 240 at [41].
27 [2011] HKCFI 240 at [71]. In that passage Reyes J described the process as 'med-arb', although nothing turns on that nomenclature.
28 [2011] HKCFI 240 at [72].
29 [2011] HKCFI 240 at [77].





So much for the ambivalent 'support' for arb-med. On the facts, Reyes J held that the mediation was not conducted in a manner that avoided apparent bias.[30]

On public policy grounds Reyes J held that a Hong Kong award tainted by apparent bias was unenforceable in Hong Kong and it should make no difference to the principle that the award is that of a foreign tribunal. Relevantly, His Honour said, 'Upholding such an award will have the consequence that justice would not be seen to be done. Enforcement of such an award would be an affront to this Court's sense of justice.'[31]

His Honour refused Keeneye's application for leave to enforce the XAC award.

## Off to the Court of Appeal

After its initial success with the *ex parte* application for leave to enforce the XAC award, Keeneye thereafter suffered two losses (one before Saunders J and the other before Reyes J), yet Keeneye's determination in appealing to the Court of Appeal ultimately bore fruit.

In a very short judgment, the Court of Appeal held, in essence, that the Gaos failed to complain about any apprehension of bias until the award was handed down, and that their failure to complain about the events at the Shangri-la amounted to a waiver and for that reason the appeal should be allowed. Further, the Court of Appeal held that no case of actual or apparent bias had been made out and that Reyes J erred in finding to the contrary.

Importantly, the Court of Appeal said nothing about arb-med. But the court did make observations about what happened at the Shangri-La. The Court of Appeal said that the mainland court was better able than a Hong Kong court to decide whether the practice of mediating over dinner in a hotel is acceptable.[32] The court rejected the notion that 'there was any wining and dining by Pan' as 'it was Zeng who paid for the dinner'.[33]

Otherwise, the Court of Appeal gave no consideration to the appropriateness or suitability of arb-med to commercial disputes in Hong Kong. Nor did the Court of Appeal make any statements that qualified or negated the views of Reyes J regarding the fallibility of arb-med.

The court allowed Keeneye's appeal and set aside Reyes J's orders. The upshot was that Keeneye was permitted to enforce the XAC arbitral award.

## What do we glean from this pitch battle?

Several issues emerge from this litigation – some specific to the particular dispute between the Gaos and Keeneye and some of general importance to arb-med in Hong Kong.

30 [2011] HKCFI 240 at [80].
31 [2011] HLCFI 240 at [99].
32 [2012] 1 HKC 335 at [99].
33 This expression puts a complexion on the facts that was not open, in the authors' views. The person who pays for the meal is not necessarily the person who wines and dines others.

First, the Hong Kong judiciary is divided on the key point of whether arb-med undermines the impartiality of the arbitration process. In certain quarters, various judges (Saunders and Reyes JJ, for example) have highlighted how impartiality should be a beacon that illuminates the attainment of justice in Hong Kong – whether in the hearing of cases or in the enforcement of arbitral awards. Those judges equate impartiality with the important public policy of justice and fairness. For them, the court should not assist a party where an arbitral award is tainted by the appearance of bias; such an appearance is particularly likely to arise during the arb-med process.

In the other camp are the judges (such as Tang VP, Fok JA and Sakhrani J) who prefer to give effect to, rather than frustrate, the workings and awards of arbitral tribunals of other countries. For them it is neither desirable nor efficacious to embark on an excursus into the way other countries undertake their arbitral process.

One cannot predict with reliable certainty how a differently constituted Court of Appeal might address the issue. After all, the Court of Appeal in *Gao v Keeneye* did not pronounce upon (whether adversely or positively) the observations of Saunders J or Reyes J on aspects of arb-med. The reasons for judgment of Tang VP were, for the most part, confined to the facts of the case and to the complexion of apparent bias. Are legal practitioners to understand from the decision of the Court of Appeal in Gao v Keeneye that in Hong Kong a mood of support exists for arb-med in the context of international commercial arbitration? Or do legal practitioners tread warily, knowing that the judiciary is divided on point?

It seems counterintuitive that the parties, having elected to resolve their dispute by arbitration and thus outside the arena of court, would wish a high level of curial involvement with the possibility of a court denouncing the decision of the arbitral tribunal. The decision of the Court of Appeal was wholly consonant with the pro-enforcement bias underpinning the Model Law and the New York Convention. Yet, by the same token, legal systems grounded in the English common law are affronted by the notion that a judicial or quasi-judicial determination might have been procured by bias, something antithetical to the fundamental nature of justice.

Has the decision in *Gao v Keeneye* brought the law of Hong Kong into line with the law of most other jurisdictions in relation to the efficacy and use of arb-med? Hence, has the law of Hong Kong now been corrected, away from the heretical views of opponents to arb-med? Or is the judiciary of Hong Kong divided on point with the result that a simmering suspicion still pervades the use of arb-med? Will a differently constituted appeal court reach a different view about the enforceability of an award that was procured by conduct potentially amounting (on one view, at least) to apparent bias?

As the Court of Appeal in *Gao v Keeneye* confined its decision to the facts, it cannot be said that future challenges to the enforceability of arbitral awards on the basis of the inherent bias of the arb-med process will be decided in the same way. Sufficient underlying suspicion still pervades arb-med in Hong Kong.





# Dos and don'ts for drafting alternative dispute resolution causes[1]

Ian Gault[2] and Sophie East[3]

In our experience there are a number of matters commonly overlooked when parties draft alternative dispute resolution (ADR) clauses. The following piece does not purport to be a complete guide to drafting such clauses, but rather we have highlighted what we see as five key issues to address.

## Scope: defining 'dispute'

It is surprising how often one sees ADR clauses that refer to determining a 'dispute', but nowhere in the contract do the parties identify or define the scope of disputes that may be submitted to ADR. It is important to identify this and to ensure that the scope covers precisely what the parties intend. In most cases, this will be all disputes 'arising out of or in connection with' the contract. The phrases 'arising out of or in connection with' and 'arising out of or relating to' have become the model for many of the arbitration clauses published by the major arbitral institutions around the world (for example, the standard arbitration clause under the International Chamber of Commerce (**ICC**) Rules of Arbitration and the recommended arbitration clause under the London Court of International Arbitration (**LCIA**) Rules). By using a more-limited description, for example one which covers only disputes 'arising out of' the contract, the parties risk a Court finding that the parties did not intend a certain fact pattern to be the subject of ADR (see, for example, the United States Federal Appeal Court decision of *Vetco Sales, Inc v Vinar*, 98 F. App'x 264, 266-67 (5th Cir. 2004), where the Court held that 'arising out of' language in an arbitration clause indicated that 'the parties intended to limit the applicability of this clause', and holding that claims for breach of a related agreement were outside the scope of the arbitration clause).

The issue is highlighted by considering the two alternative formations of the definition of 'dispute' below:

### Example 1

'Dispute' means any dispute, difference or question which may arise at any time hereafter between X and Y with respect to this agreement.

### Example 2

'Dispute' means any dispute, difference or question arising out of or in connection with this agreement or its formation.

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