

**THE RISKS OF APPARENT BIAS WHEN
AN ARBITRATOR ACTS AS A MEDIATOR
REMARKS ON HONG KONG COURT’S DECISION
IN *GAO HAIYAN***

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I. Introductory Remarks

There has been an on-going, heated debate among scholars and practitioners over whether one neutral party can serve as both an arbitrator and a mediator in the same proceeding.¹ This process is sometimes referred to as either “med-arb” – where the neutral party is a mediator first and, if that fails, the same person will serve as an arbitrator, issuing a final and binding decision – or “arb-med” – where the neutral party is a mediator only after the arbitration session but before the final binding decision is released. Due to differing legal cultures and traditions, this is one of the few issues for which there is no international consensus, despite the general trend of harmonization of the law and practice of international arbitration.²

Divergent opinions on the admissibility and appropriateness of arbitrators facilitating settlement arise from the different perceptions of the role played by arbitrators: If the arbitrators’ mission is to resolve the dispute by a process of adjudication and produce a binding decision, then promoting settlement is incompatible with that mission.³ But if the arbitrators’ mission also involves

¹ For a discussion on this topic, see M. COLLINS, Do International Arbitral Tribunals Have Any Obligations to Encourage Settlement of the Disputes Before Them?, 19 *Arb. Int’l* 3 (2003), p. 333-343; R. DENDORFER/ J. LACK, The Interaction Between Arbitration and Mediation: Vision v Reality, 1 *Disp. Res. Int’l* 1 (2007), p. 73-98; M. HOELLERING, Comments on the Growing Inter-Action of Arbitration and Mediation, in A.J. VAN DEN BERG (ed.), *ICCA Congress Series no 8*, 1998, p. 121-124; M. HWANG, The Role of Arbitrators as Settlement facilitators-Commentary, in A.J. VAN DEN BERG (ed.), *ICCA Congress Series no 12*, 2005, p. 571-581; P. LALIVE, The Role of Arbitrators as Settlement Facilitators-A Swiss View, in A.J. VAN DEN BERG (ed.), *ICCA Congress Series no 12*, 2005, p. 556-564; J. PETER, Med-Arb In International Arbitration, *Doutrina Internacional* (2005); D. PLANT, The Arbitrators as Settlement Facilitator, 17 *J. Int’l. Arb.* 1 (2000), p. 142-146; M. SCHNEIDER, Combining Arbitration with Conciliation, in A.J. VAN DEN BERG (ed.), *ICCA Congress Series no 8*, 1996, p. 57-100; G. KAUFMANN-KOHLER, When Arbitrators Facilitate Settlement: Towards a Transnational Standard, 25 *Arb. Int’l* 2 (2009), p. 187-205; TANG HOZHUI, Is There an Expanding Culture that Favors Combining Arbitration with Conciliation or Other ADR Procedures?, in A.J. VAN DEN BERG (ed.), *ICCA Congress Series no 8*, 1996, p. 101-120; Tang Houzhi, Combination of Arbitration with Conciliation – Arb-Med, in A.J. VAN DEN BERG (ed.), *ICCA Congress Series no 12*, 2005, p. 547-555; M. HUNTER, Commentary on Integrated Dispute Resolution Clauses, in A.J. VAN DEN BERG (ed.), *ICCA Congress Series no 12*, 2005, p. 470-477; J. LEW, Multi-Institutional Conciliation and the Reconciliation of Different Legal Cultures, in A.J. VAN DEN BERG (ed.), *ICCA Congress Series no 12*, 2005, p. 421-429; K.P. BERGER, Integration of Mediation Elements into Arbitration: Hybrid Procedures and “Intuitive” Mediation by International Arbitrators, 19 *Arb. Int’l* 3 (2003), p. 387-403; A. MARRIOTT, Arbitrators and Settlement, in A.J. VAN DEN BERG (ed.), *ICCA Congress Series no 12*, 2005, p. 533-546.

² On the trend of harmonization, see G. KAUFMANN-KOHLER, Globalization of Arbitral Procedures, 36 *Vanderbilt Journal of Transnational Law* 1313 (2003), p. 1313–1333; M. BLESSING, Globalization (and Harmonization?) of Arbitration, 9 *J. Int’l Arb.* 1 (1992), p. 79–90.

³ See M. COLLINS (note 1), p. 343.

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assisting the parties in resolving their disputes in the most effective way, then participating in Alternative Dispute Resolution (“ADR”) falls within the mission.⁴

Is the combination of mediation and arbitration desirable? What are the advantages and disadvantages of the combined approach?⁵

Supporters of the combination argue that the effective use of mediation during the arbitration proceedings may improve the administration of justice.⁶ They claim that combining the process of mediation and arbitration to resolve disputes makes the entire mechanism more efficient.⁷ According to the supporters’ position, combining mediation and arbitration adds value in several respects. First, the arbitrator already knows the case, and the parties do not need to educate another neutral on the facts, which creates unavoidable duplication of work, additional expenses and delays. Second, the arbitrator has the power to pick the appropriate moment to offer the tribunal’s services for settlement purposes. Third, a settlement agreement entered into in the course of a pending arbitration may form part of a consent award and become enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”).⁸ The Chinese experience also shows that combining methods of dispute resolution makes mediation more likely to produce a settlement than when mediation and arbitration are conducted separately.⁹ The reason may be that the mediation is conducted “in the shadow of the award”. Furthermore, if no settlement is reached, the ultimate arbitral award often is more acceptable to the parties. Previous negotiations will have served to narrow the issues and may result in procedural measures (for example, a third party evaluation on key findings of fact) that could lead to more predictable and acceptable solutions.¹⁰

The main argument against arbitrators also serving as mediators is the risk of a breach of due process and natural justice. A fundamental aspect of natural justice is a party’s right to be aware of and able to answer an opponent’s claim. The rule of due process, which protects the fairness of disputes, forbids *ex-parte* communications with the decision maker. However, if “caucusing” (meeting the parties separately) is used by the mediator during the mediation, information communicated confidentially to the mediator is not made known to the opposing

⁴ See P. SANDERS, The 1996 Alexander Lecture, Cross-Border Arbitration-A View on the Future, 62 *Arbitration* (1996), p. 173; M. SCHNEIDER (note 1), p. 76.

⁵ On the advantages and disadvantages of the combined practice, see G. KAUFMANN-KOHLER (note 1), p. 197-202; G. KAUFMANN-KOHLER/ KUN FAN, Integrating Mediation into Arbitration: Why It Works In China?, 25 *J. Int’l. Arb.* 4 (2008), p. 490-492.

⁶ See G. KAUFMANN-KOHLER (note 1), p. 188; A. MARRIOTT (note 1), p. 533.

⁷ See, for instance, R. MCLAREN/ J. SANDERSON, *Innovative Dispute Resolution: the Alternative*, Scarborough 1994, p. 1-6.

⁸ G. KAUFMANN-KOHLER (note 1), p. 197.

⁹ SHENGCHANG WANG, Combination of Arbitration with Conciliation and Remittance of Awards – with Special Reference to the Asian-Oceania Region, 19 *J. Int’l. Arb.* 1 (2002), p. 51-66.

¹⁰ G. KAUFMANN-KOHLER/ KUN FAN (note 5), p. 490-491.

party and cannot be refuted or clarified, which runs against the rule of due process and natural justice.¹¹ The opponents also fear that the confidential information disclosed to the mediator during the caucus may influence the impartiality of the neutral party, who will later become the arbitrator that renders a binding decision. Furthermore, the opponents argue that the effectiveness of the mediation process may actually be reduced, as the parties may be less candid with the mediator knowing that the same person will render a binding decision if mediation fails.¹²

In April 2011, the Hong Kong Court of First Instance (“CFI”) held in *Gao Haiyan* that an arbitration in which one of the arbitrators and the General Secretary of the Xi’an Arbitration Commission (“XAC”) acted as mediators (a so-called “arb-med” procedure) was tainted by apparent bias. The CFI refused to enforce the arbitral award on the basis that the enforcement would be contrary to public policy in Hong Kong¹³. The CFI’s decision was later reversed by the Court of Appeal on 2 December 2011, who concluded that the arb-med procedure did not disclose the existing bias in the process, giving rise to an issue of public policy¹⁴. *Gao Haiyan* is one of the first cases in which the enforcement of an award arising out of an arb-med procedure was discussed. It has caused much interest amongst academics and practitioners, given that arb-med is widely used in mainland China and also allowed by the new Hong Kong Arbitration Ordinance (Ordinance No. 17 of 2010) (“Ordinance”).¹⁵

II. Statutory Provisions in Mainland China and Hong Kong

Before discussing the details of *Gao Haiyan* decision and its potential implications, we shall first give a brief overview of the statutory provisions governing arbitrators who act as mediators in mainland China and Hong Kong. Experience and empirical research show that the way arbitrators conduct proceedings is greatly influenced by

¹¹ See, for instance, E. ONYEMA, *The Use of Med-Arb in International Commercial Dispute Resolution*, 12 *Am. Rev. Int’l Arb.* (2001), p. 415.

¹² See, for instance, A. REDFERN/ M. HUNTER, *Law and Practice of International Commercial Arbitration* (5th ed.), Oxford University Press 2009, p. 48.

¹³ *Gao Haiyan and Xie Heping v. Keeneye Holdings Ltd and New Purple Golden Resources Development Ltd*, [2011] HKE 514, Court of First Instance, 12 April 2011.

¹⁴ *Gao Haiyan and Xie Heping v. Keeneye Holdings Ltd and New Purple Golden Resources Development Ltd*, CACV 79/2011, Court of Appeal, 2 December 2011.

¹⁵ The new Hong Kong Arbitration Ordinance (Cap. 609) was approved by the Hong Kong Legislative Council on 10 November 2010. It came into effect on 1 June 2011, replacing the existing Arbitration Ordinance (Cap. 341). The Ordinance draws heavily on the Model Law, with certain modifications (and additions), which reflect the specific features of arbitration in the region.

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the way judges in their home jurisdiction conduct court proceedings.¹⁶ It is thus helpful to look first to the state of law in national courts and then examine the law and practice of arbitration in the two jurisdictions.

A. Recognition of the Combined Practice in Mainland China

Mediation has a long history in China and has been deeply influenced by the Confucian philosophy emphasizing harmony and the avoidance of conflict.¹⁷ Despite the significant economic, political and social changes in modern China, mediation still plays an important role in China's contemporary dispute resolution mechanism. In this setting, mediation is used both on its own and in combination with adversarial procedures, such as litigation and arbitration.

Chinese judges customarily promote settlement to relieve their heavy case-load and to reduce judicial costs. After a short period in the 1980s and 1990s when the function of mediation was weakened¹⁸, since 2003 the Communist Party and the courts have shifted their focus to "mediatory" justice and away from "adjudicatory" justice.¹⁹ The Civil Procedure Law of China of 2007 ("CPL 2007")²⁰ allows judges to mediate the disputes before them. Article 9 of the CPL 2007 provides that "*when adjudicating civil cases, the people's courts may mediate the disputes according to the principles of voluntariness and lawfulness. If a mediation agreement cannot be reached, the courts shall render judgements without delay.*" Furthermore, following the promulgation of the Supreme People's Court ("SPC") Provisions on Court's Civil Mediation Work in 2004²¹, courts have revised their incentive mechanisms to encourage court-mediation; many have established a

¹⁶ See G. KAUFMANN-KOHLER/ V. BONNIN, Arbitrators as Conciliators: A Statistical Study of the Relation between an Arbitrators' Role and Legal Background, 18 *ICC Bulletin* 2 (2007), p. 79-85.

¹⁷ On the mediation tradition in China, see K. CLARK, The Philosophical Underpinning and General Workings of Chinese Mediation Systems: What Lessons Can American Mediators Learn?, 2 *Pepp. Disp. Resol. L.J.* 117 (2002), p. 117-139; KUN FAN, Mediation Tradition and Innovation in China (in Chinese), 5 *Journal of Justice* (2010), p. 64-76; XU XIAOBING, Different Mediation Traditions: A Comparison between China and the U.S., 16 *Am. Rev. Int'l Arb.* (2005), p. 515-545; ZENG XIANYI, Mediation in China-Past and Present", 17 *Asia Pacific L. Rev.* Special Issue on Mediation (2009), p. 1-29.

¹⁸ HUALING FU / R. CULLEN, From Mediatorial to Adjudicatory Justice: The Limits of Civil Justice Reform in China (November 25, 2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1306800>.

¹⁹ HUALING FU, Access to Justice in China: Potentials, Limits and Alternatives (2009), available at <<http://ssrn.com/abstract=1474073>>.

²⁰ Adopted by the Standing Committee of the National People's Congress in October 2007 and entered into force on 1 April 2008.

²¹ Adopted at the 1321st meeting of the Judicial Committee of the Supreme People's Court on August 18, 2004, and became effective as of November 1, 2004. The Provision requests that "*all cases that can be mediated should be mediated*".

target settlement rate for civil litigation.²² As a result, an increasing number of cases are *settled* rather than *adjudicated*. The percentage of civil cases resolved through mediation in China increased from 31% in 2004²³ to 65.29% in 2010²⁴, doubling within six years.

Deeply influenced by court practice, there is also a high usage of arb-med and med-arb in China. When the Arbitration Law of China (“Arbitration Law”) was promulgated in 1995, the combination of mediation and arbitration was first permitted and even actively encouraged. Article 51 of the Arbitration Law provides that “*the arbitral tribunal may carry out mediation prior to giving an arbitral award. The arbitral tribunal shall conduct mediation if both parties voluntarily seek mediation. If mediation is not successful, an arbitral award shall be made promptly* (emphasis added).” Most institutional arbitration rules in China also expressly recognize the combination of mediation and arbitration. The new CIETAC Arbitration Rules, which came into effect on 1 May 2012 (“CIETAC Rules 2012”), provide that “*where both parties desire to conciliate, or where one party desires to conciliate and the other party’s consent has been obtained by the arbitral tribunal, the arbitral tribunal may conciliate the case during the course of the arbitration proceedings.*”²⁵ Similarly, the Beijing Arbitration Commission (“BAC”) Arbitration Rules of 2008 (“BAC Rules 2008”) allow the arbitral tribunal to mediate a case in a manner, which the tribunal considers appropriate at either the request of both parties or upon obtaining the consent of both parties.²⁶ In practice, Chinese arbitrators systematically propose mediation to parties in an arbitration proceeding.²⁷

B. Recognition of the Combined Practice in Hong Kong

In Hong Kong, mediation is one of the main objectives of the Civil Justice Reform of 2009. In the Practice Direction on Mediation, which came into effect on 1 January 2010, one of the underlying objectives of the Rules of the High Court and the District Court is to facilitate settlement:

“The court has the duty as part of active case management to further that objective by encouraging the parties to use an alternative reso-

²² For a discussion on the court’s return to mediation, see C. MINZNER, *China’s Turn Against Law*, 59 *Am. J. Com. L.* 4 (2011); HUALING FU (note 19).

²³ The SPC Work Report of 2005.

²⁴ The SPC Work Report of 2011.

²⁵ Article 45(1) of the CIETAC Rules 2012. Similar provisions were contained in Article 40 of the CIETAC Rules 2005.

²⁶ Article 39 of the BAC Rules 2008.

²⁷ According to a series of interviews conducted by the author, together with Professor Gabrielle Kaufmann-Kohler, during a 2007 research trip in China. The trip was part of a research project on international arbitration in China, directed by Professor Kaufmann-Kohler and funded by Swiss National Science Foundation.

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lution procedure (“ADR”) if the court considers that appropriate and facilitating its use (“the duty in question”). The court also has the duty of helping the parties to settle their case. The parties and their legal representatives have the duty of assisting the court to discharge the duty in question.”²⁸

In line with the ADR movement in judicial practice, the new Ordinance, borrowed and enhanced from the old regime, contains express provisions on the power of arbitrators to act as mediators. Under the Ordinance, an arbitrator may act as a mediator after the arbitration proceedings have commenced, provided that all parties give their written consent.²⁹ If an arbitrator acts as a mediator, the arbitration proceedings are stayed to ensure that mediation is given the maximum chance of success.³⁰ If mediation fails, the arbitrator-mediator is required to disclose to all parties any confidential information obtained during the mediation which he or she considers to be “*material to the arbitral proceedings*”.³¹ The Ordinance further provides that no challenge shall be made to the arbitrator solely on the ground that the arbitrator previously served as a mediator in connection with the dispute submitted to arbitration.³² Despite this statutory recognition, however, in practice arbitrators in Hong Kong rarely exercise such a dual role due to the problems inherent in arb-med proceedings.

III. The *Gao Haiyan* Case

A. Facts and Procedural Backgrounds

The original dispute in this case involved a share transfer agreement and a supplementary share transfer agreement (“Agreements”) executed by Gao Haiyan and his wife (“Applicants”) and Keeneye Holdings Ltd and New Purple Golden Resources Development Ltd (“Respondents”). In June 2009, the Applicants commenced litigation in Hong Kong alleging that the Agreements were void on the grounds of duress and misrepresentation. In the meantime, in July 2009 the Respondents commenced arbitration proceedings before the XAC claiming that the Agreements were valid.

The arbitral tribunal (“Tribunal”) consisted of three arbitrators. At the end of the first arbitration hearing in December 2009, the Tribunal asked whether the

²⁸ PD 31 – Practice Direction on Mediation, effective from 1 January 2010. For a commentary, see KUN FAN, Mediation and Civil Justice Reform in Hong Kong, 27 *The International Litigation Quarterly* 2, p. 11-14.

²⁹ Section 33(1) of the Ordinance.

³⁰ Section 33(2) of the Ordinance.

³¹ Section 32(4) of the Ordinance.

³² Section 32(3)(a) of the Ordinance.

parties were agreeable to mediation. The written record of the proceedings showed that the parties “*agreed*” with the suggestion of mediation. Following the first hearing, the Tribunal suggested that the parties to settle the case by the Respondents paying RMB 250 million to the Applicants (“Proposal”). The Tribunal appointed Mr X (Secretary General of XAC) and Mr Y (one of the arbitrators) to contact the parties with the Proposal. On 27 March 2010, over dinner in a hotel in Xi’an, Mr X and Mr Y conveyed the Proposal to Mr Z, presented as “*a person related to*” the Respondents, and asked him to “*work on*” the Respondents. The Respondents refused the Proposal. The Applicants also subsequently rejected the Proposal. A second hearing took place in May 2010, but no complaint was brought about the conduct of Mr X and Mr Y.

The arbitral award rendered in June 2010 was different from the suggestion intimated by Mr X and Mr Y back in March 2010. The award dismissed the Respondent’s claim in its entirety and revoked the Agreement. The Tribunal “*recommended*” that the Respondents “*shall take the initiative to pay RMB 50 million as the economic compensation to [the Applicants] in order to end the disputes between the parties*”³³. However, this recommendation was “*based on the fairness and reasonableness arbitration principles, it is not binding and not included in the arbitral matters*”³⁴.

In the Respondents’ application to the Xi’an Intermediate Court (“Xi’an IPC”) to set aside the award, the Respondents contended that the difference in the outcome was due to Mr X’s manipulation and the Tribunal’s “*favouritism and malpractice*”³⁵. The Xi’an IPC dismissed that application and held that the mediation complied with the XAC Arbitration Rules.

When the Applicants sought to enforce the award in Hong Kong, the CFI found that the conduct at the hotel on 27 March 2010 (a so-called “arb-med” procedure) would cause a fair-minded observer to apprehend a real possibility of bias on the part of the Tribunal. After finding apparent bias, the CFI refused to enforce the award on the basis that enforcement would be contrary to public policy in Hong Kong, pursuant to section 40E(3) of Hong Kong’s old Arbitration Ordinance (cap 341) (the old Ordinance was then in force, but has since been superseded by section 95 of the new Ordinance).³⁶

The Applicants subsequently appealed to the Court of Appeal. On 2 December 2011, the Court of Appeal allowed the appeal and approved enforcement of the award in Hong Kong on the basis that the Respondents had waived their right of objection. The Court of Appeal also held that the arb-med procedure did not create apparent bias giving rise to an issue of public policy.³⁷

³³ Award, *Gao Haiyan v. Keeneye*, CFI (note 13), para. 29.

³⁴ *Ibid.*

³⁵ *Ibid.*, para. 30.

³⁶ *Gao Haiyan v. Keeneye*, CFI (note 13).

³⁷ *Gao Haiyan v. Keeneye*, Court of Appeal (note 14).

B. Reasoning of the CFI

In considering the Respondents' application to resist enforcement of the award, the issue before the Court was whether it would be contrary to public policy to enforce the award under Section 40E(3) of the Arbitration Ordinance. In particular, the CFI focused on whether the award was made in circumstances, which would cause a fair-minded observer to apprehend a real possibility of bias on the part of the Tribunal.

1. The Parties "Agreed" to Arb-Med

There was a dispute as to whether the parties unequivocally agreed that the Tribunal could attempt to resolve the parties' differences through mediation before it conclusively determined the substantive dispute. The Applicants argued that the parties' lawyers definitely agreed to mediate. The Respondents claimed that the parties' lawyers only signified their clients' willingness to consider resolving their dispute through mediation. The lawyers gave conflicting oral evidence on this point. The written record of the hearing noted only that the parties "agreed" to the Tribunal's suggestion of mediation.

The judge accepted the written record of the proceedings, rather than relying on the recollection of either lawyer. He proceeded on the basis that the parties' lawyers agreed on behalf of their clients that the Tribunal could first attempt to resolve the matter as mediators, before themselves determining the merits of the dispute as arbitrators.

2. The Inherent Risk of Bias When an Arbitrator Acts as a Mediator in the Same Proceeding

The next question is whether an arbitrator who is also acting as a mediator in the same proceeding creates a risk of actual or apparent bias. In other words, the judge needs to decide whether the arbitrators' conduct in an arb-med proceeding would cause a fair-minded observer to apprehend a real possibility of bias on the part of the Arbitral Tribunal.³⁸

The judge noted that there was nothing wrong in principle with arb-med. For instance, the UNCITRAL Model Law on International Commercial Arbitration (with Amendments as adopted in 2006) ("Model Law"), enacted as law in Hong Kong under the Ordinance, expressly allows arb-med upon the parties' agreement. The XAC Arbitration Rules, which governed the arbitration, also expressly allow the arbitrators to mediate with the parties' consent.³⁹

Even though arb-med is permitted in principle, the judge pointed out that, from the point-of-view of impartiality, the arb-med process creates difficulties that

³⁸ *Parter v. Magil*, [2002] AC 357 (HL).

³⁹ Article 36 of the XAC Arbitration Rules.

are self-evident. The judge highlighted the distinction between mediation and arbitration as follows:

“A mediator typically meets individually with the parties to explore the concerns of the latter and the possible settlement plans which the latter may broach. An arbitrator, on the other hand, must avoid unilateral dealings with the parties.”⁴⁰

Because of the important differences between the mediation and the arbitration processes, the risk of a mediator turned arbitrator appearing to be biased will always be great. Therefore, an arbitrator taking on the role of a mediator should exercise that role with extreme care.

3. *The Conduct in the Hotel on 27 March 2010 Established an Appearance of Bias on the Part of the Tribunal*

Returning to the facts of *Gao Haiyan*, the judge should determine whether what happened at the hotel on 27 March 2010 would cause a fair-minded observer to apprehend a real possibility of bias on the part of the Tribunal.

The Xi'an IPC accepted that the hotel event was part of an unsuccessful mediation by the arbitral tribunal. The CFI proceeded on that basis, albeit with serious reservations, because the Tribunal's procedure varied from the requirements in Article 37 of the XAC Arbitration Rules⁴¹. The judge made several observations which appear inconsistent with the XAC Arbitration Rules. First, neither the Tribunal as a whole nor its presiding arbitrator conducted the mediation attempt. Instead, the mediation was conducted by one arbitrator (Mr Y) and the Secretary General of the XAC (Mr X). Second, there is no evidence that the parties were ever asked to approve Mr X as a mediator. Instead, Mr X simply appears to have been unilaterally asked by the Tribunal to become involved. Third, it is unclear whether the parties ever consented to the time and place of the mediation (during dinner in a hotel). Fourth, Mr X and Mr Y apparently presented the settlement proposal of RMB 250 million on their own initiative; there is no evidence as to how that amount was decided upon for a mediation proposal. Fifth, mediations are normally conducted at a formal location, such as an office or a conference

⁴⁰ *Gao Haiyan v. Keeneye*, CFI (note 13), para. 74.

⁴¹ Article 37 of the XAC Arbitration Rules provides that “a mediation may be conducted by the arbitral tribunal or the presiding arbitrator (hereinafter called mediator). With the approval of the parties, any third party may be invited to assist the mediation, or they may act as the mediator. The mediation may be proceeded simultaneously between both parties or with one party separately; the time and place for that mediation are confirmed after the mediator obtains the consent from the parties. The mediator may put forward a mediation resolution plan for the parties' reference, and the parties may accept, refuse to accept, or render some amendment(s) to the resolution plan set forth by the mediator. No written record of the specific process of that mediation shall be made, but the content of the mediation agreement shall be made as a written record.”

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room. It is odd for a mediation to be conducted during dinner at a hotel restaurant with only one of the parties represented.

Even if what happened at the hotel was an authorized mediation, the judge found that the arb-med process was not conducted in a manner to avoid apparent bias. The judge based his analysis on the undisputed facts about what happened at the hotel on 27 March 2010 (“the minimalist version”). The judge concluded that the minimalist version was an insufficient basis for finding actual bias, but was sufficient to give rise to an apprehension of apparent bias. Against the background of the reservations mentioned earlier, the judge found that there would be more than ample justification for a fair-minded observer’s apprehension. The judge specifically pointed out the following awkward, unanswered questions (among others):

“What did [Mr X and Mr Y] mean when, having made the proposal of RMB 250 million, they asked [Mr Z] «to work on» the Respondents to accept the proposal? Why would [Mr X and Mr Y] be asking [Mr Z] to «work on» the Respondents when [Mr X and Mr Y] were supposed to be the mediators? [...] The expression «work on» has overtones of [Mr X and Mr Y] actively pushing for settlement at RMB 250 million. The fear is that [Mr X and Mr Y] 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.”⁴²

“Why was a figure of RMB 250 million proposed by [Mr X and Mr Y], without authorisation from the Applicants or [any] 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 [Mr Z] to «work on» the Respondents? The impression conveyed, rightly or wrongly, is that [Mr X and Mr Y] were acting on their own on an initiative which favoured the Applicants.”⁴³

“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 [hotel] to be what ought to be paid to the Applicants in return for the Share Transfer Agreements being treated as valid). Precisely how did [Mr X and Mr Y] come up with the figure of RMB 250 million? [...] Again the impression conveyed, rightly or wrongly, is that [Mr X and Mr Y] were favouring the Applicants.”⁴⁴

⁴² *Gao Haiyan v. Keeneye*, CFI (note 13) paras 59-61.

⁴³ *Ibid*, paras 62-63.

⁴⁴ *Ibid*, paras 64-66.

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“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 [Mr X and Mr Y] had chosen the venue in order to push their RMB 250 million solution to [Mr Z].”⁴⁵

In short, the Court held that although the parties agreed to have the arbitrators acting as mediators in an arbitration proceeding, the mediation was not conducted according to the relevant arbitration rules. The Court further held that the manner in which the mediation was conducted would give a fair-minded observer an impression that the Tribunal favoured one party over the other. Thus, the CFI decided that the award was tainted by apparent bias.

4. *The Balance of Two Compelling Public Policy Considerations*

Having found apparent bias, the CFI had to decide whether the award should be set aside based on public policy. Reyes J referred to two compelling public policy considerations. On the one hand, there should be finality to litigation. Where the parties have opted to go to arbitration, they should be held to their choice and the resultant award should normally be enforced by the Court. On the other hand, upholding an award tainted by an appearance of bias would violate the Court’s sense of justice.

Ultimately, Reyes J held that, as a matter of Hong Kong public policy, the second consideration should be given more weight than the first. Otherwise, it would taint the idea of justice if an award with the appearance of bias was enforced in the same way as a court judgment. The court’s judgments (including awards enforced as such) must always be seen to be impartial. Reyes J considered that the same rule should apply when an award is from a foreign tribunal. Accordingly, the CFI declined to enforce the award as a matter of public policy, even though the Chinese court – the court at the seat of arbitration – had dismissed a challenge to the award based on bias.

C. Reasoning of the Court of Appeal

Subsequently, the CFI’s findings were reversed by the Court of Appeal based on the following principal grounds:

1. *Waiver of the Right to Object*

The Court first held that the Respondents failed to timely raise any objection to the arb-med procedure during the arbitration itself and had therefore waived their right

⁴⁵ *Gao Haiyan v. Keeneye*, CFI (note 13) para. 67.

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to do so in the enforcement proceedings. The XAC Arbitration Rules, which governed the proceedings, specifically provided for waiver of the right to object in such circumstances.⁴⁶ The Court of Appeal also noted that a party cannot keep a complaint about impropriety or bias “*up its sleeve*” for potential use at a later point in time. For these reasons, it held that a clear case of waiver had been established and that the Respondents had lost their right to complain about the arb-med procedure.

2. *The Arb-Med Procedure Did Not Establish Apparent Bias Giving Rise to an Issue of Public Policy*

The Court’s second ground for overturning the decision was that the arb-med procedure did not disclose apprehended bias giving rise to an issue of public policy. This part of the Court of Appeal’s judgment is likely to give rise to considerable discussion and debate, given the striking factual circumstances of this case. The Court of Appeal specifically addressed the awkward, unanswered questions, which the CFI considered to convey an impression of bias to a fair-minded observer.

a) On the Discrepancy between Settlement Proposal and the Final Award

With regard to how Mr X and Mr Y came up with RMB 250 million, the Court of Appeal found that whether or not that figure was reasonable would depend to some extent on an evaluation of the Applicants’ chance of succeeding in the arbitration. The Court of Appeal held that the court in Hong Kong was not in a position to express any view on the likelihood of such success. Furthermore, the Court stated that such an analysis may also depend on the value of the shares at issue. Without commenting on the correctness of the valuation, the Court of Appeal noted that the Applicants had rejected the proposed settlement at RMB250 million, and the evidence showed that Applicants were in the course of raising RMB250 million when the award was made. As a result, the Court of Appeal held that the RMB250 million proposed settlement was not itself evidence of bias in favour of the Applicants.

The Court also concluded that the RMB50 million in the actual award bore no relation to the RMB250 million suggested at the mediation. Rather, the RMB50 million was a suggested “*compensation*” for the Applicants, who had expanded RMB30 million in the acquisition of the Baijun shares (an amount they had not sought to recover in the Arbitration). Accordingly, the Court of Appeal rejected the claim that the difference between the RMB250 million proposed settlement and

⁴⁶ Article 5 of the XAC Arbitration 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.”

RMB50 million award would give rise to an apprehension of apparent bias by a fair-minded observer.

b) On the Expression of “Work On” the Respondents

In deciding whether the use of the expression “*work on*” by Mr X and Mr Y conveyed an impression of bias, the Court of Appeal concluded that such a determination might depend upon an understanding of how mediation was conducted in Mainland China. It noted that the expression “*work on*” (“*做工作*”) was a common expression in the Mainland. It appeared three times in the Chinese original of Mr Z’s witness statement of 11 September 2010 in the Xi’an Court:

“[...] [Mr X], 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. [...]” (emphasis added).⁴⁷

Contrary to the CFI’s findings, the Court of Appeal concluded that there was no indication that Mr Z’s had ever “*pushed*” the other shareholders.

c) On the Setting of the Mediation

The Court of Appeal held that a Mainland court was better able to decide whether the conduct of mediation over dinner at a hotel was acceptable. Even though the Court of Appeal acknowledged concern about the way in which the mediation was conducted – because mediation is normally conducted differently in Hong Kong – it emphasized again the importance of understanding how mediation is normally conducted in the place where it actually occurred. In this regard, it placed considerable weight upon the fact that the local court in Xi’an with supervisory jurisdiction over the arbitration had refused to set aside the award. According to the Court, the Xi’an court’s refusal was a very strong consideration to take into account in deciding whether or not to enforce an award.

⁴⁷ *Gao Haiyan v. Keeneye*, Court of Appeal (note 14), para. 95.

3. *Balance of Public Policy Considerations*

Lastly, the Court of Appeal, citing *Hebei Import & Export Corp*⁴⁸ and relevant English authority⁴⁹, narrowly construed the public policy consideration, holding that enforcement of an award should be refused only if its enforcement “*would be contrary to the fundamental conceptions of morality and justice’ of the forum*”⁵⁰. The Court concluded that the circumstances of the arb-med procedure did not meet this heavy standard in Hong Kong, and, thus, the finality of the award should be upheld.

IV. Implications of *Gao Haiyan*

Because arbitration is now being criticized for becoming “*judicialized*,”⁵¹ due to the slowness and expensiveness of the procedure, practitioners are beginning to see the merits of integrating mediation and other ADR means into arbitration. The Chinese experience with arb-med and med-arb has drawn increasing attention from other jurisdictions. The decision in *Gao Haiyan* may give some comfort to parties engaging in arb-med or med-arb procedures in mainland China, where practices may differ significantly from those in Hong Kong and other jurisdictions. According to the Court of Appeal, if the conduct of the arb-med procedure is acceptable in the jurisdiction in which it took place, it will not amount to a breach of public policy in Hong Kong unless it was so serious as to be contrary to fundamental conceptions of morality and justice. Of course, it remains to be seen whether or not the Court of Appeal’s findings in this regard will be upheld in the event of any appeal or future cases.

With that being said, labelling a process as either “arb-med” or “med-arb” does not mean that anything goes. There are appropriate and inappropriate ways of conducting such a proceeding. The discussions on appropriateness of conduct in the so-called arb-med procedure in *Gao Haiyan* and CFI’s finding on apparent bias have garnered a lot of discussion regarding the boundary between the role of an arbitrator and the role of a mediator. It highlights the importance of ensuring that any mediation conducted by arbitrators is done in an appropriate manner to ensure that, if the mediation does not end in a settlement and the arbitration proceedings resume, an award will be enforceable. It warns mediators (who might later become arbitrators) to avoid, wherever possible, conduct which might give rise to allega-

⁴⁸ *Hebei Import & Export Corp v. Polytek Engineering Co Ltd*, [1999] 2 HKCFAR 111.

⁴⁹ Sir Anthony Mason NPJ and Litton PJ, cited in *Gao Haiyan v. Keeneye*, Court of Appeal (note 14), paras 50-51.

⁵⁰ *Gao Haiyan v. Keeneye*, Court of Appeal (note 14), para. 105.

⁵¹ B. OPPETIT, *Théorie de l'arbitrage*, Presses Universitaires France 1998, p. 27-34.

tions of procedural irregularities or other grounds to challenge an award or its enforcement.

The question is, how can an arb-med or med-arb process be carried out effectively without impeaching the idea of due process and natural justice? What safeguards should an arbitrator take to avoid or minimize the risks that a subsequent award may be susceptible to challenge? In this context, the Report of the Center for Effective Dispute Resolution Commission on Settlement in International Arbitration (“CEDR Report”)⁵², the Protocols for International Arbitrators Who Dare to Settle Cases proposed by Harold Abramson (“Protocol”)⁵³, and the safeguards when arbitrators facilitate settlements proposed by Professor Kaufmann-Kohler (“Safeguards”)⁵⁴ may offer some useful guidelines. In light of the CEDR Report, the Protocol, the Safeguards and the specific issues discussed in *Gao Haiyan*, the following safeguards should be considered if an arbitrator is to carry out the role of a mediator in the same proceeding.

A. Selecting the Right Neutral Party

“Arbitration is as good as arbitrators”.⁵⁵ An arb-med (or med-arb) proceeding is only as good as the arb-mediators (or med-arbitrators) involved. If the parties wish to have the same neutral party acting in both roles, he or she must “*be trained in the ethics, norms and techniques of each process*”.⁵⁶

The demands of the jobs and the skills required for a good mediator and a good arbitrator vary significantly. Such differences can be illustrated by an anecdote from a world-class neutral party, who reported that his wife always knew whether he had arbitrated or mediated that day: “*If he arbitrated he came home in time for dinner with energy for companionship and conversation. If he mediated he came home very late, emotionally drained, and went immediately to bed.*”⁵⁷ A

⁵² The Report was conducted by the Commission set up by CEDR, co-chaired by Lord Wolff and Professor Gabrielle Kaufmann-Kohler, for the purpose of investigating the different approaches to settlement in international arbitration. The list of the members of the CEDR Commission is available in the CEDR Final Report (November 2009), p. 28. The CEDR Report is intended to provide tools to increase the prospects of parties being able to settle their disputes without the need to proceed through the conclusion of arbitration proceedings, after having taken into account the different approaches currently adopted for the encouragement of settlement within arbitration proceedings, including the approaches in China, Hong Kong, Germany and Switzerland, as well as typical common law approach.

⁵³ H. ABRAMSON, Protocols for International Arbitrators Who Dare to Settle Cases, 10 *Am. Rev. Int'l Arb.* 1 (1999), p. 1-18.

⁵⁴ G. KAUFMANN-KOHLER (note 1), p. 203-205.

⁵⁵ This sentence is frequently invoked and has become an adage in international arbitration. For a list of references, see T. CLAY, *L'arbitre*, Dalloz 2001, p. 11, footnote 3.

⁵⁶ H. ABRAMSON (note 53), protocol 1, p. 9.

⁵⁷ E. SUSSMAN, Developing an Effective Med-Arb/Arb-Med Process, 2 *NYSBA New York Dispute Resolution Lawyer* 1 (2009), p. 73.

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mediator generally assumes a number of roles in seeking to help parties reach a mutually satisfactory resolution, including organizing parties and information, assisting in understanding, assessing negotiation strategies, serving as a listener, coach, coordinator and communication director, assisting in developing workable solutions, and helping parties overcome psychological barriers to settlement (with skilful techniques such as normalizing, neutralizing, rephrasing, separating people from the problem, forward-looking, and interest-based⁵⁸).⁵⁹ An arbitrator, on the other hand, often assumes the role of managing the proceeding efficiently, providing a fair opportunity for each side to present its case and analysing the facts and the law based on the evidence to arrive at the ultimate award.

The main difference between the two functions is that the mediator's role requires many of the skills utilized by a psychologist, whereas the arbitrator's role requires many of the skills utilized by a judge.⁶⁰ Therefore, only those possessing the skills required both for a mediator and an arbitrator are suitable to wear both hats.

B. Informed Written Consent and Waiver of Challenge

There was a dispute in *Gao Haiyan* as to whether the parties unequivocally accepted the process of arb-med. Conflicting oral evidence was provided by the parties' lawyers. The CFI resolved the dispute by relying on the written record of the hearing, which notes the consent of the parties to the Tribunals suggestion of mediation. This brings our attention to the importance of obtaining informed written consent of the parties before the arbitrator may start an arb-med process. Such informed consent will imply a waiver of the right to challenge the arbitrator or the award if settlement fails.⁶¹ More specifically, "*consent must be given to the principle of the arbitrator acting as settlement facilitator and to the procedure to be followed*".⁶²

C. No Coerced Settlement

One of the concerns with the so-called arb-mediators' conduct in *Gao Haiyan* is the way they asked Mr Z to "*work on*" the Respondents. The CFI found that such conduct gave an impression that the mediators were actively pushing their proposal to be accepted by the Respondents, which conveyed an impression of bias to a fair-

⁵⁸ See, R. FISHER/ W. URY/ B. PATTON, *Getting to Yes: Negotiating Agreement Without Getting In* (2nd ed.), Penguin 1999.

⁵⁹ K. KOVACH, Mediation, in M. MOFFITT/ R. BORDONE (eds), *The Handbook of Dispute Resolution*, Jossey-Bass 2005, p. 304; E. SUSSMAN (note 57), p. 73.

⁶⁰ E. SUSSMAN (note 57), p. 73.

⁶¹ G. KAUFMANN-KOHLER (note 1), p. 204.

⁶² *Ibid.*

minded observer.⁶³ Even though the Court of Appeal did not find that the evidence supported a finding of coercion,⁶⁴ the discussion raised some general concerns that giving a settlement facilitator the power to decide the case may create a coercive atmosphere for settlement. Therefore, when assisting parties in reaching a settlement, the neutral party should respect the right of each party to enter into a voluntary agreement.⁶⁵ The arb-mediator or med-arbitrator must be especially careful “to avoid any initiatives that may be viewed as coercive in order to preserve the principle of party self-determination”.⁶⁶

D. The Range of Settlement Initiatives that Arbitrators May Engage In

When the parties agree to have the same neutral exercise both roles, there must be limits on the settlement techniques that may be used to ensure the integrity of the two processes. A neutral acting in two roles generally has less involvement in the settlement initiatives than in a traditional mediation (the settlement initiatives used by the arbitrators are sometimes referred to as “quasi-mediation”⁶⁷). With the warnings of *Gao Haiyan*, practitioners should rethink the range of appropriate settlement initiatives, in particular, whether it is appropriate (a) to meet with the parties separately, (b) to indicate any opinion on the merits or (c) to give the parties a settlement proposal.⁶⁸

1. Meeting the Parties Separately, or “Caucusing”?

One of the main concerns is the risks associated with the neutral meeting the parties separately, or “caucusing”, during the mediation phase. The CFI in *Gao Haiyan* specifically pointed out the risk inherent in a caucus:

“the mediator who acts as arbitrator obtains confidential information in the course of one-on-one meetings with a party. That information may consciously or sub-consciously influence the mediator when sit-

⁶³ *Gao Haiyan v. Keeneye*, CFI (note 13), paras 59-61.

⁶⁴ *Gao Haiyan v. Keeneye*, Court of Appeal (note 14), para. 95.

⁶⁵ G. KAUFMANN-KOHLER (note 1), p. 205.

⁶⁶ H. ABRAMSON (note 53), protocol 3, p. 10.

⁶⁷ H. ABRAMSON (note 53), p. 7.

⁶⁸ Settlement techniques include (i) suggesting that the parties try to negotiate a settlement; (ii) actively participating in settlement negotiations (at the parties' request); (iii) proposing a settlement formula (at the parties' request); (iv) meeting with the parties separately to discuss settlement options (with the parties' consent); (v) hinting at the possible outcome of the arbitration; and (xi) rendering a “case evaluation” (at the parties' request). See C. BUHRING-UHLE/ L. KIRCHHOFF/ G. SCHERER, *Arbitration and Mediation in International Business*, Kluwer Law International 2006, p. 121-123. (The authors asked practitioners about the frequency and appropriateness of the use of these techniques).

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ting as arbitrator. It would be unfair on the other party for the mediator turned arbitrator to act upon the confidential information without first disclosing the same and affording that other party a chance to comment on any prejudicial impact of the confidential information.⁶⁹

In light of the risks, the Commission recommends that the neutral party refrain from using caucus in a med-arb or arb-med proceeding, unless either (1) such practices are acceptable in the courts of all jurisdictions which might have reason to evaluate the validity of the tribunal's award or (2) the parties explicitly consent to this approach and its consequences.⁷⁰

With that being said, the Commission also recognizes that such concerns may not arise where the arbitration takes place in jurisdictions where the courts consider a caucus to be a common and accepted practice.⁷¹ The use of caucus is indeed a common and accepted practice in arb-med or med-arb procedures in China.⁷² Many mediators consider caucuses to be critical to the success of mediation. Meeting with parties separately allows the mediator to better understand the parties' real interests and to better facilitate a negotiated settlement. Caucusing also allows mediators to provide a "reality check" to a party with an overly optimistic view of its chances of success, causing that party to reconsider the case on its merits and, thereby, increase the possibility of a settlement.⁷³ The Court of Appeal decision in *Gao Haiyan* seems to allow the use of caucus when it is an acceptable practice in the jurisdiction where the arb-med took place.

However, *Gao Haiyan* also offers some warnings about the use of a caucus: extreme precaution needs to be taken in light of the due process and impartiality issues raised. The CEDR Report recommends that the arbitrators explain to the parties the risks associated with caucus and take necessary steps to minimize the risk, especially with respect to confidential information obtained during the caucus. On this issue, the Ordinance requires the mediator-turned arbitrator to disclose the confidential information that he considers "*material*" to the arbitration proceeding.⁷⁴ Another approach is the prohibition against using information obtained dur-

⁶⁹ *Gao Haiyan v. Keeneye*, CFI (note 13), para. 75.

⁷⁰ Section 2.4.3 of the CEDR Report.

⁷¹ Article 8 of the Safeguards for Arbitrators Who Use Private Meetings with Each Party As a Means of Facilitating Settlement, Annex 2 of the CEDR Report.

⁷² G. KAUFMANN-KOHLER/ KUN FAN (note 5), p. 498.

⁷³ For a discussion on the benefits of caucus, see C. BUHRING-UHLE/ L. KIRCHHOFF/ G. SCHERER (note 68), p. 184-185.

⁷⁴ Section 33(4) of the Ordinance provides that, "*If (a) confidential information is obtained by an arbitrator from a party during the mediation proceedings conducted by the arbitrator as a mediator; and (b) those mediation proceedings terminate without reaching a settlement acceptable to the parties, the arbitrator must, before resuming the arbitral proceedings, disclose to all other parties as much of that information as the arbitrator considers is material to the arbitral proceedings.*" Section 66(3) of the Singapore

ing the mediation proceedings in a later arbitration process, as provided in the Arbitration Rules of the CIETAC and the BAC.⁷⁵ Both approaches were considered by the Commission.⁷⁶ However, neither approach may totally eliminate the risks of potential contamination of the neutral party when he or she is exposed to confidential information during private meetings. An alternative approach proposed in the Protocol might be worth discussing. The parties may try different configurations of the arbitral tribunal. For instance, when there is a three-member arbitral tribunal, the parties may agree to have the two co-arbitrators to serve as mediators without the involvement of the chair. The use of caucus by the mediators in this circumstance would be permissive, as the chair remains uncontaminated by any confidential information that might have been obtained during the private meetings. If settlement efforts are unsuccessful, the chair could serve as the sole arbitrator, or the three neutral parties could all resume their roles as arbitrators.⁷⁷ This and other possibilities could be further explored and tested to preserve the impartiality of the neutral party as arbitrator while opening opportunities for settlement and improving the efficiency of the process.

2. *Opinions on the Merits?*

The CEDR Rules for the Facilitation of Settlement in International Arbitration (“CEDR Rules”) expressly permit the arbitral tribunal to provide all parties with preliminary non-binding findings of law and fact on key issues in the arbitration.⁷⁸ This does not appear to be the general practice in China. Expressing views as to the merits of the dispute is viewed with extreme caution by Chinese arbitrators, as they think it may affect their impartiality.⁷⁹

In *Gao Haiyan*, the CFI’s finding of apparent bias was based on the minimalist version of the facts, according to which RMB 250 million was raised as

International Arbitration Act (Revised Edition 2002, incorporating amendments as at 1 January 2010) contains a similar provision.

⁷⁵ Article 45(9) of the CIETAC Rules 2012, provides that, “*where conciliation fails, any opinion, view or statement, and any proposal or proposition expressing acceptance or opposition by either party or by the arbitral tribunal in the process of conciliation, shall not be invoked by either party as grounds for any claim, defense or counterclaim in the subsequent arbitration proceedings, judicial proceedings, or any other proceedings*”, and further, “*where conciliation fails, the arbitral tribunal shall proceed with the arbitration and render an arbitral award*”. Article 39(4) of the BAC Rules 2008 contains a similar provision.

⁷⁶ Article 7(1) of the Safeguards for Arbitrators Who Use Private Meetings with Each Party As a Means of Facilitating Settlement, Annex 2 of the CEDR Report.

⁷⁷ Five configurations of the arbitral tribunal in helping parties settle a case were proposed in H. ABRAMSON (note 53), protocol 8, p. 13-14.

⁷⁸ Article 5 (1) 1.2 of the CEDR Rules for the Facilitation of Settlement in International Arbitration, Annex 1 of the CEDR Report.

⁷⁹ G. KAUFMANN-KOHLER/ KUN FAN (note 5), p. 488.

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a settlement proposal, not as the Tribunal's decision on the merits. Respondents challenged that finding on appeal, arguing that Mr X informed Mr Z that the Tribunal had decided on a "result" of the arbitration –that the Share Transfer Agreements were valid but the Respondents should pay the Applicants RMB 250 million. In light of the risks of apparent bias surrounding the debates in *Gao Haiyan*, it may be most prudent for the arbitrator to refrain from expressing his or her opinion on the merits, unless both parties request such an evaluation, which may be common practice in certain jurisdictions. The arb-mediators or med-arbitrators must ensure at all times that nothing is said or done in the mediation which could convey an impression of bias.

3. Settlement Proposals?

The CEDR Rules allow the arbitral tribunal to offer suggested terms of settlement as a basis for further negotiation, when requested by the parties in writing.⁸⁰ On the suitability of making settlement proposals, some Chinese arbitrators assert that they rarely give formal proposals unless one is requested by the parties. Yet others believe that a formal proposal may be helpful to speed up the process. The settlement proposal can be in the form of a specific amount to be paid, but such proposals more frequently provide a range of numbers within which the arbitrator suggests the final solution should lie. Whatever the form of the proposal might be, all of the Chinese arbitrators interviewed expressed apprehension in giving any party the impression that a refusal of their proposal would upset them or elicit an unfavourable award.⁸¹

The conduct of the arbitrators in *Gao Haiyan* does not appear to be consistent with the general precaution expressed by the Chinese arbitrators. They not only conveyed a settlement proposal but also asked the related third party to "work on" the Respondents. The CFI viewed such conduct as inappropriate, which raised concerns that the mediators were actively pushing for the settlement proposal. Even though CFI's decision was reversed by the Court of Appeal, the CFI's warnings are particularly important for all potential arb-mediators or med-arbitrators to note, so as to minimize the risk of apparent bias:

"The mediator who may be sitting as arbitrator in the same case must be particularly careful not to convey to one party or the other the impression of bias. This means that, in a mediation session with one party A, the mediator when conveying settlement suggestions apparently benefitting the other party B to the dispute, must be sensitive to the need not to appear to A as if the mediator favoured B's case."⁸²

⁸⁰ Article 5 (1) 1.3 of the CEDR Rules for the Facilitation of Settlement in International Arbitration, Annex 1 of the CEDR Report.

⁸¹ G. KAUFMANN-KOHLER/ KUN FAN (note 5), p. 487-489.

⁸² *Gao Haiyan v. Keeneye*, CFI (note 13), para. 76.

V. Conclusion

The decision of *Gao Haiyan* illustrates that, within certain parameters, an arbitrator can act as a mediator during the course of the arbitration proceeding. This dual role is also consistent with the express provision to this effect in the Ordinance. In the meantime, it provides a powerful reminder to arbitrators who act as mediators to be wary about the risks of apparent bias when wearing both hats in the same proceeding. The bottom line is that combining mediation and arbitration proceedings can be an effective means to improve the administration of justice, but the process must be conducted with the necessary safeguards to respect the fundamental principles of natural justice.