

## **15 Years of the Handover: The Rise, Discontent, and Positive Interaction of Cross-border Arbitration in Hong Kong with Mainland China**

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*Since the sovereignty handover and establishment of the Hong Kong SAR in 1997, Hong Kong has faced the dual challenges of balancing her need to facilitate a cross-border arbitration regime which is compatible with Mainland China under the principle of “one country, two systems”, and promoting herself as an international arbitration center. The two goals are at times incompatible, as accommodating the localized needs and standards of Mainland China often requires Hong Kong courts to be more “flexible” than established international arbitration standards would allow. This Article attempts to give a comprehensive analysis of the above problems. First, this Article surveys all the cases of the enforcement of Mainland China arbitration awards in Hong Kong courts since the handover to present the actual interpretation of the standard of cross-border arbitration in Hong Kong with Mainland*

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*China. Second, from this comprehensive evaluation of the enforcement landscape, this Article makes a macro-proposition over the interaction between the Mainland China arbitral regime and the Hong Kong courts, with the judgments of the Hong Kong courts serving as a catalyst for improvements in the rules and practices of the Mainland China arbitral authorities. This Article gives credit to the proper type of interaction between the two sides, i.e. the positive interaction trend where Mainland China arbitral authorities reflecting on Hong Kong's arbitral enforcement judgments, become persuaded and incentivized to change their rules to cohere with the high and internationally accepted arbitration standards that Hong Kong maintains. This Article argues that "positive interaction" is important to the cross-border arbitration development. Despite the recent halt, or even reversal, of the positive interaction trend in light of the Keeneye case, this Article argues that positive interaction should be and is likely to be resumed, as Hong Kong seeks to maintain its image as an international arbitration powerhouse and Mainland China continues to modernize and internationalize its arbitration system. In the long run, this improved cross-border arbitration consensus will bring about the healthy development of the legal cooperation between the two sides and act as an engine for economic growth in the Greater China region.*

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## INTRODUCTION

Arbitration has been a popular means of dispute resolution for handling foreign business in both Hong Kong and Mainland China.<sup>2</sup> Hong Kong has been a member of the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) since 1977, when, as the then-British colony, the United Kingdom extended its application to Hong Kong. In 1986, the People’s Republic of China acceded to the New York Convention.<sup>3</sup> Cross-border arbitration between the two sides commenced in 1989 when the first award made by China

<sup>2</sup> According to the CIETAC, foreign related arbitration cases it accepted reached the record high in 2009 of 559. *CIETAC Caseload Hits a Record High in 2009*, CIETAC NEWSLETTER (Feb. 4, 2010), <http://www.cietac.org/index/newsletter/47690b6b38216b7f001.cms>. In 2010, the 209 arbitration commissions in Mainland China accepted a total of 1219 foreign related arbitration cases. *Foreign-related Arbitration Identified as Key Priority of Arbitration Service*, CIETAC NEWSLETTER (Sept. 23, 2011), <http://www.cietac.org/index/newsletter/4772dbe48545837f001.cms>.

<sup>3</sup> China has made two reservations when agreeing to the New York Convention. First, it only recognizes awards made by member states of the Convention; second, it only applies the Convention provisions to conflicts arising from legal relationships, whether contractual or not, that are considered commercial under PRC law.

International Economic and Trade Arbitration Commission (the “CIETAC”) in Beijing sought recognition and enforcement in Hong Kong, and this marked the beginning of the cross-border arbitration system in Hong Kong with Mainland China.<sup>4</sup>

Since the sovereignty handover in 1997, as the New York Convention could no longer apply within one sovereign State, the cross-border arbitration scheme and mutual enforcement regime based on the Convention ceased to have effect between the two jurisdictions. To fill in the post-handover legal lacuna, the Supreme People’s Court of Mainland China and the Department of Justice of the Hong Kong Special Administrative Region (the “SAR”) signed an Arrangement on Mutual Recognition and Enforcement of Arbitral Awards (the “Mutual Arrangement”) between Mainland China and Hong Kong under the “one country, two systems” principle.<sup>5</sup> Under the Mutual Arrangement, Article 7 provides a number of grounds for refusal of enforcement of arbitral awards from the other side, which are similar to those listed in Article V of the New York Convention.<sup>6</sup> A matter that has created much debate and speculation over the past fifteen years, however, concerns the different understanding of the “public policy” ground at both sides and in association, the level of standard of review of the Mainland China arbitral awards in Hong Kong.<sup>7</sup> Claims on this ground are particularly easy to make and, as Hong Kong and Mainland China obviously hold on to different legal systems and ideologies, an arbitration which has been conducted according to Mainland China standards may easily be impeached under public policy grounds by applying a more stringent common law standard in Hong Kong.

After the establishment of the Hong Kong SAR in 1997, particularly after the promulgation of the Mutual Arrangement in

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<sup>4</sup> Xian Chu Zhang, *Enforcement of Arbitral Awards between Mainland China and Hong Kong: Before and After Reunification*, in *THE NEW LEGAL ORDER IN HONG KONG* 192, 192 (Raymond Wacks ed., 1999).

<sup>5</sup> Arrangement Concerning Mutual Recognition and Enforcement of Arbitral Awards between Mainland China and the Hong Kong Special Administrative Region, June 21, 1999, [available at](http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandmutual2e.pdf) <http://www.legislation.gov.hk/intracountry/eng/pdf/mainlandmutual2e.pdf> [hereinafter Mutual Arrangement].

<sup>6</sup> *Id.* art. 7; see United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 303 U.N.T.S. 4739 [hereinafter New York Convention].

<sup>7</sup> See generally Gu Weixia, *Recourse against Arbitral Awards: How Far Can a Court Go? Supportive and Supervisory Role of Hong Kong Courts as Lessons to Mainland China Arbitration*, 4 *CHINESE J. INT’L L.* 481, 481-500 (2005).

1999, Hong Kong has had to face the dual challenges of finding her place in the new cross-border arbitration order and leading the new-born SAR forward in becoming a regional and international arbitration center. For reasons of comity between the two jurisdictions and the unreasonableness of requiring Mainland China arbitrations to adhere to the strict standards of Hong Kong law and practice, Hong Kong courts have long since closely scrutinized all public policy claims challenging Mainland China awards seeking enforcement in Hong Kong, and have placed a high threshold of requiring the alleged infringement to be fundamental to Hong Kong's sense of justice and morality.<sup>8</sup> Delicate issues of Hong Kong's cross-border arbitration relationship with Mainland China have arisen, which often underscore the legal conflicts between the two sides.<sup>9</sup> On one hand, there is a need to foster the modernization of Mainland China towards the higher international standards of arbitration which Hong Kong seeks to maintain, whilst on the other hand, in association with the sovereignty change, there is the practical need to facilitate a cross-border arbitration regime which is compatible with Mainland China under the principles of "one country, two systems" and closer economic cooperation. Therefore, a more flexible approach in reviewing Mainland China's arbitral awards is needed in order to maintain the viability of cross-border transactions. Caught in this quagmire, it is challenging for Hong Kong courts to decide what standards they should require of Mainland China arbitration.

This Article attempts to give a comprehensive analysis of the above problems and make two contributions. First, this Article surveys all the cases of the enforcement of Mainland China arbitration awards by the Hong Kong SAR courts since the 1997 handover to present the actual interpretation of the standard of cross-border arbitration in Hong Kong with Mainland China. In association with the case review, this Article compiles a series of tables on basis of the data collected at the Hong Kong International Arbitration Center, which consolidates the numbers of cases received by the Hong Kong courts where enforcement of the Mainland China awards are sought in Hong Kong, the rate of

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<sup>8</sup> See *Hebei Imp. & Exp. Corp. v. Polytek Eng'g Co.*, [1999] 2 H.K.C.F.A.R. 111, 117-18 (C.F.A.) (discussing public policy considerations).

<sup>9</sup> For an introduction of the arbitration system in Mainland China, see GU WEIXIA, *ARBITRATION IN CHINA: REGULATION OF ARBITRATION AGREEMENTS AND PRACTICAL ISSUES* (Sweet & Maxwell eds., 2012).

challenges to enforcement, and the rate of such challenges being successful. The cases are collected from the 1997 handover (July 1<sup>st</sup>) till the end of 2012, covering a period of approximately fifteen years.

Second, from this comprehensive evaluation of the enforcement landscape, this Article makes a macro-proposition and identifies a healthy and welcome interaction trend between the Mainland China arbitration regime and the Hong Kong courts where the judgments of the Hong Kong courts serve as a catalyst for improvements in the rules and practices of the Mainland China arbitral authorities. This Article gives credit to such proper type of interaction, i.e. the positive interaction, which this Article defines as the phenomenon or trend where Mainland China arbitral authorities, reflecting on Hong Kong arbitral enforcement judgments, become persuaded and incentivized to change their rules and practices to cohere with the high and internationally accepted arbitration standards that Hong Kong maintains. This Article argues that “positive interaction” is important to the cross-border arbitration and judicial assistance development. Despite the recent halt, or even reversal, of the positive interaction trend in light of the *Keeneye* case,<sup>10</sup> this Article argues that positive interaction should be and is likely to be resumed, as Hong Kong seeks to maintain its image as an international arbitration powerhouse and Mainland China continues to modernize and internationalize its arbitration system. In the long run, this improved cross-border arbitration consensus will bring about the healthy development of the legal cooperation between the two sides and act as an engine for economic growth in the Greater China region.

Structurally, this Article is divided into five parts. Following this Introduction, Part II gives a detailed historical account of the current cross-border arbitration system between Hong Kong and Mainland China. The historical review is intended to compare the pre-handover cross-border arbitral relation between Hong Kong and Mainland China with that of the post-handover, and to give a historical background of the dual challenges that Hong Kong faces in balancing a cross-border arbitration regime with Mainland China today. In Part III, the Article examines all of the Mainland China arbitration awards seeking enforcement in Hong Kong since the 1997 sovereignty handover, in order to give a consolidated view of

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<sup>10</sup> Gao Haiyan v. Keeneye Holdings Ltd. (*Keeneye II*), [2012] 1 H.K.L.R.D. 627 (C.A.).

the development of cross-border arbitration jurisprudence. Doctrinal research and law and development studies are mainly adopted in Part III for going over the cases and associated literatures commenting on the cases. This Part tracks down the jurisprudence, discourse, and development of cross-border arbitration in Hong Kong with Mainland China both before and after the handover. By comparing post-handover arbitral enforcement cases in Hong Kong with respect to Mainland China to those preceding the handover, Part III also provides a consolidated view of the law and development in the field. Part IV analyzes the trend on cross-border arbitration between the two jurisdictions over one and a half decades. It argues how the Hong Kong jurisprudence has helped shape the cross-border arbitration regime over the years by encouraging “positive interaction” at the Mainland China side. It then explains that the recent case of *Keeneye* may have caused a halt in such positive interaction. Moreover, Part IV gives credit to positive interaction as the prospective law and policy direction for judicial assistance development between the two sides. Part V wraps up the Article with conclusions. The author opines that the *Keeneye* case could be an unfortunate development and offers reflections of why positive interaction should be resumed and continued. Part V also discusses some other contributions this Article might bring to the literature.

#### THE LEGAL PARADIGM OF CROSS-BORDER ARBITRATION BETWEEN HONG KONG AND MAINLAND CHINA

##### *The Pre-Handover New York Convention System*

Before the reunification, arbitral awards were recognized and enforced across the border on the basis of the accession of both China and the United Kingdom to the New York Convention. This pre-handover cross-border arbitration system, as enforced by the Convention, was fairly well implemented. From its inception in 1989 till its end in June 1997, approximately 150 Mainland China awards were enforced by the High Court in Hong Kong.<sup>11</sup> In accordance with the Convention, courts in Hong Kong limited their

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<sup>11</sup> Zhang, *supra* note 3, at 192.

review to procedural matters.<sup>12</sup> In particular, during that period, public policy challenges, known to be the most controversial but popular ground to challenge a Convention award, were never successful in enforcement proceedings involving Mainland China awards.<sup>13</sup> Before the change of sovereignty, only two applications to enforce the CIETAC award were denied by Hong Kong courts under public policy ground. The two successful challenges were in *Paklito Investment Ltd. v. Klockner East Asia Ltd.*<sup>14</sup> and *Apex Tech Investment Ltd. v. Chuang's Development (China) Ltd.*<sup>15</sup>

In *Paklito*, there was an argument between the parties of whether steel provided by the respondent seller was defective.<sup>16</sup> The case was administered by CIETAC, where the tribunal notified the parties that it would employ its own experts to inspect the steel.<sup>17</sup> After investigation, the experts in their report found in favor of the claimant.<sup>18</sup> The respondent then informed the tribunal of its intention to comment against the report and to introduce new evidence to rebut its conclusion.<sup>19</sup> However, the tribunal proceeded to render an award against the respondent without allowing it the opportunity to provide its case on the expert report.<sup>20</sup> In the enforcement proceedings, in February 1992, Master Cannon refused to enforce the award by reason that the respondent had been prevented from presenting its case and been denied a fair and equal opportunity of being heard.<sup>21</sup>

The case was appealed to and heard by Judge Kaplan at the High Court in January 1993, in which he came to the same

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<sup>12</sup> Article V(1) of the New York Convention lists a few grounds for refusal for enforcement to be proven by the Respondent, such as (a) lack of a valid arbitration agreement; (b) violation of due process; (c) excess of arbitral tribunal's authority; (d) irregularity in the composition of arbitral tribunal or arbitral procedure; and (e) the award has not yet been binding, been set aside, or suspended. New York Convention art. V. The full text of the New York Convention is available at the UNCITRAL website, [http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII\\_1\\_e.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf) (last visited Dec. 5, 2013).

<sup>13</sup> Article V(2) of the New York Convention mandates that recognition and enforcement of foreign arbitral awards may also be refused if the enforcement authority finds the enforcement will be against its public policy, or the dispute not arbitrable according to the law of the place of enforcement. New York Convention art. V.

<sup>14</sup> *Paklito Inv. Ltd v. Klockner E. Asia Ltd.*, [1993] 2 H.K.L.R. 39, 50 (H.C.).

<sup>15</sup> *Apex Tech Inv. Ltd v. Chuang's Dev. (China) Ltd.*, [1996] 2 H.K.L.R. 155, 159 (C.A.).

<sup>16</sup> *Paklito*, [1993] at 2 H.K.L.R. 41.

<sup>17</sup> *Id.* at 42.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 40-41.

conclusion as Master Cannon, and dismissed the appeal.<sup>22</sup> Moreover, Judge Kaplan made the following commentary on the cross-border arbitration as of that time:

In the three years from 1990 to 1992, this court has enforced approximately 40 CIETAC awards. Some of these applications were opposed but this is the first time that enforcement has been refused. This is a creditable record and I would not like it thought that problems such as occurred in this case are commonplace in CIETAC arbitrations. Judges and arbitrators in all jurisdictions occasionally and unwittingly fall into error and it is in serious cases involving arbitral awards that the enforcing court refuses enforcement to prevent injustice. It has been my experience that in all other cases that I have considered from CIETAC the due process requirements have been fairly met.<sup>23</sup>

A less noticed but important aspect of the *Paklito* case is its significance to the cross-border arbitration regime. First, it is the first case where a Mainland China arbitral award was refused enforcement in Hong Kong. Second, it is the first time a Mainland China arbitration authority has changed its arbitral rules in response to a Hong Kong court review.<sup>24</sup>

One year after the judgment of *Paklito*, in March 1994, CIETAC revised its arbitration rules which had been in place since 1988. Article 40 of the 1994 CIETAC Rules, in amending Articles 26 to 28 of the 1988 Rules, provided that “a copy of the expert report conducted by the tribunal be sent to the parties concerned who should also be offered an opportunity to express their opinions; in addition, the parties may require the experts to appear in the hearing to explain their report and conclusions.”<sup>25</sup> This timely amendment showed that the Mainland China side was paying attention to the Hong Kong standard of conducting arbitrations.

*Apex Tech* was the second case in which a Mainland China arbitral award was refused enforcement. It was again a CIETAC

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<sup>22</sup> *Id.* at 40.

<sup>23</sup> *Id.* at 50.

<sup>24</sup> As will be further elaborated later in this article, such arbitral rule revisions constitute the main form of convergence of the two systems of arbitration across the border.

<sup>25</sup> Zhang, *supra* note 3, at 193 n.63.

award. The case concerned whether a certificate issued by the Guangdong land authority enabled the Mainland Chinese seller to transfer his right to use the land to a Hong Kong homebuyer.<sup>26</sup> In the CIETAC arbitration, the tribunal conducted its own enquiries and consulted the Guangdong Province State-owned Land Bureau about the ambit of the certificate.<sup>27</sup> Relying on the opinion by the Land Bureau that the certificate had been issued for foreign investment rather than commodity real property to be sold abroad, and without notifying the parties of the results of its enquiries, the tribunal made an award against the Hong Kong party.<sup>28</sup>

In the enforcement proceedings of the first instance, Judge Leonard found that there had been a procedural irregularity, and that the Hong Kong party was deprived of an opportunity to be heard on the results of the tribunal's enquiries.<sup>29</sup> However, Judge Leonard held that the procedural irregularity was not prejudicial as the result could not have been different even if the opportunity to be heard had been granted, and therefore enforced the award.<sup>30</sup> The Hong Kong buyer's appeal was, however, allowed by the Court of Appeal (the "CA"). The bench unanimously found that the name of the certificate under the dispute was not conclusive and the Hong Kong party had not been given an opportunity to respond to the opinion of the Land Bureau in Guangdong.<sup>31</sup> Although the CA did not disagree with the finding by Judge Leonard that there had been a procedural irregularity, the CA disagreed that had the respondent been given due opportunity to be heard, it could not have affected the outcome of the award and therefore allowed the appeal and refused to enforce the award.<sup>32</sup>

Apart from illustrating its standard of review to be confined to due process checks of arbitral award, throughout the pre-handover years, the prevalent judicial attitude towards arbitration, particularly cross-border arbitration with Mainland China, seemed to have been rather pro-enforcement. In January 1993, while the cross-border arbitration system based on the New York Convention was still in its infant stage, Judge Kaplan, in *Qinhuangdao Tongda Enterprise*

<sup>26</sup> *Apex Tech*, [1996] at 2 H.K.L.R. 156.

<sup>27</sup> *Id.* at 157.

<sup>28</sup> *Id.* The arbitration award in question was also made under the 1988 CIETAC Arbitration Rules.

<sup>29</sup> *Id.* at 156, 159.

<sup>30</sup> *Id.* at 156.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 158-59.

*Development Co. and Another v. Million Basic Co. Ltd.*, took the opportunity to lay out the judiciary's pro-enforcement attitude towards cross-border awards from Mainland China, and its disdain towards enforcement challenges framed in terms of public policy.<sup>33</sup> *Qinhuangdao* concerned a CIETAC award in which the tribunal held that the respondent had breached its contract. In the enforcement proceedings at the Hong Kong Court of First Instance (the "CFI"), the respondent argued that the contract was a forgery and that it would be against Hong Kong's public policy to enforce an award based on a forged contract.<sup>34</sup>

Judge Kaplan rejected the forgery argument on the facts, but commented in obiter that the New York Convention does not allow parties to an international arbitration to request from the Hong Kong courts a re-hearing on the merits of the case.<sup>35</sup> The public policy ground for refusal must not be seen as a catch-all provision to be used wherever convenient. It is limited in scope and is to be sparingly applied. Moreover, public policy requires proceedings, both in the courts and in arbitral tribunals, to have a finite end. Once a tribunal has set a date for the end of the proceedings, it cannot be right that any party can go to the tribunal with new evidence and demand that it have an opportunity to be re-heard. Judge Kaplan referenced with approval *Parsons & Whittemore v. RAKTA*,<sup>36</sup> in which the U.S. Circuit Judge Joseph Smith famously declared, "the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice."<sup>37</sup>

The narrow construction and application of the public policy ground has been upheld in virtually all New York Convention member states, and has ever since formed part of the basis of Hong Kong's pro-enforcement policy in receiving foreign arbitral awards, in particular, awards received from Mainland China. The prudent judicial attitude under the Convention system discouraged challenges which sought to rely on the technical differences in

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<sup>33</sup> *Qinhuangdao Tongdao Tongda Enter. Dev. Co. & Another v. Million Basic Co. Ltd.*, [1993] 1 HKLR 173, 177 (H.C.).

<sup>34</sup> *Id.* at 176.

<sup>35</sup> *Id.* at 177.

<sup>36</sup> *Id.* at 178 (noting *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974)).

<sup>37</sup> *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974).

procedural standards across the border. Unfortunately, upon the handover, the Convention was rendered void as between Hong Kong and Mainland China, as the two jurisdictions were within one sovereign State, the People's Republic of China. The situation was only remedied two years later by the Mutual Arrangement scheme in 1999.

*The Mutual Arbitration Arrangement between Hong Kong and Mainland China*

Pursuant to the Basic Law, the mini-constitution in Hong Kong defining Hong Kong's overall legal relationship with the Central Government in Beijing,<sup>38</sup> laws previously in force in Hong Kong were to be maintained, except those which contravened the Basic Law, or specifically amended by the legislature.<sup>39</sup> Laws which governed arbitration in Hong Kong, such as the Arbitration Ordinance (Cap.341) and the common law on arbitration, were all retained post-handover. As the retention of the arbitration laws was without amendment by the legislature or the Basic Law, in theory it would have provided a smooth transition for both domestic and international arbitrations in Hong Kong post-handover. On the other hand, although cross-border legal relations between Hong Kong and Mainland China had been considered by the Sino-British Joint Liaison Group, the possible issues with cross-border enforcement of arbitral awards after a sovereign change seemed to have been overlooked, as the Central Government in Beijing considered the matter to be one of "internal politics."<sup>40</sup>

The overlooked problem is as follows. After the handover, as the United Kingdom was no longer the sovereign of Hong Kong, its signature to the New York Convention could no longer cover the newly born Hong Kong SAR. Instead, upon the handover, the Chinese government extended her signature to the Convention

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<sup>38</sup> For a general introduction to the Basic Law and the constitutional relationship between Hong Kong and the Central Government in mainland China, see Albert H. Y. Chen, *Constitutional Adjudication in Post-1997 Hong Kong*, 15 PAC. RIM L. & POL'Y J. 627, 627-82 (2006) (discussing the difficulty for the judiciary in administration of "one country, two systems").

<sup>39</sup> XIANGGANG JIBEN FA art. 8 (H.K.).

<sup>40</sup> Robert J. M. Morgan, *The Transition of Sovereignty to the People's Republic of China and the Arbitration Regime in Hong Kong: The Issues and Their Management*, MEALEY'S INT'L ARB. REP., May 1997, at 18.

towards Hong Kong. However, as the New York Convention only deals with enforcement of foreign arbitral awards and Mainland China is no longer a country foreign to Hong Kong, the Hong Kong courts could no longer rely on the Convention to enforce Mainland China awards, and, likewise, Mainland China courts could no longer rely on the Convention to enforce Hong Kong awards.<sup>41</sup>

This problem was fully portrayed in *Ng Fung Hong Ltd. v. ABC*.<sup>42</sup> In that case, a CIETAC award was sought to be enforced at the CFI in Hong Kong, pursuant to section 2GG of what was then the Hong Kong Arbitration Ordinance (Cap. 341).<sup>43</sup> Judge Findlay held that section 2GG only dealt with domestic arbitration.<sup>44</sup> Since a Mainland China arbitration award was no longer international after the handover, it could not be a Convention award either. Section 2GG could only apply to arbitration awards where the place of arbitration is within Hong Kong, in which case the Mainland China awards could not fall squarely into either.<sup>45</sup> Hence, the applicant could only enforce the award by a separate action using the award as evidence of an unpaid debt.<sup>46</sup> In coming to the conclusion, Judge Findlay rendered his decision with great reluctance:

I must say that I reach this conclusion with some regret. The procedure for the enforcement of awards between Hong Kong and the rest of China was convenient and worked well. . . . [I]t is a pity that such an award cannot be enforced directly. What is equally important is that there may be difficulties in seeking to enforce a Hong Kong award in Mainland China. There seems to be no obvious reason why there should not be a simple mechanism put in place for the mutual enforcement of arbitral awards between Mainland China and Hong Kong, and I hope we will see such a system before too long.<sup>47</sup>

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<sup>41</sup> LEGAL DEPARTMENT, HONG KONG, REPORT OF THE WORKING PARTY ON LEGAL AND PROCEDURAL ARRANGEMENTS BETWEEN HONG KONG AND CHINA IN CIVIL AND COMMERCIAL MATTERS (Oct. 13, 1992) (on file with author).

<sup>42</sup> *Ng Fung Hong Ltd. v. ABC*, [1998] 1 H.K.L.R.D. 155 (C.F.I.).

<sup>43</sup> *Id.* at 156.

<sup>44</sup> *Id.* at 156-57.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 156.

<sup>47</sup> *Id.* at 157.

Soon after, in *Hebei Import-Export Corp. v. Polytek Engineering Co. Ltd. (No 2)*,<sup>48</sup> the CA, in obiter, clarified the unfortunate situation that after the handover, awards made in Mainland China can neither be treated as New York Convention awards nor domestic awards. This, it was held, is because a purposive meaning has to be given to the words “domestic” in the sentence of Article I(1) of the Convention,<sup>49</sup> especially in light of the principle of “one country, two systems.”<sup>50</sup>

On the Mainland China side, people’s courts were indeed adopting the same position towards cross-border enforcement of arbitral awards rendered in Hong Kong. In July 1998, the Taiyuan Intermediate People’s Court in Shanxi Province indefinitely suspended enforcement of a Hong Kong award, due to lack of a clear legal basis.<sup>51</sup> In about one year’s time, people’s courts in Beijing, Anhui, Shandong and Guangdong Provinces all followed suit in more than ten proceedings to refuse enforcement of Hong Kong awards in the Mainland.<sup>52</sup>

The loss of the cross-border arbitration scheme with the Mainland side negatively impacted the arbitration business in Hong Kong, which had not only been an important legal service industry in Hong Kong but also a supporting industry to Hong Kong’s financial and trade services.<sup>53</sup> Likewise, the legal lacuna seriously harmed the cross-border economic exchanges between the two sides. The then-Chief Justice of the Hong Kong SAR pointed out that it

<sup>48</sup> *Hebei Imp. & Exp. Corp. v. Polytek Eng’g Co. (No 2)*, [1998] 1 HKC 192 (C.A.).

<sup>49</sup> Article I(1) of the New York Convention provides as follows: “This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of the State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.” New York Convention art. I.

<sup>50</sup> *Hebei*, [1998] at 1 H.K.C. 196-97.

<sup>51</sup> See Robert Morgan, *Mutual Enforcement of Arbitral Awards between Hong Kong and the People’s Republic of China—One Country. Still No System*, MEALEY’S INT’L ARB. REP., Feb. 1999, at 41 n.38.

<sup>52</sup> Interview with Mr. Shen Deyong, Vice President of the Supreme People’s Court in China, *Wen Wei Bao*, June 22, 1999, p A3.

<sup>53</sup> Xian Chu Zhang, *The Agreement between Mainland China and the Hong Kong SAR on Mutual Enforcement of Arbitral Awards: Problems and Prospects*, 29 HONG KONG L.J. 463, 465 n.19 (1999) (citing Lok Kin Wah, *Alienating Itself from the International Legal Framework; How Can Hong Kong Be a Financial Centre?* XIANGGANG JINJI RIBAO (HONG KONG ECONOMIC TIMES), Aug. 12, 1998 at A22; and Wang Shengchang, *The Mutual Enforcement of Arbitral Awards in Hong Kong SAR and the Mainland China: A Deadlock Must Be Broken as Soon as Possible*, a paper presented at the International Dispute Resolution Conference, Hong Kong, November 1998).

was important for the health of business and arbitration in both Hong Kong and the rest of China that there should be an efficient regime of mutual enforcement of arbitration awards.<sup>54</sup> It is noteworthy that although Article 95 of the Basic Law explicitly provides that the SAR may maintain judicial relations with the judicial organs of other parts of Mainland China, and the two sides may render assistance to each other,<sup>55</sup> the lack of implementation details took both sides two years to work out the Mutual Arrangement as the new legal basis to replace the old landscape set up by the New York Convention. It had been reported that the slow progress in working out the cross-border arbitration scheme was costing millions of dollars in business in Hong Kong as people were forced to arbitrate in Singapore in order to get their arbitral awards enforced in China.<sup>56</sup>

Against this backdrop, the conclusion of the Mutual Arrangement on June 21, 1999 deserves applause. It brought the long-awaited relief for many award holders and had a significant impact on the future of cross-border arbitration. The Mutual Arrangement declared that “the courts of the Hong Kong SAR agree to enforce the awards made pursuant to the Arbitration Law of the People’s Republic of China by the arbitration authorities in Mainland China . . . and the people’s courts of Mainland China agree to enforce the awards made in the Hong Kong SAR pursuant to the Arbitration Ordinance of the Hong Kong SAR.”<sup>57</sup>

For eligibility requirements, the Mutual Arrangement mandates that where a party fails to comply with an arbitral award, whether made in Mainland China or in the Hong Kong SAR, the other party may apply to the relevant court in the place where the party against whom the application is filed is domiciled, or where the property to be enforced against is situated.<sup>58</sup> The relevant court in Hong Kong would be the High Court, and in Mainland China the Intermediate People’s Court.<sup>59</sup> For parties facing the enforcement, Article 7 of the Mutual Arrangement provides all the types of challenges

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<sup>54</sup> Zhang, *supra* note 52, at 466 (referring to the Keynote address made by Andrew Li, the then-Chief Justice of the Court of Final Appeal of Hong Kong, at the International Commercial Arbitration: Asian Update Conference, Hong Kong, Nov. 13, 1997).

<sup>55</sup> XIANGGANG JIBEN FA art. 95 (H.K.).

<sup>56</sup> Zhang, *supra* note 52, at 465-66 (citing Karen Cooper & Jane Moir, *Millions ‘Lost’ as Settlements Go to Singapore*, SOUTH CHINA MORNING POST, Nov. 30, 1998, at 3).

<sup>57</sup> Mutual Arrangement, para. 1.

<sup>58</sup> Mutual Arrangement, art. 1.

<sup>59</sup> Mutual Arrangement, art. 2.

available to them, as if they were parties to an application to enforce a New York Convention award. This is because Article V of the New York Convention is incorporated almost verbatim into Article 7 of the Mutual Arrangement. There is one amendment, though, on public policy, as under the 7<sup>th</sup> paragraph of Article 7:

The enforcement of the award may be refused if the court of Mainland China holds that the enforcement of the arbitral award in the Mainland would be contrary to the *public interest* of Mainland China, or if the court of Hong Kong SAR decides that the enforcement of the arbitral award in Hong Kong would be contrary to the *public policy* of the Hong Kong SAR.<sup>60</sup>

In the New York Convention, the nature of the public policy ground is to allow enforcing courts to turn down the award if the enforcement of that award would be contrary to the public policy of that particular jurisdiction.<sup>61</sup> As regards enforcement of cross-border arbitral awards, although it is evident that the different wording employed by Hong Kong and Mainland China constitute a ground of refusal of a different scope, it was unclear, at the time of the promulgation of this Mutual Arrangement, how exactly the two grounds differ.

One may only guess that the concept of *public interest* is employed for Mainland China instead of *public policy* because a broader non-Convention meaning can be applied at opportune times, so as to accommodate Mainland China's political or economic interests.<sup>62</sup> In openly-publicized commentary on social and public interest in Mainland China, the concept includes not only expressed Chinese State commitments and social morality (which is in line with international practice), but also unexpressed State interests and localized short-term policies (which has no basis in international

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<sup>60</sup> Mutual Arrangement, art. 7 (emphasis added).

<sup>61</sup> New York Convention, art. V.2(b).

<sup>62</sup> For example, in *Repower Ltd. v. Shanghai Far-East Aero-Technology Imp. & Exp. Corp.*, enforcement was denied on the basis of the social public interest being against the local economic interests. *Repower Ltd. v. Shanghai Far-East Aero-Technology Imp. & Exp. Corp.* (Arbitration Institute of the Stockholm Chamber of Commerce, July 13, 1993), available at <http://arb.rucil.com.cn/enarticle/default.asp?id=198> (last visited Dec. 5, 2013). See also Fredrick Brown & Catherine A. Rogers, *The Role of Arbitration in Resolving Transnational Disputes: A Survey of Trends in the People's Republic of China*, 15 BERKELEY J. INT'L L. 331, 341-42 (1997) (referring to the *Repower* case).

practice),<sup>63</sup> and “has been characterized as not only a legal institution but also a political means to implement the [Chinese] domestic policy.”<sup>64</sup> In contrast, under the public policy doctrine in Hong Kong, the Hong Kong courts have given public policy in the Mutual Arrangement the same meaning as applied in the New York Convention. In line with the international practice, the standard application of the public policy defense in Hong Kong has been that it should be construed narrowly and exercised with great caution. Awards may only be denied where enforcement would violate the forum’s public policy, i.e. Hong Kong’s most fundamental notion of morality and justice.<sup>65</sup>

Despite these ongoing concerns, with the Mutual Arrangement in place, the problem faced in the *Ng Fung Hong* case was finally resolved, and the post-handover legal abyss in cross-border award enforcement was finally filled. The problem was also resolved retrospectively, as Article 10 of the Mutual Arrangement provided that Mainland China awards which had been refused enforcement during the period between July, 1 1997 and adoption of the Arrangement (February 1, 2000), were allowed to make fresh applications for enforcement.<sup>66</sup> Hence, the Mutual Arrangement created a new cross-border arbitration scheme to replace the old New York Convention system, which was later codified into the Hong Kong Arbitration Ordinance.<sup>67</sup> The most recent amendment to the Hong Kong Arbitration Ordinance, taking effect in June 2011, also confirmed the contents of this cross-border arbitration Arrangement.<sup>68</sup>

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<sup>63</sup> Zhang, *supra* note 52, at 476-77.

<sup>64</sup> *Id.*

<sup>65</sup> See *Paklito*, [1993] at 2 H.K.L.R. 50 (citing *Parsons & Whittemore*, at 508 F.2d 974); see also *Hebei*, [1998] at 1 H.K.C. 193-194 (citing *Parsons & Whittemore* at 508 F.2d 974).

<sup>66</sup> Mutual Arrangement, art. X.

<sup>67</sup> The Arrangement is incorporated into the Hong Kong Arbitration (Amendment) Ordinance 2000 (Ordinance No.2 of 2000) and codified as Hong Kong Arbitration Ordinance, (2000) Cap. 341, pt. IIIA.

<sup>68</sup> Enforcement of Mainland Awards, H.K., Hong Kong Arbitration Ordinance, (2011) Cap. 609, pt. 10, div. 3, available at [http://www.legislation.gov.hk/blis\\_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075?OpenDocument&bt=0](http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075?OpenDocument&bt=0) (last visited Dec. 5 2013).

DEVELOPMENT OF CROSS-BORDER ARBITRATION IN HONG  
KONG SINCE HANDOVER: REVIEW OF MAINLAND CHINA  
ARBITRATION AWARDS BY HONG KONG COURTS

This Part consolidates all of the cases of the enforcement of Mainland China arbitration awards by Hong Kong courts since the handover, in an attempt to present the jurisprudence of cross-border arbitration in Hong Kong with Mainland China and the actual interpretation of its standard of cross-border arbitration review. It analyzes how the courts of Hong Kong have received the new cross-border arbitration framework on the basis of the Mutual Arrangement, how they have integrated the New York Convention jurisprudence to the new system, and how they have shifted their judicial attitudes towards the enforcement of Mainland China arbitral awards over the years. It examines cross-border enforcement of the Mainland China arbitral awards by the Hong Kong courts from the 1997 handover till the end of 2012, covering a period of approximately fifteen years.

The analysis focuses on enforcement issues, which remains the area of greatest conflict and controversy within cross-border arbitration relations, especially with the arrival of cases such as *Keeneye* in 2011,<sup>69</sup> where the two different systems and ideologies of law and arbitration across the border fight for dominance. Before the analysis, quantitative studies are given, to provide an overview of the change of caseload regarding challenges to the enforcement of Mainland China arbitration awards in Hong Kong in the past fifteen years, underling the “one country, two systems” innovation and Hong Kong’s change of judicial assistance attitude towards Mainland China. After the statistical evaluation of the enforcement landscape, this Part then moves to case jurisprudence analyses and qualitative examination of the role-play interaction between Mainland China arbitral regime and the Hong Kong courts, with the judgments of the Hong Kong courts identified to serve as a catalyst for improvements in the rules and practices of the Mainland China arbitral authorities. Part III is also intended to pave the way for the arguments on “positive interaction” in Part IV, which this Article advocates as the proper and healthy development trend for cross-border arbitration and judicial assistance between the two sides.

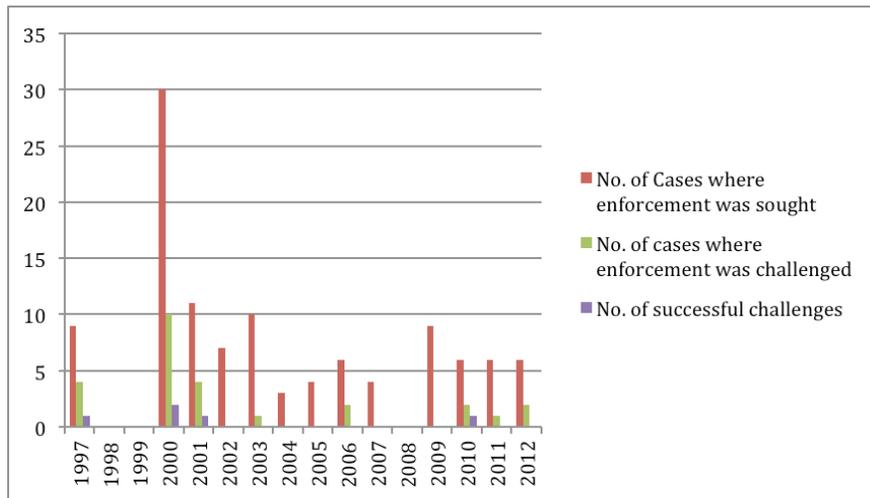
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<sup>69</sup> *Keeneye II*, [2012] at 1 H.K.L.R.D. 627.

*An Overview of the Caseload Change*

Below are two tables compiled on basis of the data collected at the Hong Kong International Arbitration Center (the “HKIAC”), which show the numbers of cases received by the Hong Kong courts where enforcement of the Mainland China awards are sought in Hong Kong, the rate of challenges to enforcement, and the rate of such challenges being successful. Table 2 is a breakdown illustration of Table 1. Both Tables (Tables 1 and 2) will be extensively referred to in the subsequent discussions in order to examine the four different phases in which the Hong Kong courts have treated the enforcement of the Mainland awards differently.

**Table 1: Enforcement of Mainland China Awards in Hong Kong since the Handover**



**Table 2: Breakdown of Table 1**

Year	No. of cases where enforcement was sought	No. of cases where enforcement was challenged	Challenge rate	No. of successful challenges	Challenge success rate	Enforcement rate
1997	9	4	44%	1	25%	89%
1998	0	0	N/A	0	N/A	N/A
1999	0	0	N/A	0	N/A	N/A
2000	30	10	33%	2	20%	93%
2001	11	4	36%	1	25%	91%
2002	7	0	0%	0	N/A	100%
2003	10	1	10%	0	0%	100%
2004	3	0	0%	0	N/A	100%
2005	4	0	0%	0	N/A	100%
2006	6	2	33%	0	0%	100%
2007	4	0	0%	0	N/A	100%
2008	0	0	N/A	0	N/A	N/A
2009	9	0	0%	0	N/A	100%
2010	6	2	33%	1	50%	83%
2011	6	1	17%	0	0%	100%
2012	6	2	33%	0	0%	100%
Total	111	26	23%	5	19%	95%

Source: Data collected at the HKIAC<sup>70</sup>

*1997-1999: The Dark Age of Cross-border Arbitration and the Significance of the Hebei Judgment*

**The Dark Age of Cross-border Arbitration**

As has been outlined in the previous discussion, before the Mutual Arrangement was put into place, the Hong Kong courts

<sup>70</sup> Data compiled by the author from data provided at the HKIAC's website. See *Enforcement of Arbitration Awards in Hong Kong*, HKIAC, <http://www.hkiac.org/index.php/en/hkiac-statistics/enforcement-of-awards> (last visited Dec. 5, 2013).

generally had a hands-off attitude towards the enforcement of Mainland China awards.<sup>71</sup> In the SAR courts' first case of an enforcement of a Mainland China arbitral award post-handover, i.e. the *Ng Fung Hong* case, Judge Kaplan held that there was no legal basis in which a Mainland China arbitral award could be enforced by the Hong Kong courts, after the misapplication of the New York Convention since the handover.<sup>72</sup> Working on the basis of Article 8 of the Basic Law that the laws previously in force in Hong Kong shall be maintained, with a bit of creative judicial interpretation, the courts could have probably enforced a Mainland China arbitral award as a "domestic award" under Section 2GG of the then Arbitration Ordinance (Cap. 341).<sup>73</sup> However, the judiciary decided to defer the issue to the legislature. Unfortunately, the legislature did not react quickly either. In combination with the *Ng Fung Hong* case, the cross-border arbitration system entered an almost-two-year limbo.

As is shown in Table 2, before the promulgation of the Mutual Arrangement, for the period from 1997 to 1999, there were nine Mainland China arbitral awards sought to be enforced in Hong Kong in 1997,<sup>74</sup> but most of them were awards which were instituted prior to the handover on July 1<sup>st</sup> in order to be decided before the New York Convention was rendered inapplicable between Hong Kong and China. Four of those enforcement applications were opposed and only one opposition succeeded.<sup>75</sup> The case where enforcement challenge was successful was *Guangdong Overseas Shenzhen Co. Ltd v. Yao Shun Group International*.<sup>76</sup> The case concerned a CIETAC arbitration in 1996 and the award was set aside on the basis that procedural injustices were found to have occurred.<sup>77</sup> The CIETAC tribunal made an award in favor of the claimant, and enforcement was sought at the CFI in Hong Kong.<sup>78</sup> The respondent opposed the award under the premise that the award was made on the same day that the arbitral tribunal had received the respondent's response to the claimant's

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<sup>71</sup> See discussion *supra* pp. 4-7.

<sup>72</sup> *Ng Fung Hong Ltd.*, [1998] at 1 H.K.L.R.D. 156-57; see discussion *supra*.

<sup>73</sup> See *Ng Fung Hong Ltd.*, [1998] at 1 H.K.L.R.D. 156; see also discussion *supra*.

<sup>74</sup> See *supra* Table 2.

<sup>75</sup> See *supra* Table 1.

<sup>76</sup> *Guangdong Overseas Shenzhen Co. Ltd. v. Yao Shun Grp. Int'l*, [1998] 1 H.K.C. 451 (C.F.I.).

<sup>77</sup> *Id.* para. 9.

<sup>78</sup> *Id.* para. 1-2.

written submissions on an issue.<sup>79</sup> Although the tribunal seemed to have directed that oral submissions would be received after written submissions, an award was made without further hearing.<sup>80</sup> The award was then set aside by Judge Findlay under the reasoning that the respondent's right to be heard was infringed.<sup>81</sup> He held that the tribunal could not have properly considered the submissions, and if it had intended to proceed without considering those submissions, it should have informed the respondent.<sup>82</sup>

The *Guangdong* case aside, the real intrigue in this period is the dearth of cross-border arbitration in Hong Kong. As Table 1 shows, in the years 1998 and 1999, there were no applications to the Hong Kong courts for the enforcement of Mainland China arbitral awards at all.<sup>83</sup> The reason was simply due to the disapplication of the New York Convention as demonstrated by the *Ng Fung Hong* case in 1998.<sup>84</sup> On the other hand, despite the absence of cross-border enforcement mechanism, it was, however, in this particular period that Hong Kong's leading case on arbitration law was born.

Before the Mainland China-Hong Kong Mutual Arrangement entered into force on February 1, 2000, the basis of Hong Kong's stance on enforcement of arbitral awards, particularly enforcement of the Mainland China awards, had been set up in early 1999, in the Court of Final Appeal case, *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*<sup>85</sup>

### **The Hebei Judgment**

In the *Hebei* case, a CIETAC arbitral tribunal made an award in favor of the claimant, Hebei, in March 1996.<sup>86</sup> Four months later, in July 1996, Hebei obtained ex parte leave to enforce the award at the CFI in Hong Kong. Polytek, the respondent, then sought to resist enforcement.<sup>87</sup> The hearing was somewhat delayed, as the bench determined that the hearing should be delayed pending the determination by the supervisory court of the arbitration, i.e. the

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<sup>79</sup> *Id.* para. 3.

<sup>80</sup> *Id.* para. 8.

<sup>81</sup> *Id.*, para. 8-9.

<sup>82</sup> *Id.* para. 9.

<sup>83</sup> See *supra* Table 1.

<sup>84</sup> See *Ng Fung Hong Ltd.*, [1998] at 1 H.K.L.R.D. 156.

<sup>85</sup> *Hebei*, [1999] at 2 H.K.C.F.A.R. 125.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

Beijing No. 2 Intermediate People's Court, concerning an application to set aside the award in question at the seat of arbitration.<sup>88</sup> The application to set aside was finally dismissed by the Beijing Court, and the Hong Kong proceedings resumed, where the CFI dismissed the application to set aside and allowed the enforcement on May 15, 1997, just before the handover.<sup>89</sup> Because the application for enforcement was made prior to the handover, the CIETAC award had therefore been considered a Convention award despite the fact that it was rendered in Mainland China, which is why this case was reported during the legal abyss period.<sup>90</sup>

The main procedural injustice in *Hebei*, as complained by the respondent, was that the presiding arbitrator and expert witness appointed by the tribunal had inspected allegedly-defective equipment at issue in the case in the presence of the claimant's technicians but not the respondent's.<sup>91</sup> In association, the respondents did not receive proper notice of the inspection, were refused a further hearing subsequent to the inspection, and were not allowed to call the manufacturer to give evidence on the findings of the report of the inspection.<sup>92</sup> It was thus complained that the award was tainted by apparent bias and violated public policy of Hong Kong.<sup>93</sup> Despite the fact that the supervising court in Mainland China, the Beijing No.2 Intermediate People's Court, refused to entertain the respondent's complaints, on appeal, in January 1998, the CA ruled against the enforcement of the award on the basis of public policy.<sup>94</sup>

The case went further to the Court of Final Appeal (the "CFA"). On February 9, the CFA unanimously allowed the appeal and demonstrated the pro-enforcement approach. It was found that the opportunity of "a party to present his case and a determination by an impartial and independent tribunal" is basic to the notions of justice and morality in Hong Kong.<sup>95</sup> However, in determining whether what happened in the case was contrary to such notions, the CFA

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<sup>88</sup> *Id.*

<sup>89</sup> *Hebei (No 2)*, at [1998] 1 H.K.C. 195.

<sup>90</sup> *Id.*

<sup>91</sup> *See Hebei*, [1999] at 2 H.K.C.F.A.R. 119.

<sup>92</sup> *Id.* at 125.

<sup>93</sup> *Id.* at 112.

<sup>94</sup> *Hebei (No 2)*, [1998] at 1 H.K.C. 210.

<sup>95</sup> Robert Morgan & Man Sin Yeung, *Enforcement of Foreign and Mainland Arbitral Awards in Hong Kong: Med-Arb, Public Policy and Waiver*, 2012 ASIAN DISP. R. 30, 31 (discussing *Hebei*, [1999] at 2 H.K.C.F.A.R. 118).

found that the respondents were able to present their case. It was said that the inspection at the end user's factory and the presentation by the technicians in the absence of the respondent were procedures which in Hong Kong might be considered unacceptable. However, it was held that, by inaction, the respondent had waived his right to complain about the irregularity.<sup>96</sup>

On the point of waiver, the CFA held "that refusal by a supervisory court at the seat of arbitration [(i.e. the Beijing Court)] to set aside an award would not debar [the party] from resisting enforcement of the award in Hong Kong on the same ground,"<sup>97</sup> as "public policy reason in a supervisory court may be different from a court of enforcement. The position would, however, be different if a party had failed to raise [the challenge] before the supervisory court; it would then be estopped from raising that point before the court of enforcement."<sup>98</sup>

The *Hebei* case is a leading authority. It is famous for prescribing Hong Kong's standard for setting aside awards based on the public policy ground. Moreover, being the apex of Hong Kong's judiciary enjoying high judicial autonomy under the "one country, two systems" principle, the CFA had, for the first time since the handover, dealt with public policy issues concerning Mainland China arbitration practice with detailed explanations and guidance. As a decision made before the conclusion of the Mutual Arrangement, the CFA placed its emphasis on adherence to the fundamental principle of the New York Convention to encourage the recognition and enforcement of arbitration agreements and awards in cross-border commercial transactions. Therefore, using public policy as a legal device to safeguard the integrity of the justice system of the enforcing jurisdiction such as in Hong Kong should be given a narrow construction. The "narrow construction" was elaborated by Non-Permanent Judge Sir Anthony Mason as such:

[T]he 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

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<sup>96</sup> *Hebei*, [1999] at 2 H.K.C.F.A.R. 122.

<sup>97</sup> Morgan & Yeung, *supra* note 94, at 30.

<sup>98</sup> Morgan & Yeung, *supra* note 94, at 30 (discussing *Hebei*, [1999] 2 H.K.C.F.A.R. 111).

enforced. In order to ensure the attainment of that object without excessive intervention on the part of courts of enforcement, the provisions of art V [of the Convention], notably art V2(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 art V2(b) means ‘contrary to the fundamental conceptions of morality and justice’ of the forum.<sup>99</sup>

Permanent Judge Litton stated that “courts should [also] recognize the validity of decisions of foreign arbitral tribunals as a matter of comity, and give effect to them, unless to do so would . . . [be against the forum court’s] most basic notions of morality and justice,” and that a public policy objection could only be grounded on extreme injustice.<sup>100</sup> Quoting Permanent Judge Bokhary on the proper understanding of public policy:

In regard to the refusal of enforcement of awards on public policy grounds, there are references in the cases and texts to what has been called ‘international public policy.’ Does this mean some standard common to all civilized nations? Or does it mean those elements of a State’s own public policy which are so fundamental to its notions of justice that its courts feel obliged to apply the same not only to purely internal matters but even to matters with a foreign element by which other States are affected? I think that it should be taken to mean the latter.<sup>101</sup>

Hence, for an award to be denied it must be fundamentally offensive to that particular jurisdiction’s notion of justice.<sup>102</sup> Non-Permanent Judge Sir Anthony Mason added his agreement with the opinion that the public policy ground could only be applied to a situation “contrary to the fundamental conceptions of morality and justice of

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<sup>99</sup> *Hebei*, [1999] at 2 H.K.C.F.A.R. 139 (citations omitted).

<sup>100</sup> *Id.* at 118.

<sup>101</sup> *Id.* at 123.

<sup>102</sup> *Id.* at 123-24.

Hong Kong.”<sup>103</sup> In this regard all the justices firmly took the same stand on the application criterion of public policy in Hong Kong.<sup>104</sup>

The *Hebei* judgment shows that the Hong Kong courts are predisposed towards enforcement of arbitration awards. The courts are also willing to overlook small amounts of inequity as long as the injustice caused is curable, severable, or is not so fundamentally offensive as to shock Hong Kong’s most basic notions of justice. The *Hebei* standard, as we see in cases from subsequent years, has made challenges under public policy grounds difficult and deterred challenges on pure technical grounds.

In the meantime, the *Hebei* judgment had been made entirely in accordance with the New York Convention. Because the Mutual Arrangement has largely followed the contents of the Convention, courts in Hong Kong have been able to employ Convention jurisprudence, in particular the *Hebei* ratio, in the post-Mutual-Arrangement cross-border arbitration system and in almost all subsequent arbitration enforcement proceedings in Hong Kong.<sup>105</sup> As will be demonstrated by following discussions, it is generally believed that the pro-enforcement approach laid down by *Hebei* was well suited to face the new political reality of reunification.

#### *2000-2001: The Case Rebound by Riding the Wave of Hebei*

With the Mutual Arrangement taking effect on February 1, 2000, the cross-border arbitration activities between the two sides were revived. In accordance with Article 10 of the Arrangement, which was later incorporated into Section 40G of the then-Hong Kong Arbitration Ordinance (Cap.341), Mainland China arbitration awards which had been refused enforcement during the period of legal abyss (i.e. between July 1, 1997 and February 1, 2000) were

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<sup>103</sup> *Id.* at 139.

<sup>104</sup> In this case Chief Justice Li and Permanent Judge Ching did not write their separate opinions, but agreed with Non-Permanent Judge Sir Anthony Mason on his judgment. *See, id.* at 116, 121.

<sup>105</sup> The *Hebei* case was prevalently cited by many courts in the common law world. For example, the *Hebei* case was cited in the New Zealand case of *Downer –Hill Joint Venture v. Gov’t of Fiji* [2005] 1 NZLR 554, the Australian case of *Traxys Europe SA v. Balaji Coke Indus. PVT Ltd. (NO 2)* [2012] 291 ALR 99, and the English Supreme Court case of *Dallah Real Estate and Tourism Holding Co. v. Ministry of Religious Affairs of the Gov’t of Pakistan* [2009] EWCA (Civ) 755.

allowed to make fresh applications for enforcement.<sup>106</sup> As such, 2000 was the year in which the biggest portion of applications to enforce Mainland China awards was made in history, with a total of 30 applications being made that year.<sup>107</sup> In the next year, 2001, 11 applications to enforce Mainland China awards were made, which, although much less than the previous year, is the second-highest total in application volume over the one-and-a-half decades since the handover.<sup>108</sup>

Not only was the enforcement application volume the largest ever in these two years, the volume of cases where enforcement was opposed, as of the year end of 2012, was also the greatest, with 10 enforcement applications being challenged in 2000 and another 4 challenges in 2001.<sup>109</sup> Since then, there have never been more than two cases in any single year in which applications to enforce Mainland China arbitral awards were opposed.<sup>110</sup> It is interesting to note, however, that although the opposition rate was high in the years after the Mutual Arrangement was promulgated, the success rate of those challenges was quite low; hence, the enforcement rate of Mainland China awards in Hong Kong remained as high as above 90%.<sup>111</sup> This is because the pro-enforcement attitude of Hong Kong courts towards Convention awards, as espoused in *Hebei*, had been equally applied towards the enforcement of Mainland China arbitral awards, as we will see in a chain of cases which were adjudicated shortly after Mainland China awards became enforceable in Hong Kong under the bilateral agreement.

One of the very first cases where a Mainland China award was sought to be enforced in Hong Kong under the Mutual Arrangement was *Shanghai City Foundation Works Corp. v. Sunlink Ltd.*<sup>112</sup> The *Shanghai* case concerned an arbitration award made by CIETAC in October 1999, but, due to the lack of a cross-border enforcement scheme, the CIETAC award was unable to be enforced in Hong Kong until after February 2000.<sup>113</sup> In the case, the respondent alleged that enforcement of the award should be refused, as there

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<sup>106</sup> See Mutual Arrangement, art. 10; Hong Kong Arbitration Amendment Ordinance, (2000) Cap. 341, § 40 (G). See also *supra* notes 50-51.

<sup>107</sup> See *supra* Tables 1 & 2.

<sup>108</sup> See *supra* Table 2.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Shanghai City Found. Works Corp. v. Sunlink Ltd.*, [2001] 3 H.K.C. 521 (C.F.I.).

<sup>113</sup> *Id.*

was an oral agreement between the parties providing that whatever the outcome of the arbitration, the settlement of the outstanding sums would only be payable after certain other conditions were fulfilled.<sup>114</sup> The court refused to withhold enforcement of the award to allow oral testimony as to the existence of the alleged agreement.<sup>115</sup> Applying *Hebei*, it was held that the respondent's failure to raise its challenge at the supervisory court in Mainland China amounted to an estoppel or a defeat of bona fide such as to justify enforcement of the award.<sup>116</sup>

Although the respondent referred the court to the case of *J.J. Agro (P) Industries Ltd. v. Texuna International Ltd.*, in which case Judge Kaplan, in 1992, decided to hear oral testimony in relation to an allegation of fraud, it was held that the fact that the case was the only authority the respondent referred to indicated that acceding to an application to hear oral evidence is the exception rather than the rule.<sup>117</sup> The court found that such matters of legal validity were matters best left to the supervisory court, i.e. court in Mainland China, unless the challenge to enforcement involved matters which would invoke Hong Kong's public policy.<sup>118</sup> However, although public policy was also pleaded to challenge the award enforcement, applying *Hebei*, the high threshold of Hong Kong's most basic notions of morality and justice had not been met.<sup>119</sup>

Another noteworthy case in this period was *Shantou Zheng Ping Xu Yueli Shu Kuo Trading Co. Ltd. v. Wesco Polymers Ltd.*<sup>120</sup> The case concerned a CIETAC award in 2001 over a contract for the supply of goods.<sup>121</sup> The dispute was straightforward. What was noteworthy was a comment made by Judge Burrell in the case, on the clear application of the Convention jurisprudence to the enforcement of Mainland China arbitral awards following the enactment of the cross-border Mutual Arrangement:

In my judgment, no extra burden lies on the plaintiff which makes his task more difficult than it would otherwise have been [if it was a Convention award].

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* (construing *J.J. Agro (P) Indus. Ltd v. Texuna Int'l Ltd.*, [1994] 1 H.K.L.R. 89).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Shantou Zheng Ping Xu Yueli Shu Kuo Trading Co. v. Wesco Polymers Ltd.*, [2002] H.K.E.C. 76 (C.F.I.).

<sup>121</sup> *Id.*

The Plaintiff starts therefore with the advantage of the strong pro-enforcement bias afforded by the legislation.<sup>122</sup>

This shows and reinforces Hong Kong courts' pro-enforcement attitude towards Mainland China arbitral awards, and the courts' unwillingness to differentiate between the thresholds of challenges to enforcement applications of Mainland China awards and Convention awards. It is generally believed that this pro-enforcement approach, as laid down by *Hebei*, has been well taken to properly redefine the cross-border arbitration relationship between Hong Kong and Mainland China after the reunification.

#### *2002-2009: The Calm under the Pro-Enforcement Policy*

In the period from 2002 to 2009, courts in Hong Kong kept riding the wave of *Hebei* in virtually all enforcement challenges, particularly those challenges against Mainland China arbitral awards. The judiciary had formed a clear and express pro-enforcement attitude. Based on the figures in Table 2, it can be seen that there were 43 Mainland China awards seeking enforcement in Hong Kong in the years 2002 till 2009, but only 3 cases had met with challenges and none of these challenges had been successful, making the enforcement rate reach the historic high of 100% for eight years.<sup>123</sup> This is a stunning reversal in attitude by parties facing unfavorable Mainland China arbitral awards, as compared to the two previous years, during which 41 enforcement applications were made and 14 were challenged before the Hong Kong courts.<sup>124</sup> Despite the calm and light caseload (on challenges) from 2002 till 2009, a couple of high quality judgments were delivered which clarified the proper role of Hong Kong courts in cross-border enforcement actions, particularly on the point of public policy.

One of the challenges concerned a CFA decision on public policy. In 2007, in *Unruh v. Seeberger*, "it was alleged that a Mainland China arbitral award should not be enforced because it

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<sup>122</sup> *Id.*

<sup>123</sup> *See supra* Tables 1 & 2.

<sup>124</sup> *Id.*

was made in circumstances involving a champertous agreement, which was illegal in Hong Kong.”<sup>125</sup> In balancing public policies between the supervisory jurisdiction (Mainland China) and enforcement jurisdiction (Hong Kong), it was held that it was improper for the Hong Kong courts to impose its public policy against champerty on mature commercial parties who have chosen to arbitrate in a jurisdiction where champerty is not contrary to public policy (i.e. Mainland China).<sup>126</sup>

Another high-profile case against Mainland China arbitral award enforcement was made in 2008 in *Xiamen Xinjingdi Group Ltd. v. Eton Properties Ltd. & Anor* where the role of the Hong Kong courts in enforcement actions was properly explained.<sup>127</sup> The *Xiamen* case concerned a disputed termination by the Hong Kong respondents of a contract, which allowed the Mainland Chinese claimant to develop and receive profit from a piece of land of a holding company owned by the respondent.<sup>128</sup> Arbitration proceedings commenced before CIETAC in August 2005.<sup>129</sup> The respondent defended its case by stating that the agreement was contrary to Mainland Chinese law and thus unenforceable, and that performance was impossible as the respondent had begun construction work on the land.<sup>130</sup> The respondent then applied to set aside leave to enforce the arbitral award, claiming that to enforce it would be against public policy, as it was fundamentally offensive to the court’s notion of justice to order it to perform the award when the applicant was not ready, willing or able to perform its obligations under the agreement.<sup>131</sup> The case eventually reached the CA.<sup>132</sup> However, it was at the CFI and through Judge Reyes that much analysis was given on the standard of arbitration review and enforcement policy in Hong Kong, and such analysis was agreed to in the CA.<sup>133</sup>

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<sup>125</sup> Weixia Gu & Xian Chu Zhang, *The Keeneye Case: Rethinking the Content of Public Policy in Cross-Border Arbitration between Hong Kong and Mainland China*, 42 H.K. L.J. 1001, 1012 (2012); Unruh v. Seeberger, [2007] 2 H.K.L.R.D. 414, 440 (C.F.A.).

<sup>126</sup> *Id.* at 454.

<sup>127</sup> *Xiamen Xinjingdi Grp. Ltd. v. Eton Props. Ltd.*, [2008] 4 H.K.L.R.D. 972 (C.F.I.).

<sup>128</sup> *Id.* at 976-77.

<sup>129</sup> *Id.* at 977.

<sup>130</sup> *Id.* at 988.

<sup>131</sup> *Id.*

<sup>132</sup> *See Xiamen Xinjingdi Grp. Ltd. v. Eton Props. Ltd.*, [2009] 4 HKLRD 353 (C.A.).

<sup>133</sup> *See id.* at 355.

According to Judge Reyes, an enforcement court only has two tasks to make a decision.<sup>134</sup> First, it has to determine whether an award is valid.<sup>135</sup> Second, it has to determine whether there exists a valid ground to refuse the award's enforcement.<sup>136</sup> If the award is valid and there exists no valid ground to refuse enforcement, the award should be mechanistically enforced.<sup>137</sup> The enforcement court needs not bother itself with the reasoning or circumstances in which the award was made.<sup>138</sup> Hence, the court's role should be "although by no means entirely 'mechanistic', 'as mechanistic as possible'."<sup>139</sup>

Consistent with the "mechanistic" principle, Judge Reyes held that unless an award was plainly "incapable of performance, such that it would be obviously oppressive to order a party to comply with it", the court could not hold that to enforce the award would be contrary to public policy.<sup>140</sup> If it was merely arguable that the award was incapable of performance, it is incumbent on the parties that the issue be raised at the courts of supervision;<sup>141</sup> it was held that it is not the place of enforcement courts "to go behind the award," nor to "explore the reasoning," and allow the re-opening of what the arbitrators had already decided.<sup>142</sup> If the issue was not raised at the courts of supervision, it was not for the courts of enforcement to second-guess how the courts of supervision might have decided. The Hong Kong judgment and the "mechanic" principle had quoted an earlier English Court of Appeal judgment, *C v D*.<sup>143</sup> The English Court held that:

[A]n agreement as to the seat of arbitration is analogous to an exclusive jurisdiction clause. Any claim for a remedy going to the . . . validity of an existing interim or final award is agreed to be made only in the courts of the place designated as to the seat of the arbitration.<sup>144</sup>

<sup>134</sup> See *Xiamen Xinjingdi Grp.*, [2008] at 4 H.K.L.R.D. 982-88.

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

<sup>137</sup> *Id.* at 982.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* at 973.

<sup>141</sup> *Id.* at 984.

<sup>142</sup> *Id.* at 980, 983.

<sup>143</sup> *Id.* at 972, 984 (quoting *C v D*, [2007] EWCA (Civ) 1282, [17]).

<sup>144</sup> *C v D*, [2007] EWCA (Civ) 1282, [17] (quoting *A v B* [2006] EWHC (Comm) 2006, [111]).

It seems that the Hong Kong position on enforcement and public policy towards Mainland China arbitral awards, up to the *Xiamen* case, has been consistently in a cautious manner.<sup>145</sup> The court generally follows the narrow interpretation of public policy, although in the meantime parties are reminded of the importance of raising procedural objections at the supervisory court in a timely manner.<sup>146</sup>

As the line of the above cases shows, the Hong Kong courts respect the fact that when parties agree to arbitration, it is their intention that their dispute be settled and argued by arbitration and not in court. Hence, any error in judgment by arbitration would be insufficient to counterbalance the public policy of pro-enforcement, unless there is some substantial injustice to render the enforcement repugnant.<sup>147</sup>

For reasons of comity between the two jurisdictions and the unreasonableness of requiring Mainland China arbitrations to adhere to the strict standards of Hong Kong law, Hong Kong courts have closely scrutinized all claims challenging enforcement.<sup>148</sup> The courts have placed a high threshold of public policy by requiring the alleged infringement to be fundamentally contrary to Hong Kong's most basic sense of justice and morality.<sup>149</sup> "[T]he high threshold set by Hong Kong courts may have acted as a potent disincentive against frivolous claims on public policy, and to protect the operation of the arbitration systems, both in Hong Kong and with Mainland China."<sup>150</sup> However, the test has been controversial because parties with genuine issues of public policy and who are subject to irregular awards, now find it "difficult to avail themselves of the public policy exception to enforcement."<sup>151</sup>

A most recent Hong Kong decision considers public policy-based procedural objections to the "enforcement of a Mainland China arbitral award that was made following the hybrid process of

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<sup>145</sup> See generally *Hebei*, [1999] at 2 H.K.C.F.A.R. 111; *Unruh*, [2007] at 2 H.K.L.R.D. 414; *Xiamen Xinjingdi Grp.*, [2008] at 4 H.K.L.R.D. 972; see also Gu & Zhang, *supra* note 124, at 1013.

<sup>146</sup> See generally *Hebei*, [1999] at 2 H.K.C.F.A.R. 111; *Shanghai City Found. Works Corp.*, [2001] at 3 H.K.C. 521; see also Gu & Zhang, *supra* note 124.

<sup>147</sup> Gu & Zhang, *supra* note 124, at 1013-14.

<sup>148</sup> *Id.* at 1003.

<sup>149</sup> *Hebei*, [1999] at 2 H.K.C.F.A.R. 139.

<sup>150</sup> Gu & Zhang, *supra* note 124, at 1003.

<sup>151</sup> *Id.*

mediation and arbitration (the ‘med-arb’).”<sup>152</sup> The “*Keeneye* case,” (*Gao Haiyan v Keeneye Holdings Ltd.*), decided by the CA in early December 2011, in which the appeal against the ruling of the CFI was allowed,<sup>153</sup> represents the latest judicial approach of enforcement of Mainland China awards in Hong Kong.<sup>154</sup> As will be demonstrated in following discussions, the *Keeneye* case throws the judicial standard in enforcement proceedings, particularly with respect to the enforcement of a Mainland China award in Hong Kong, into confusion.

*2010 and onwards: The Controversy and Discontent since Keeneye*

### **The Keeneye Case**

In the period covering 2010 to 2012, as reflected in Table 2, although there were altogether five enforcement challenges against Mainland China awards, only one challenge was successful. On the other hand, it is in this period, after almost ten years of calm in the cross-border arbitration regime, that the future uncertainty of whether the high standard of Hong Kong courts in cross-border enforcement actions should be lowered to defer to the Mainland China arbitration status quo and its developing rule-of-law reality has been unveiled. What is striking in this period is a single case, the *Keeneye*, in which the disparity between the rulings of the CFI and CA seemed to make the public policy approach not as clear cut as before (or more nuanced now) when the Mainland China arbitration practice holds a standard of integrity which is lower than that required in Hong Kong.<sup>155</sup>

On April 12, 2011, Judge Reyes at the CFI denied enforcement of a Mainland China arbitral award by reason that it infringed Hong Kong’s public policy, because it was made under circumstances

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<sup>152</sup> *Id.*

<sup>153</sup> *Keeneye II*, [2012] at 1 H.K.L.R.D. 627; see *Gao Haiyan v. Keeneye Holdings Ltd. (Keeneye I)*, [2011] 3 H.K.C. 157 (C.F.I.).

<sup>154</sup> Gu & Zhang, *supra* note 124, at 1003-04.

<sup>155</sup> *Keeneye II*, [2012] at 1 H.K.L.R.D. 627 (C.A.); *Keeneye I*, [2011] at 3 H.K.C. 157 (C.F.I.).

indicating apparent bias.<sup>156</sup> The reasoning of the case is secondary to how the arbitration was conducted. In the dispute settlement, mediation was conducted as part of the arbitration process, i.e. med-arb.<sup>157</sup> “The bias was found to arise from a private meeting between an arbitrator nominated by the applicants and the Secretary General of the Xi’an Arbitration Commission (the “XAC”) and an affiliate of the respondents, who was told to ‘work on’ [(做工作)] a RMB 250 million proposal” at a dinner table in a hotel with the respondents in the med-arb process.<sup>158</sup> “The respondents eventually refused to pay the proposed settlement and proceeded to arbitration.”<sup>159</sup> The tribunal ruled against the respondent, but the award amounted to only RMB 50 million.<sup>160</sup>

The Arbitration Rules of the XAC expressly provided for mediation to take place within the arbitration process (i.e. med-arb). Pursuant to Article 37 of the Rules, med-arb should be conducted “by the arbitral tribunal or the presiding arbitrator,” though it goes on to say that “[w]ith the approval of the parties, any third party may be invited to assist the mediation, or they may act as mediator.”<sup>161</sup> After the award was rendered, the respondents challenged the award to the supervisory court, the Xi’an Intermediate Court, on ground of bias and breaches of the proper procedure of med-arb under the XAC Rules.<sup>162</sup>

The Xi’an court found against the claims, ruling that there was no evidence of bias, no breach of the arbitral rules, and upheld the award.<sup>163</sup> The respondents then resisted the award at the enforcement stage in Hong Kong.<sup>164</sup>

As the presiding judge at the CFI trial, Judge Reyes refused to follow the decision of the Xi’an Court. The CFI held that although the Xi’an Court, by its standards, found the private meeting with “working on” parties to be entirely fine and the subsequent award perfectly valid, in accordance with *Hebei*, the Hong Kong courts

<sup>156</sup> *Keeneye I*, [2011] at 3 HKC 157 at paras. 3, 5-7, 101-103.

<sup>157</sup> *Id.* at paras. 15-17. The Med-Arb process is a process where the parties agree to mediate their dispute within the process of arbitration.

<sup>158</sup> Gu & Zhang, *supra* note 124, at 1005; *Keeneye I*, [2011] at 3 HKC 157 at para. 22.

<sup>159</sup> Gu & Zhang, *supra* note 124, at 1005.

<sup>160</sup> *See Keeneye I*, [2011] at 3 HKC 157 at para 68.

<sup>161</sup> Gu & Zhang, *supra* note 124, at 1005 (quoting Judge Reyes’ English translation of Article 37 of the Rules of the Xi’an Arbitration Commission); *Keeneye I*, [2011] at 3 H.K.C. 157 at para 21.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

could apply their own standards when deciding whether an award should be refused under public policy grounds.<sup>165</sup> The CFI held that a med-arb process may run into self-evident difficulties [with respect to] impartiality and the risk of apparent bias arising from an arbitrator also acting as mediator.<sup>166</sup> Moreover, the phrase “work on” insinuated that the party might have been actively pushed to accept the settlement proposal.<sup>167</sup> As such, it was held that when the circumstances surrounding an arbitrator would cause a fair-minded observer to apprehend a real risk of bias, an award made in that situation could be refused enforcement under the public policy exception of Hong Kong.<sup>168</sup> The CFI thus concluded that the med-arb conducted, while insufficient to prove actual bias, when combined with the contrasting result of the RMB 50 million and the proposed RMB 250 million settlement during mediation, can lead a reasonable bystander to apprehend bias as a real possibility in the making of the award.<sup>169</sup>

However, upon appeal, Vice President Tang (“Tang VP”), Justice of Appeal Fok and Justice Sakhrani at the CA unanimously allowed the appeal and reinstated the award.<sup>170</sup>

At the CA trial, in leading the bench, Tang VP stressed and reapplied the usual strict policy of disallowing the refusal of enforcement of arbitral awards except in most exceptional circumstances threatening Hong Kong’s morality and justice.<sup>171</sup> The CA agreed with the CFI that Hong Kong can apply its own public policy in deciding whether outside arbitral awards are to be denied enforcement in Hong Kong. The CA was, however, concerned that deference should be paid to supervisory court in Mainland China and to the fact that the Mainland supervisory court had previously found that there was no finding of bias and that the med-arb process was properly proceeded with according to their standards. Hence, the CA blamed the CFI for not having placed enough weight on the decision of the Xi’an Court.<sup>172</sup> After considering all the facts of the case, the CA held that a Mainland China court would be in a better position to decide on the properness of the procedure where the

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<sup>165</sup> Morgan & Yeung, *supra* note 94, at paras 28-31.

<sup>166</sup> *Id.*, at para 72.

<sup>167</sup> *Keeneye I*, *supra* note 155, at para 22(3).

<sup>168</sup> *Id.*, per Judge Reyes, at paras. 53, 69.

<sup>169</sup> *Id.*, at paras. 3, 5, 7, 53, 69, 99-101, 103.

<sup>170</sup> *Keeneye II*, [2012] at 1 H.K.L.R.D. 627 (CA).

<sup>171</sup> *See, e.g., Hebei*, [1999] at 2 H.K.F.A.R. 111.

<sup>172</sup> *Id.*, at para 68.

court saw no bias and no complaint about the venue had been made to the Xi'an Court.<sup>173</sup> Thus guided, in deference to the supervisory court, the CA reversed the CFI's ruling, concluding that apparent bias had not been sufficiently proven to warrant a refusal to enforce the Mainland China award.<sup>174</sup>

While the CA came to this conclusion on basis of the common principles of finality of arbitration and comity of cross-border arbitration, and most directly, the English authority of *Minmetals Germany GmbH v Ferco Steel Ltd.*,<sup>175</sup> its application is somewhat controversial. The CA decision was questioned on whether it has lowered its standards too far in the court's usual policy of refusing to enforce biased awards, in order to protect the vibrancy of the cross-border arbitration system.<sup>176</sup>

### The Controversies

The *Keeneye* case has fleshed out a new wave of discussions on public policy that the Hong Kong common law mindset has had against the Mainland China style arbitration.<sup>177</sup> The first controversy is on the issue of bias and its associated due process concerns, and the second is on whose standard of bias should be employed when deciding whether the public policy of Hong Kong was infringed by the purported bias. Viewing the two controversies together, it seems that, since *Keeneye*, Hong Kong courts have lost clarity in their enforcement standard and the cross-border arbitration order has been driven towards Mainland China standards.

Regarding the first controversy, the problem of bias in the med-arb context is latent. In cases where the roles of mediator and arbitrator are assumed by the same person, when mediation fails and parties proceed to arbitration, the mediator-turned-arbitrator may become privy to confidential information not placed before the

<sup>173</sup> *Id.*, at para 99.

<sup>174</sup> *Id.*, at para 104-106.

<sup>175</sup> *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647. (Queen's Bench Commercial Court, England and Wales), where Justice Coleman explained on English public policy of deference to the supervisory jurisdiction of arbitration. See *Minmetals*, per Justice Coleman, at para 661, cited in *Keeneye II*, per Tang VP, at para 67.

<sup>176</sup> Gu & Zhang, *supra* note 124, at 1006. For a general review of the criticism of the case, see Phillip Georgiou, *The Real Risk of Bias in "Chinese Style" Arbitrations*, JONES DAY COMMENTARY (May, 2011), <http://www.jonesday.com/files/Publication/77df6edc-7689-474b-91f5-bb916886282c/Presentation/PublicationAttachment/7ccf7cab-b094-4857-8afc-706338512f90/Real%20Risk%20of%20Bias.pdf>.

<sup>177</sup> Gu & Zhang, *supra* note 124, at 1018.

arbitral tribunal but only available during mediation, and hence loses his impartiality.<sup>178</sup> The *Keeneye* case highlights the difficulties inherent in med-arb proceedings, particularly with respect to the mode of mediation. This is crucial in the Mainland China context, as mediation is a much relied on dispute resolution system and parties are highly encouraged to adopt mediation within arbitration.

Moreover, the mediator-turned-arbitrator may become “attached to any settlement proposals he may have made” and would try to “prove himself right during the arbitration.”<sup>179</sup> It is the combination of these factors which makes it easy for an arbitrator to lose his impartiality after having assumed the role of mediator. To counter this possibility, many “common law arbitrators therefore tend to refuse to participate in med-arb, so that they can avoid appearing to be biased, even if they [might be] confident that they can act professionally and adjudicate without bias.”<sup>180</sup> It is this trend that “was the main thrust of the challenge of the award in the *Keeneye* case.”<sup>181</sup>

At the CFI, Judge Reyes held that if an award were found to be tainted by the appearance of bias, the enforcement “would be an affront to this Court’s sense of justice”<sup>182</sup> and hence, an award made in that situation could be refused enforcement under the public policy exception of Hong Kong.<sup>183</sup> The point on bias was further investigated in the CA, which “found the *Hebei* case to be the definitive authority.”<sup>184</sup> On the standard of apparent bias, Permanent Judge Bokhary found:

[S]hort 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. . . . After all,

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 1018-19.

<sup>180</sup> Carlos De Vera, *Arbitrating Harmony: ‘Med Arb’ and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China*, 18 COLUM. J. ASIAN L. 149, 155-157 (2004).

<sup>181</sup> Gu & Zhang, *supra* note 124, at 1019.

<sup>182</sup> *Keeneye I*, [2011] at 3 H.K.C. 157, para. 99.

<sup>183</sup> *Id.* at paras. 99-100.

<sup>184</sup> Gu & Zhang, *supra* note 124, at 1019; *Keeneye II*, [2012] at 1 H.K.L.R.D. 644.

where the appearance of bias is strong enough, it can lead to an inference that actual bias existed.<sup>185</sup>

“From this quote, it seems that only the finding of actual bias would be sufficient to raise the public policy ground to resist the enforcement” in Hong Kong.<sup>186</sup> In *Hebei*, however, Non-Permanent Judge Sir Anthony Mason at page 139 said: “[T]he opportunity of a party to present his case and a determination by an 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.”<sup>187</sup>

It seems that Non-Permanent Judge Sir Anthony Mason, espousing a standard different from Permanent Judge Bokhary’s threshold, was saying that “apparent bias could also be a ground under public policy to refuse enforcement.”<sup>188</sup> Despite the seemingly contrary views, Tang VP at the CA, in his leading judgment in *Keeneye*, did not find any conflict between the two quotes.<sup>189</sup> Unfortunately, Tang VP has not confirmed whether an appearance of bias strong enough that actual bias can be inferred is sufficient to pass the court’s current threshold of the basic notion of justice in Hong Kong. It is still unknown to what extent the apparent bias can be justified in order to deny the enforcement of an award. The standard is controversial in enforcement challenges when awards are made in circumstances involving some sort of apparent bias which is not uncommon in Mainland China as a developing rule-of-law jurisdiction with less respect for due process.

The associated problem with bias is the likely violation of due process. “[A] violation of due process may occur, as the additional information obtained in the private caucus of mediation may affect the mediator-turned-arbitrator’s mind without the other party having the right to question the validity and accuracy of what was said in the caucus.”<sup>190</sup> Fairly speaking, it is not that when an arbitrator acts as a mediator, he is already under suspicions of bias and impartiality, but it is reasonable to say that arbitrators acting as mediators are

<sup>185</sup> *Keeneye II*, [2012] at 1 H.K.L.R.D. 660-61 (quoting *Hebei*, [1999] at 2 H.K.C.F.A.R. 124).

<sup>186</sup> Gu & Zhang, *supra* note 124, at 1020.

<sup>187</sup> *Hebei*, [1999] at 2. H.K.C.F.A.R. 139.

<sup>188</sup> Gu & Zhang, *supra* note 124, at 1020.

<sup>189</sup> *Keeneye II*, [2012] at 1 H.K.L.R.D. 661.

<sup>190</sup> Gu & Zhang, *supra* note 124, at 1021 (citing De Vera, *supra* note 172).

under conditions where it is easy to develop a due process concern. Internationally, the problem is often resolved by requiring the arbitrator who participated in the mediation to disclose all information which may be relevant to the issues. For example, in Hong Kong, the Arbitration Ordinance requires arbitrators to disclose to all other parties all such confidential information received by him in the role as a mediator if he considers the information material to the arbitral proceedings.<sup>191</sup>

Conversely, the situation is far from satisfactory in Mainland China. The 1994 China Arbitration Law (the “AL”) “only provides sweep reference to the practice of med-arb[s].”<sup>192</sup> The AL contains neither “provisions disallowing private meetings (caucus), nor are there any provisions requiring arbitrators to disclose information obtained from such meetings to other parties or to the rest of the tribunal.”<sup>193</sup> The AL is further silent on whether Chinese “arbitrators are restricted from using their knowledge of such information when deciding the case afterwards” and it is not uncommon that mediator-turned-arbitrators would rely on the confidential information in making the award.<sup>194</sup> “Hence, the difference in legislative policy the two jurisdictions have towards the maintenance of due process is outstanding [when Mainland China] awards are transferred to Hong Kong seeking enforcement.”<sup>195</sup>

The second controversy is even more problematic, as the CA removed the clarity on whose standard of apparent bias was to be employed when deciding whether the public policy of Hong Kong was infringed by the purported bias. The default position used to be clearly the standard of the enforcing jurisdiction, i.e. Hong Kong’s standard. Quoting Sir Anthony Mason in the *Hebei* case, “[i]t has been generally accepted that the expression ‘contrary to the public policy of that country’ in art.V2(b) [of the New York Convention]

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<sup>191</sup> Arbitration Ordinance, (2011) Cap. 609, 13, § 33(4).

<sup>192</sup> Gu & Zhang, *supra* note 124, at 1021; Zhongcai Fa (仲裁法) [Arbitration Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Aug. 31, 1994, effective Sep. 1, 1995) 1994 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 31. Article 51 of the Arbitration Law only provides that if parties suggest mediation, the tribunal is obliged to conduct it.

<sup>193</sup> Gu & Zhang, *supra* note 124, at 1021.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

means ‘contrary to the fundamental conceptions of morality and justice’ of the forum.”<sup>196</sup>

Following principles established in *Hebei*, a party which unsuccessfully challenges an arbitral award before the supervisory court will not be precluded from raising the same ground before the enforcement court because the public policy of the latter may well differ from that of the former.<sup>197</sup> The CA, however, was concerned that the refusal of a supervisory court to revoke an award on the ground of apparent bias needs to be respected as such refusal was relevant to the enforcement court’s decision.<sup>198</sup>

Thus guided, the CA chastised the CFI for not having placed enough weight on the decision of the supervisory court (Xi’an court) on the issue of apparent bias.<sup>199</sup> At the CA, Tang VP considered that the enforcement court must take into account the difference in mediation culture and med-arb practice between Hong Kong and Mainland China. Hence, the Mainland China court is better able to decide whether mediation by way of a dinner meeting in a hotel would be acceptable in Mainland China practices, where the court saw no bias.<sup>200</sup> The Mainland court decision was therefore followed in Hong Kong because of this deference.

*Keeneye* is a surprising decision, as it throws into doubt the seemingly-established law that when an enforcement court considers award challenges under the auspices of public policy, it is only the public policy of the forum court which is relevant. Although the Hong Kong courts’ application of Hong Kong’s public policy is tempered with competing concerns such as adopting Mainland China’s views as the supervisory court, that does not translate into deference towards its decision without balancing in the first place. Hong Kong courts should be slow in deferring to the opinion of the supervisory courts after properly balancing the pro-enforcement policies against Hong Kong’s public policy of requiring arbitrations to be free from bias and conform to the principles of due process.<sup>201</sup> Otherwise, the public policy exception of allowing enforcement courts to refuse awards according to their

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<sup>196</sup> *Hebei*, [1999] at 2 H.K.C.F.A.R. 139 (quoting *Parsons & Whitmore*, 508 F.2d at 974 (2nd Cir. 1974)).

<sup>197</sup> *Id.*, per Sir Anthony Mason NPJ at para 140.

<sup>198</sup> *Keeneye II*, at paras 67 and 68.

<sup>199</sup> *Keeneye II*, [2012] at 1 H.K.L.R.D. 650.

<sup>200</sup> *Id.* at 659.

<sup>201</sup> See Gu & Zhang, *supra* note 124, at 1023.

fora's own standards would be emasculated. In this regard, the CA has been criticized for having too readily deferred its opinion of the enforceability of an award to the Mainland China supervisory court without full consideration and careful balancing of the relevant issues of the Hong Kong policy of justice and morality against the policy of pro-enforcement of the Mainland China award.<sup>202</sup>

### **Implication of the Keeneye in Cross-border Arbitral Relations**

In retrospect, the *Keeneye* case may be considered a skillful “maneuver” of being considerate to Mainland China arbitration system and legal institutions. The CA judgment was not crystal clear in its reasoning and is ambiguous enough to sustain different interpretations of the decision. As to what has been reflected in *Keeneye*, Tang VP at the CA, asked the panel to pay due regard to how mediation was normally conducted in the arbitral seat and to how the supervisory court would be in a better position to assess the norms of arbitration practice (i.e. whether mediation by way of a dinner meeting in a hotel with “work on” by other parties would be acceptable in Mainland China).<sup>203</sup> The CA judgment, after all, never attempted to substitute its views for the Mainland China court's interpretation on the properness of its arbitral procedure. The legal community in Mainland China seemed satisfied with this approach, the legal community in Hong Kong has, however, challenged the decision as deviating from Hong Kong's former approach and standard. It was argued that the CA judgment gave too much deference to Mainland China's arbitral practice. It was also commented that such recognition, or understanding, would foster cross-border arbitral and business relations.<sup>204</sup> As the reasoning behind this approach was not fully explained in the judgment, both Mainland China and Hong Kong's legal communities may read from the judgment what they desire. The jurisprudence problems at issue, however, are more complicated than merely whether Hong Kong courts recognize Mainland China arbitral practice or convergence between the two jurisdictions per se; such recognition involves legal repercussions which could determine the future

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<sup>202</sup> See Morgan & Yeung, *supra* note 94, at 30-33.

<sup>203</sup> See Gu & Zhang, *supra* note 124, at 1023.

<sup>204</sup> See *id.* at 1026.

interaction trend and development path of the two arbitral systems across the border.

First, the *Keeneye* case reveals a disagreement between Hong Kong courts concerning the relative weight they should place on the pro-enforcement policies of comity and finality and whether the court should defer its opinion on the enforceability of an award when the supervisory court's public policy is substantially different from what the Hong Kong courts apply. As has been analyzed, this disagreement is undesirable and makes it difficult for parties to anticipate the outcome of enforcement challenges made under the public policy ground in Hong Kong.

Second, there is the more subtle legal conflict between the two jurisdictions. The conflict has long been known to both sides, as Hong Kong and Mainland China have had different legal histories and have been driven by different sets of legal systems and ideologies. Even after unification for more than fifteen years, the legal, cultural, and ideological disparities between the two sides as reflected in *Keeneye* are still outstanding. The common expression of "work on" and the practice to involve third parties for influence in the Mainland Chinese arbitral process played a delicate role in the *Keeneye* case and led to different judgments in Mainland China and Hong Kong, as well as different rulings at the two levels of Hong Kong courts in Hong Kong. Judge Reyes at the CFI found apparent bias with the apprehension of "a fair minded observer" (in Hong Kong)<sup>205</sup> whereas Tang VP at the CA based his judgment more on "an understanding of how mediation is normally conducted in the place where it was conducted" (in Mainland China).<sup>206</sup> This shows that the different expectations of arbitral standards across the border can cause both legal and ideological conflicts, and as these differences persist, so will their corollary conflicts. In the particular scenario of med-arb, problems will arise more frequently with respect to Mainland China arbitration than with arbitrations from other New York Convention jurisdictions, as not only is the practice more popular in Mainland China arbitration, but there are less procedural safeguards accorded to parties in Mainland China as well. Hence, the impact of the *Keeneye* case on cross-border arbitration cannot be underestimated.

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<sup>205</sup> *Keeneye I*, [2011] at 3 H.K.C. 157, para 53.

<sup>206</sup> *Keeneye II*, [2012] at 1 H.K.L.R.D. 659.

The *Keeneye* case also seems to indicate that the standard of public policy in the cross-border enforcement of arbitral awards in Hong Kong might be somewhat China-oriented, or comparatively more relaxed than what is applied to the New York Convention awards.<sup>207</sup> Pursuant to the reasoning of the CA in *Keeneye*, because both parties involved in the arbitration come from Mainland China and the Mainland Chinese court has interpreted the legality of the case, it would thus be undesirable for Hong Kong courts to read into the mind of the Mainland China judges unless the issues threaten the fundamental justice and morality of Hong Kong.<sup>208</sup> What is worth noting is that the legal issues such as bias, private caucus, confidentiality, and due process concerned in med-arb procedures, although challenged as problems in Hong Kong, have, however, been practiced for ages and never been considered as problems in [the] Mainland China dispute resolution context.<sup>209</sup> As Mainland China lags behind in comparison to the common law's respect of the rule of law and due process, similar disagreements over Mainland China's arbitral practices are likely to arise. Hence, if Hong Kong's public policy standards are applied rigidly, Hong Kong courts may find themselves facing all sorts of enforcement challenges of procedural violations and impartiality issues involving Mainland China awards.

Such conflicts over arbitral standards are not particular to *Keeneye*, and can be found in many earlier cases, such as in *Hebei* (where the Mainland China arbitral authorities were found to have less respect for the importance of due process), and in *Unruh v. Seeberger* (where Mainland China had no qualms about champertous agreements). Regardless of legal terms and technical grounds, the real concern behind all of the worries seem to be the quality and integrity of Mainland China arbitral awards, especially when the awards are made by government-affiliated local arbitration commissions widespread throughout the nation after the taking effect of the AL in 1995.<sup>210</sup> Hence, the *Keeneye* jurisprudence and the conflicts it involves reflect the difficulties, or delicate discontent, of Hong Kong courts in finding the appropriate balance between being pro-enforcement and respecting due process with respect to

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<sup>207</sup> Gu & Zhang, *supra* note 124, at 1025.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 1025-26.

<sup>210</sup> For a brief account of the development of local arbitration commissions in Mainland China, see GU, *supra* note 8, at ch. 6.

Mainland-China-standard arbitration, even after one and a half decades of practice of cross-border arbitration.

*Summary: The Jurisprudence of Cross-border Arbitration in Hong Kong with Mainland China*

To conclude this Part, with a view to the Tables on caseload change regarding the enforcement of Mainland China arbitral awards in Hong Kong, it can be seen that the Hong Kong courts have faithfully followed the pre-handover pro-enforcement policy and have heavily relied on New York Convention jurisprudence. Past the first two years after the promulgation of the Mutual Arrangement, the pro-enforcement policy as upheld by the *Hebei* case has kept award challenges to the rate as low as 10%.<sup>211</sup> The success rate of challenges has similarly been quite low, at an average of 21% since the handover.<sup>212</sup> With an overall enforcement rate as high as 95%, the good health of the cross-border arbitration enforcement system in Hong Kong with respect to Mainland China is evident.<sup>213</sup>

Turning from statistics to legal development, the abovementioned cases represent the jurisprudence evolving thus far as to how Hong Kong courts have treated Mainland China awards and how they have defined their role in the cross-border arbitral order with respect to Mainland China. In summary, since the 1997 handover, the jurisprudence has generally undergone four different phases, in which the Hong Kong courts have treated the enforcement of Mainland China arbitral awards with different attitudes.

First, there was an enforcement dark age in the initial years of handover due to the legal vacuum regarding the cross-border arbitration scheme (1997-1999). It was followed by a significant rebound of cases after the promulgation of the Mutual Arrangement (2000-2001). The cross-border enforcement in Hong Kong kept calm and rode swift upon the wave of *Hebei* for a significant period of time (2002-2009). Finally, in the most recent years, there has been controversy and discontent over the “China-centric”

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<sup>211</sup> Fifty-five Mainland awards have been applied for enforcement from the period from 2002 to 2011, and only six of those have been challenged, amounting to an approximate 10.90% challenge rate. See Table 1.

<sup>212</sup> See Table 2.

<sup>213</sup> See *id.*

enforcement standard since the publication of the *Keeneye* case (2010 and onwards). Some of these changes were due to circumstantial situations which bound the court, while others could be reflective of a conflicting judicial attitude juggling a desire to uphold Hong Kong's high standard of arbitration (including its high standard of public policy, due process, and rule-of-law) and to accommodate the more relaxed standard of Mainland China arbitration practice to be pro-enforcement.

Faced with the new challenge following the constitutional idea of "one country, two systems" and in the absence of a cross-border arbitration scheme between the two sides, it is noted that Hong Kong courts have not attempted to resist or limit the authority of Mainland China arbitral awards in the initial years following the handover. Instead, they have extended the New York Convention jurisprudence of being pro-enforcement towards Mainland Chinese awards (which used to be categorized as "foreign" before the handover). In the meantime, as shown in *Hebei*, they adhered to the common law approach of public policy and due process and managed to guide Mainland China in its development of an international-standardized arbitration system, by encouraging its reform and improvement.<sup>214</sup> Hence, in the first dozen years after the handover (1997 to 2009), courts in Hong Kong seem to have handled well the dual challenges of finding her place in the new cross-border arbitration order by setting up a high standard of arbitration review in interaction with Mainland China and leading the new-born SAR forward in becoming a regional and international arbitration center. This ability to handle the dual challenges has been degraded, however, with the arrival of *Keeneye*, as the legal and ideological conflicts in the undercurrent between Hong Kong and Mainland China have been uncovered.

Delving into the *Keeneye* jurisprudence, it seems that when reviewing Mainland China awards seeking enforcement in Hong Kong and in assessing Hong Kong's public policy, the current approach is that the Hong Kong court is entitled to consider the question of bias from its own view point. But due regard should be given to the views of the Mainland China court as the supervisory court of arbitration. In the absence of a decision by the Mainland

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<sup>214</sup> CIETAC reformed its Arbitration Rules in 2000, in response the *Hebei* judgment where the CIETAC award was turned down by Hong Kong courts. See more detailed discussions *infra*.

China court, the Hong Kong courts have full autonomy to interpret the public policy on their own and to decide the standard of enforcement in accordance with their own interpretation. Once the Mainland China court has spoken, however, the Hong Kong courts will comply. In the meantime, there is an equally important issue of estoppel. According to *Hebei*, the losing party, before coming to the enforcement court (i.e. the Hong Kong court), has to challenge first before the supervisory court (i.e. the Mainland China court); otherwise, the right to challenge would be considered waived and the party would be estopped from raising the challenge before the enforcement court.<sup>215</sup> Hence, whatever the Mainland China supervisory court is going to say about its arbitral procedure, the Hong Kong courts will be bound by it. Then what is the role of the enforcement court? The most recent jurisprudence has transmitted a clear message that the enforcement consideration, in particular, the public policy of Hong Kong, would be leaning towards, and may even be “subject to,” the perspective of Mainland China. Hong Kong is thus losing the autonomy to define its own public policy. Although the pro-China-enforcement policy might be appealing to the cross-border business community, particularly against the backdrop of the closer economic cooperation between the two sides,<sup>216</sup> is the “China-centric” standard an appropriate approach? Moreover, is it a healthy interaction or phenomenon in terms of cross-border arbitration development?

As previously analyzed, the *Keeneye* judgment underlies the controversy of how far Hong Kong courts should take into account and accommodate, if not lean towards, the decisions of the Mainland China courts in cross-border arbitration context. It was clear in *Keeneye*, as the disagreements of the two levels of the Hong Kong courts show, that there are reasonable concerns among the Hong Kong judiciary towards the fledging level of rule-of-law and informal dispute resolution culture in Mainland China. The CA judgment was thus challenged as too quick a deference to the Mainland China judicial decisions. Additionally, the *Keeneye* judgment was challenged for not having properly and carefully balanced Hong Kong’s policy of pro-enforcement against its high

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<sup>215</sup> *Hebei*, [1999] at 2 H.K.C.F.A.R. 192, 194.

<sup>216</sup> Hong Kong and mainland China signed a Closer Economic Partnership Arrangement (CEPA) in 2003, providing an unprecedented platform for the close economic ties between the two regions.

standard of due process and, accordingly, Hong Kong may have lost its identity in the cross-border arbitral order.<sup>217</sup>

#### THE POSITIVE INTERACTION OF THE CROSS-BORDER ARBITRATION SYSTEM

This following Part looks into how the Hong Kong jurisprudence on cross-border arbitration has impacted the Mainland China arbitration system through encouraging positive interaction. The “positive interaction” refers to such trend that the Mainland China arbitral authorities reflect on the enforcement judgments of the Hong Kong courts and become persuaded to improve their rules and practices to cohere with the high and internationally accepted arbitration standards that Hong Kong maintains. However, this trend of “positive interaction,” as will be explained subsequently, has been slowed down, or even hampered, since *Keeneye*.

#### *The Hong Kong Standard and Positive Interaction before Keeneye*

The experience of Hong Kong’s arbitration is impactful upon the future reform of the rather young Mainland China arbitration system.<sup>218</sup> As explained above, ever since the signing of the Mutual Arrangement, there have been signs of interaction of arbitration practices, where the Mainland China side has traditionally been more inclined towards adopting Hong Kong standards.

Obviously, of the two jurisdictions, Hong Kong’s arbitration system is the more developed. First, Hong Kong adopted the UNCITRAL<sup>219</sup> Model Law on International Commercial Arbitration as early as 1996 and has, since 2011, extended the Model Law to govern both its domestic and international arbitrations.<sup>220</sup> Being a

<sup>217</sup> Gu & Zhang, *supra* note 124, at 1025-26 (discussing the policy concerns of cross-border enforcement of arbitral awards).

<sup>218</sup> The Chinese arbitration system began to take shape after the publication of its first Arbitration Law in 1994. For a general overview of the rather young and inexperienced Chinese arbitration system, see GU, *supra* note 8.

<sup>219</sup> UNCITRAL is the short for United Nations Commission on International Trade Law.

<sup>220</sup> Hong Kong adopted the UNCITRAL Model Law on International Commercial Arbitration (the “Model Law”) in 1996 to govern its international arbitration regime, listed as Part II of the Arbitration Ordinance. In 2010, in the latest amendment to the Ordinance,

Model Law jurisdiction, Hong Kong has the benefit of being able to rely on a body of international arbitration jurisprudence and has been placed in a significantly advantageous position in being able to market its arbitration as being in line with international standards. On the other hand, the Mainland China arbitration system, with its first Arbitration Law published in 1994 and without subsequent amendment thus far, has been described as being much influenced by Chinese local standards and insufficient with respect to the protection of party and tribunal autonomy.<sup>221</sup> Second, Hong Kong has a single, simple, and unified arbitration system, which Mainland China does not have. In Mainland China, foreign-related arbitrations and domestic arbitrations are treated very differently,<sup>222</sup> and laws at the national level are often very vague, leaving much room for differences for laws and regulations from locality to locality or from arbitral institution to arbitral institution.<sup>223</sup> Third, in terms of public policy standards, Hong Kong is more in line with international standards. For example, regarding due process issues, Hong Kong courts have adhered to the high standard set by the common law which has been developed for centuries. In other respects though, especially when dealing with non-domestic arbitration, courts in Hong Kong do not shy from using foreign standards, such as other common law practices, as well as other New York Convention jurisdictions' practices. In contrast, in Mainland China, public policy carries a delicate and obscure definition, which refers to the concept of "social and public interest."<sup>224</sup> "Social and public interest" in the Arbitration Law has remained a common criticism, as Chinese courts sometimes try to review the merits of the award under the pretext of local social and public interest such as local

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the Model Law was extended to govern the domestic arbitration in Hong Kong. The amended Arbitration Ordinance took effect in June 2011.

<sup>221</sup> GU, *supra* note 8, at 43.

<sup>222</sup> For an introduction on the dual-track arbitration system in the Mainland, see GU, *supra* note 8, at 24-32.

<sup>223</sup> For the local initiatives in filling the gap of laws at the Central level, see GU, *supra* note 8, at 70-74.

<sup>224</sup> The basic principle of "social and public interest" was first established by the *General Principles of Civil Law*, which provided that "where this Chapter provides for the application of the law of a foreign country or of international practice, this must not be contrary to the public interest of the People's Republic of China". General Principles of the Civil Law of the People's Republic of China, art. 150 (promulgated by President of China, Order No. 37, April 12, 1986, effective January 1, 1987), available at <http://en.chinacourt.org/public/detail.php?id=2696>.

protectionism concerns.<sup>225</sup> Moreover, there are no rule-of-law traditions and there is little respect for due process and formal dispute resolution procedures in Mainland China.

Although the arbitration system in Hong Kong is not without deficiencies, the advantages outlined above should be respected and protected, as they have played important roles in developing Hong Kong into a regional and international hub for arbitration. To emphasize, the Hong Kong International Arbitration Centre, in its promotional webpage, “Why Hong Kong?,” uses Hong Kong’s rule of law, the common law system, its pro-enforcement courts, and the fact that Hong Kong is a Model Law jurisdiction, as selling points.<sup>226</sup> It is fair to say that when comparing the arbitration systems of Hong Kong and Mainland China, Hong Kong has been better off in many major aspects.

It would then seem sensible that interaction between the two sides and of the cross-border arbitration regime towards the higher standards which Hong Kong maintains would be more logical than interaction the other way. Moreover, Mainland China, is as eager as, or perhaps more eager than, Hong Kong to market its arbitration regime as modern and international in order to attract foreign business and investment. However, the vision of what makes a modern arbitration system may not be shared in the same sense across the border at different times.

Before *Keeneye*, the Mainland China arbitration authorities used to pay much attention to the Hong Kong courts’ treatment of the Mainland awards and respond to such judgments by reforming their arbitration regulations to cater to the concerns of the Hong Kong courts and towards the stricter due process standards applied in Hong Kong. The desire and willingness to make a change is predicated upon certain incentives seen from the Mainland China arbitral authorities for modernization. Such type of interaction is what we refer to in this Article as “positive interaction”.

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<sup>225</sup> The *Henan Dongfeng Garment* case shows how a Chinese court applies the notion of “social and public interests” where the Court in this case equated the interests of a state-owned enterprise to “social and public interests.” *Henan Garment Imp. & Exp. (Group) Co. v. Kaifeng Dongfeng Garment Factory* (unreported). See also, Song Hang, *The Enforcement of Foreign-related Awards in China – Issues in Practice*, 2 CHINA PRIVATE INT’L L. AND COMP. L.J. 357, 367-68 (1999) (in Chinese); Xiaowan Qiu, *Enforcing Arbitral Awards Involving Foreign Parties: A Comparison of the United States and China*, 11 AM. REV. INT’L ARB. 607, 611-12 (2000)

<sup>226</sup> *Why Hong Kong*, HKIAC.COM, <http://www.hkiac.org/index.php/en/arbitration/why-hong-kong> (last visited Dec. 5, 2013).

One of the examples of such positive interaction took place in 1994 when CIETAC revised its arbitration rules in response to the *Paklito* judgment where the Hong Kong court refused to enforce the Mainland China award on basis that the losing party was denied a fair and equal opportunity of presenting their case on the expert witness report.<sup>227</sup> Accordingly, Articles 26 and 28 of the 1988 CIETAC Rules were amended by Article 40 of the 1994 Rules, which afforded parties the right not only to express their opinions concerning an expert report, but also the right to require the experts to appear in the hearing to explain conclusions.<sup>228</sup> It was clear that the CIETAC revision was in response to the *Paklito* case.

In 1998, CIETAC introduced further revisions to its arbitration rules following an award challenged in the Hong Kong courts in *Hebei*.<sup>229</sup> In *Hebei*, the respondent complained that the presiding arbitrator and expert witness appointed by the tribunal had inspected allegedly defective equipment in the presence of the claimant's technicians but not the respondents. The award was subsequently challenged as being tainted by apparent bias and in violation of Hong Kong's public policy. In the aftermath of the leading judgment on *Hebei*, Article 38 of the 1998 CIETAC Rules stipulated that, when investigating the facts and collecting evidence by the tribunal itself, the tribunal should, if necessary, promptly notify both parties to be present.<sup>230</sup> The 1998 revisions were confirmed by CIETAC in its further amendment in 2000.<sup>231</sup> In a similar vein, as the flagship of locally-based arbitration institution in Mainland China,<sup>232</sup> Article 44 of the 2001 Beijing Arbitration Commission (the "BAC") Rules was also amended to state: "[t]he [t]ribunal shall deliver to the parties the evidence collected on its

<sup>227</sup> See discussions *supra*, on *Paklito*.

<sup>228</sup> CIETAC Arbitration Rules 1994 English (promulgated by China Int'l Econ. and Trade Arbitration Comm'n., effective June 1, 1994) (Kluwer Arbitration). Compare Article 40 of the 1994 CIETAC Rules with Articles 26 and 28 of the 1989 CIETAC Rules. CIETAC Arbitration Rules 1989 English (promulgated by China Int'l Econ. and Trade Arbitration Comm'n., Sept. 12, 1988, effective Jan. 1, 1989) (Kluwer Arbitration). See also Zhang, *supra* note 3, at 193 (discussing *Paklito* and subsequent revision of the CIETAC Arbitration Rules).

<sup>229</sup> See discussions *supra* on *Hebei*.

<sup>230</sup> CIETAC Arbitration Rules 1998, art. 38 (promulgated by China Int'l Econ. and Trade Arbitration Comm'n., May 6, 1998, effective May 10, 1998) (Kluwer Arbitration). See also, Zhang, *supra* note 37, at 480 (discussing the contents of Article 38).

<sup>231</sup> CIETAC Arbitration Rules 2001, art. 38 (promulgated by China Int'l Econ. and Trade Arbitration Comm'n., effective Oct. 1, 2000) (Kluwer Arbitration).

<sup>232</sup> For an introduction of the BAC as the flagship locally-based arbitration institution in mainland China, see GU, *supra* note 8, at 114-117.

own initiative [and t]he parties may provide cross-examination opinions in connection with the evidence collected by the [t]ribunal.”<sup>233</sup> It was clear to everyone that these reforms were drawn from the Hong Kong experience, in particular the Hong Kong court’s criticisms of the lower standard and insufficiency of due process in the Mainland China arbitration.

The abovementioned arbitration rule revisions are direct responses to Hong Kong’s treatment of Mainland China awards by Mainland China arbitration authorities. The reforms highlight a great desire of the Mainland side to not have its arbitration seen as sub-standard by the Hong Kong side in cross-border arbitral relations, and show the willingness of Mainland China to update its arbitration system towards the Hong Kong standard in order to achieve that goal. The reforms also show that the cross-border arbitration jurisprudence, all the way until *Keeneye*, has been clearly in line with the higher and stricter standard shaped by Hong Kong and the trend of interaction was an active and positive one where the lower and the more-relaxed standard arbitration regime (i.e. the Mainland China side) developed towards the higher and stricter standard (i.e. the Hong Kong side).

### *Is this Positive Interaction Slowing Down?*

As has been described in the previous section, in 2010, at the CFI, Judge Reyes refused to enforce the arbitral award in the *Keeneye* case, because the award was produced under apparent bias due to various circumstances, including the fact that the same arbitrator assisted in the mediation and “worked on” the parties.<sup>234</sup> Unfortunately, in the following year, in late 2011, Tang VP at the CA, reversed the decision of Judge Reyes, and held that there was no apparent bias in the case and that the lower court should have deferred to the Mainland China standard as applied by the supervising court as to whether the arbitration was conducted regularly or not.<sup>235</sup>

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<sup>233</sup> 2001 BAC Rules art. 44, (promulgated by Beijing Arbitration Comm’n., Apr. 25, 2001, effective Aug. 1, 2001), <http://www.bjac.org.cn/en/arbitration/2001.html>.

<sup>234</sup> Note that, according to Reyes, J., this mixture of arbitration and mediation, also known as med-arb, is not wrong in principle, and can be free from apparent bias if proper safeguards are in place. See *Gao Keeneye I*, [2011] at 3 HKC 157 para. 71.

<sup>235</sup> Gu & Zhang, *supra* note 124, at 1006.

In response to the *Keeneye* case, in its latest revision, CIETAC revised its arbitration rules once again (which came into effect on May 1, 2012), and notably, Article 45(8) of the 2012 Rules provides some relief to the much criticized med-arb practice in Mainland China. Article 45(8) provides:

Where the parties wish to mediate their dispute but do not wish to have mediation conducted by the arbitral tribunal, CIETAC may, with the consent of both parties, assist the parties to mediate the dispute in a manner and procedure it considers appropriate.<sup>236</sup>

Through the 2012 revision, if CIETAC, instead of the tribunal, provides for the mediation process, it seems less likely that the med-arb award would be tainted by apparent bias, as CIETAC is not directly involved in the award-making process of the arbitration. Conversely, the arbitrators may not directly get involved in the mediation process. The latest CIETAC reform, therefore, appears to allay the concerns in the *Keeneye* case (particularly regarding some of the criticisms made by Judge Reyes), and to a certain extent mirrors the approach of having the roles of mediators and arbitrators assumed by different persons.<sup>237</sup>

However, the revised provision is arguably insufficient as both parties need to be worried about bias such that they would agree to what would obviously be a more expensive procedure. In reality, if there is a likelihood of bias, it would be bias in favor of one party, and that party would be unlikely to consent to the procedure suggested by CIETAC's revisions. Hence, although there is a response to the *Keeneye* case, it does not seem to be a response which would have satisfied the standard upheld in the CFI by Judge Reyes. This is because, unlike the previous two revisions by CIETAC in 1994 and 1998, the revised rules this time provide no mandatory standard which the arbitrators/mediators have to observe in a med-arb setting in order that the issue of apparent bias can be avoided or at least mitigated.

Even more worrying, in the *Keeneye* case, the Mainland China arbitral procedure which was involved and criticized was issued by a locally-based arbitration institution, the Xi'an Arbitration

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<sup>236</sup> CIETAC Arbitration Rules 2012 art. 45(8) (promulgated by China Int'l Econ. and Trade Arbitration Comm'n., Feb. 3, 2012, effective May 1, 2012), <http://cn.cietac.org/rules/rules.pdf>.

<sup>237</sup> Gu & Zhang, *supra* note 124, at 1027.

Commission. However, that institution has thus far made no attempt to either revise its arbitration rules, or provide clarifications on the difficulties the Hong Kong courts had in interpreting its med-arb procedures.<sup>238</sup> It is reasonably believed that the quick deference to the Mainland China standard of med-arb by the CA in *Keeneye* has given the Mainland China arbitration institutions little incentive to develop their standard of arbitration towards that of Hong Kong, and may have thus slowed down the previous pace of positive interaction of the arbitration systems across the border.

Despite the importance of the court's pro-enforcement policy towards the business community, it is advocated that there is value when the Hong Kong courts refuse to bend to the more lax standards of due process in Mainland China in cross-border arbitration review and, rather, adhere to Hong Kong's high standard of justice and morality, which the Hong Kong courts see as fundamental. This is because if deference is given towards a lower standard of arbitration presently held in Mainland China or even a specific locality in Mainland China, then a plethora of theoretical and practical problems, not only with respect to Hong Kong-Mainland China cross-border arbitral relations but also beyond, could arise.

First, instead of maintaining a single standard of a particular public policy rule in order for awards to be enforced in the region, by deference, Hong Kong is transmitting the message that it has a flexible and limitless number of standards. This causes much uncertainty for parties wishing to challenge the enforcement of an award. To challenge an award in Hong Kong, parties would have the impossible task of first evaluating whether enforcing the award would breach the public policy of Hong Kong, then whether such a breach is offensive in the *lex arbitri*, then evaluate what level of deference the courts in Hong Kong would give towards the opinion of the *lex arbitri*, and finally, assess their overall chance of success. Thus, absent a single standard, parties would be confused as to the requirements of Hong Kong's arbitration scheme.

Second, as the Hong Kong courts become more accommodative towards awards which breach Hong Kong's public policy but are

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<sup>238</sup> The current Xi'an Arbitration Commission Rules in practice were issued in January 2008 and took effect in 2011. XI'AN ARBITRATION COMMISSION RULES, [http://www.xaac.org/laws\\_12.html](http://www.xaac.org/laws_12.html) (last visited July 12, 2013). No further amendments have been introduced since *Keeneye I*, despite the wide criticism and debate the case received.

not offensive in the *lex arbitri*, those jurisdictions such as Mainland China, would obviously have less incentive to reform their arbitration systems towards the Hong Kong standard. Consequently, the positive interaction of the cross-border arbitration system between the two sides would be greatly hampered.

Third, by subjecting itself to Mainland China's lower standard of due process and informal dispute resolution practice, Hong Kong would lose the identity and autonomy in setting up its own standard in the cross-border arbitral order. As a result, Hong Kong will gradually be downgrading itself from the international arbitration center in the Greater China region to a local arbitration center serving Mainland China interests. In retrospect, before *Keeneye*, Mainland China had been looking upon the Hong Kong experience to upgrade itself and align with international arbitration norms and practices that Hong Kong maintains. Thus, it would be more advisable to protect Hong Kong's heightened standard.

Finally, *Keeneye* would either slow down the positive interaction pace between the two sides previously in place, or even to indicate a sign of negative interaction where Hong Kong is diluting its autonomy, distinctiveness, and competitiveness as a rule of law jurisdiction with English law foundations and becoming a jurisdiction catering to Mainland China legal and arbitration status quo. This may in turn harm the reputation of Hong Kong as an international and regional arbitration center that the SAR government has been working hard to maintain since the handover and moreover, create an image that Hong Kong is developing towards a localized arbitration service center for Mainland China.

Due to the abovementioned reasons, too quick a deference towards Mainland China's standard without properly and carefully balancing Hong Kong's own standard of public policy is concluded as unwise, particularly because Mainland China had been attempting to positively interact, converge, and harmonize its arbitration system with that of Hong Kong over the years. Parties on both sides have much to gain from a harmonized cross-border arbitration system, but that harmonized system should be of a proper type benchmarked against the higher arbitration standards (i.e. positive interaction). The ultimate aim is that, through positive interaction, parties and arbitral authorities at the Mainland China side will improve themselves. They will have similar understandings, expectations, and attitudes towards arbitration as required under international norms and practices, which will in turn

decrease conflicts on procedural and legal issues across the border, increase the chances of settlement, and facilitate economic integration in the Greater China region. Hong Kong should take advantage of its developed rule of law and common law traditions and has an important role to play in this positive interaction process. In conclusion, Hong Kong should maintain its distinctiveness and high standards in cross-border arbitration review so as to encourage the continued positive improvement of the Mainland China arbitration regime which is mutually beneficial to both jurisdictions post-handover.

### CONCLUSION

In the fifteen years since the sovereignty handover, much has happened in the realm of cross-border arbitration in Hong Kong with respect to Mainland China. The cross-border arbitration system has seen its demise, rebirth, redevelopment and then Hong Kong's delicate discontent in recent years.

The demise came about when the New York Convention was rendered inapplicable in July 1997 because of the sovereignty handover, removing the basis of what was once a complete and smoothly running mechanism for the mutual recognition and enforcement of arbitral awards. Cross-border arbitration then went into a two year limbo in which Mainland China awards were not capable of being enforced in Hong Kong. With the application of the Mutual Arrangement between Mainland China and Hong Kong in 2000, the system was recreated by essentially redrafting the provisions of the New York Convention into a bilateral agreement between the two jurisdictions. Over the following years, the Hong Kong courts rebuilt the system on basis of the former Convention jurisprudence. The pro-enforcement policy during the Convention era in Hong Kong was reinforced by the *Hebei* case, and parties came to respect that the new cross-border arbitration system was just as respectable and stable as the former Convention-based cross-border arbitration system with respect to Mainland China arbitral awards.

However, with the arrival of the *Keeneye* case, the reinforced stability of the cross-border arbitration system was undermined. The case calls into question the once firm rule that it was the public policy standard of the enforcement court (i.e. the Hong Kong court)

which is relevant in an enforcement challenge, and not that of the seat of the arbitration or supervisory court (i.e. the Mainland China court), although it requires the taking into consideration of the views of the supervisory court such that only fundamental breaches of justice and morality in Hong Kong can be valid grounds to refuse to enforce an outside arbitral award. However, the Hong Kong Court of Appeal judgment in *Keeneye* seems to suggest that Hong Kong should instead refer itself and subject itself to the standards of Mainland China in assessing the properness of arbitration even when there are irregular awards with genuine issues of public policy seeking enforcement in Hong Kong. Arguably, this approach could keep enforcement rates high and might avoid the many conflicts which would arise from all the potential procedural violations and impartiality issues in Mainland China as a huge developing legal system undergoing rapid economic transformation and with much less respect for the rule of law and due process. However, as has been strenuously argued, this perplexing judgment of *Keeneye* has caused Hong Kong to lose much of its distinctiveness and competitiveness in defining its own public policy and, in the meantime, has slowed down or even hampered the positive interaction trend in the cross-border arbitration development with Mainland China. Although parties on both sides might gain from a “China-centric” cross-border arbitration system, this Article argues that the proper type of interaction bears much more value than the interaction per se. The cross-border arbitration system should be developed continuing the positive improvement and benchmarked against the higher and internationally accepted standards of arbitration that Hong Kong maintains (i.e. positive interaction). It is unfortunate that the past pattern of positive interaction has been slowed down or even hampered in most recent years. Where the Mainland China arbitration institutions used to revise their arbitration rules in order to display a visage that their arbitration awards would be up to the standards of Hong Kong, now the Hong Kong courts defer to the arbitration standards of Mainland China. As such, the incentive for the Mainland China arbitration regime to improve and reform itself towards the Hong Kong standards is removed or diminished.

Despite this recent downturn, it is argued that the positive interaction trend should be and will be resumed, as Hong Kong seeks to maintain its image as an international arbitration powerhouse with a strong rule-of-law, and Mainland China has

made the improvement of its arbitration system a continued endeavor for serving trade and investment interests.<sup>239</sup> Streamlining and improving the cross-border arbitration system will be critical for both jurisdictions. In the long run, this synchronized cross-border arbitration consensus will bring about the healthy development of legal cooperation and judicial assistance and gear up economic growth in the Greater China region.

Last but not the least, the existing English-language literature on Hong Kong's relation with Mainland China post-handover, as in the legal approaches generally, focuses mainly on the constitutional order of "one country, two systems," and to some extent, the role of Hong Kong in the context of China's booming economy and trade internationalization. Little attention has been devoted to legal interactions in the conflict of laws field and how Hong Kong could contribute to Mainland China's legal development, such as engaging "positive interaction" and encouraging improvement of rules and practices at the Mainland side through cross-border judicial review over arbitral awards (as this Article has identified, argued, and advocated). It is hoped that this Article can enhance the academic sensitivity to the issues generated by the rapid transformations in the field. It is further hoped that this Article can contribute to, and stimulate greater interest in, the study of conflict of laws between Hong Kong and Mainland China.

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<sup>239</sup> The continued improvement of the arbitration system is important to the trade and investment interests in China. On this point, see arguments in GU, *supra* note 8, at 197-209.