Kluwer Mediation Blog

Try as you may, you can't hide behind the label

Nadja Alexander (Editor) (Singapore International Dispute Resolution Academy) · Thursday, November 10th, 2011

Hong Kong is the global city of designer 'labels' as even the most reluctant of shoppers cannot fail to observe. It is also the city of fakes – fakes with labels and fakes without labels – and the place where the 'No Fake' label and the 'No Label' label thrive!

Confused? Well don't worry, Hong Kongers aren't. Apart from harbouring an irreversible addiction to consumerism and retail therapy, Hong Kongers have a keen and sophisticated awareness of the worth (or not) of labels and an ability to look beyond the label to reveal the true nature of that which lies beneath it. This gift not reserved for retail professionals but extends to all echelons of society including members of the Hong Kong judiciary.

Consider the following quote from his Honour Mr Justice Reyes in Gao HaiYan and Xie HePing v Keeneye Holdings Ltd and others HCCT 41/2010 (judgment dated 12 April 2011).

> "…labelling a process as mediation does not mean that anything goes. There are appropriate and inappropriate ways of conducting mediations. The would-be mediator must ensure at all times, especially when one might act as arbitrator later on, that nothing is said or done in the mediation which could convey an impression of bias." (at 79)

This statement was made in the context of a hybrid med-arb processes. It highlights the importance of planning for hybrid processes in a manner that responsibly *labels* the process taking place and considers issues relating to procedural fairness and impartiality.

This case involved an application in Hong Kong to set aside an arbitral award issued by the Xian Arbitration Commission in the PRC on the basis that it would be contrary to public policy to enforce the award as the arbitration process had been tainted by bias or the perception thereof. A previous application to the Xian Intermediate People's Court to have the award set aside had been refused. The arbitral dispute concerned the validity of a share transfer agreement.

While some of the facts remained in dispute, it seems that during an adjournment in arbitration proceedings a member of the Xian Arbitral Tribunal contacted a lawyer for the respondent and requested that another person, Zeng, who was friendly with the respondent, meet with him and the Secretary–General of the Xian Arbitration Commission (XAC). The meeting took place over dinner at the Shangri-la Hotel. During the meeting the Secretary–General conveyed to the Zeng that while the Tribunal regarded the share transfer agreements to be valid, it considered that the respondents should compensate the applicants by a payment of RMB250 million. The Secretary-General encouraged Zeng to persuade the respondents to adopt this suggestion. Zeng conveyed the Tribunal's view to the respondents who, while satisfied with the proposed decision, refused to pay the suggested compensation.

When the arbitration resumed the Tribunal issued an award to the effect that the share transfer agreement was not valid, that is the opposite decision to that intimated during the Shangri-La dinner.

The applicants contended, and the respondents denied, that the meeting at the Shangri-la Hotel amounted to a mediation within the terms of Article 37 of the Xian Arbitration Rules. The Rules permitted arbitrators and, with the parties' consent, third parties, to act as mediators, and to meet with the parties jointly or separately. Under the Rules Mediators were expressly allowed to make settlement proposals to the parties.

Reyes J expressed reservations about whether the so-called mediation complied with Article 37 of the Rules, pointing to numerous "unusual" aspects of the process, including:
• The venue and timing, namely dinner in a hotel rather than a formal venue.
• The parties did not appear to consent to the time and place of the mediation.
• The parties did not appear to consent to a third-party 'mediator', namely the Secretary-General.
• The mediation was conducted by a non-presiding member of the Tribunal and the Secretary-General of the XAC, an unusual combination.
• The parties did not attend the mediation; rather a non-party who was thought to have influence over the respondents was asked to attend.
• The applicants did not appear to have been consulted about the proposal put to the respondents and it is unclear how the compensation figure of RMB 250 million was calculated.
• The "mediators" asked the person in attendance, Zeng, to "work on" the respondents to accept the proposal. This seems to amount to more that neutral communication of a message.

Thus, despite the mediation label, Reyes J seemed to doubt whether the process really was mediation. His Honour concluded that the events at the Shangri-la Hotel would have given the fair-minded observer "a palpable sense of unease" (54) and would have caused the apprehension of a real risk of bias (53). As a matter of public policy, therefore, he refused enforcement of the Award.

The Keeneye case sends a strong signal to dispute resolution practitioners. Despite being highly flexible in nature, mediation is not an 'anything goes' process. If you choose to blend facilitative processes, such as mediation, with determinative processes, such as arbitration, then it must be done in a manner that maintains the integrity of both processes and ensures procedural fairness and the perception thereof.

Dispute resolution practitioners have an obligation to design mediation processes which are

tailored to specific client needs, procedurally robust and reflect the mediat

So when next designing a mediation or hybrid process, make it a label worth remembering.

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