

## **State Immunity in Hong Kong – is it absolute or restrictive?**

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*Democratic Republic of Congo (and 5 others) v FG Hemisphere Associates* FACV Nos 5, 6 and 7 of 2010

Is state immunity under Hong Kong law absolute or restrictive? Under the narrower doctrine of restrictive immunity, the state's immunity does not extend to commercial transactions. Earlier this month, the Hong Kong Court of Final Appeal ("CFA"), on a 3:2 majority, held that state immunity in Hong Kong is absolute. Despite being a decision of the CFA, this judgment remains provisional as it has been referred to the Standing Committee of the National People's Congress ("SCNPC") in the People's Republic of China ("PRC"). However, if the judgment is made final, under Hong Kong law state immunity will not be confined to sovereign acts of state.

### **The facts**

The case concerns the enforcement of two arbitration awards ("the Awards") made against the Democratic Republic of Congo ("Congo"). The benefit of the Awards was later assigned to FG Hemisphere ("FGH"), a USA based company. FGH invest in emerging markets including by acquiring and recovering distressed debts, particularly those of defaulting states. FGH learned that a Hong Kong based group of companies had entered into a joint-venture agreement with Congo under which Congo would receive a very large sum by way of entry fees. FGH commenced enforcement proceedings against these entry fees before the Hong Kong Court. Despite Congo claiming state immunity, FGH obtained leave to enforce the Awards as Hong Kong judgments. Congo appealed.

### **The key legal issue**

Under Hong Kong law, state immunity has historically been restrictive, rather than absolute. This was the *obiter* view of Reyes J at first instance, although as he held the matter was not a commercial transaction, he did not need to decide the point. It was also the view of the majority of the Court of Appeal. However, in his dissenting judgment in the Court of Appeal, Yeung JA felt that Hong Kong was bound to follow the approach to state immunity adopted by the PRC. On the evidence before the Court, state immunity in the PRC is absolute. Accordingly, in his view, Congo was entitled to absolute immunity under Hong Kong law. To understand Yeung JA's reasoning, it must be remembered that the successful transition of Hong Kong from a British Colony to a Special Administrative Region of the PRC has been under the principle of "*one country two (legal) systems*". Essentially this means that although the Hong Kong Courts enjoy a high degree of autonomy in determining rights and freedoms under Hong Kong law, in certain respects Hong Kong remains an inalienable part of the PRC (the "*one country*" element of the "*one country two systems*" principle).

The key legal question then becomes whether state immunity in Hong Kong is in fact a provision concerning the management and conduct of foreign affairs. If it is, then this is an area reserved to the central government of the PRC and would fall outside the limits of Hong Kong's autonomy.

### **The CFA's decision**

There were three main questions on appeal to the CFA.

>> What is the legal doctrine of state immunity applicable in Hong Kong?

>> Does the CFA have jurisdiction to make the final ruling on this issue?

>> Had state immunity in any event been waived?

The majority of the CFA agreed with Yeung JA's dissenting judgment in the Court of Appeal. In overturning the ruling of the lower court, they held that state immunity in Hong Kong is absolute; there is no 'commercial' exception to this absolute immunity.

The CFA's reasoning was that as a matter of legal and constitutional principle, the doctrine of state immunity practised in Hong Kong must be consistent with the position in the PRC. Surprisingly, the evidence before the CFA was that there is in fact no PRC law which clearly determines the matter. Instead, the scope of state immunity in the PRC is a matter of policy to be determined by the PRC executive. The evidence on PRC state immunity before the CFA was contained in three letters from the Office of the Commissioner of the Ministry of Foreign Affairs of China in Hong Kong. These letters made it clear that the PRC has consistently adhered to the doctrine of absolute state immunity.

The reason this ruling is not final arises from the CFA finding that this was more properly a question of foreign affairs. The Hong Kong Court has no jurisdiction to conclusively determine what is in fact an act of state. The CFA felt constrained to refer the decision to the SCNPC. Therefore, for the time being, the CFA's judgment is only provisional. Finally, on the question of waiver, international law recognises that a state can waive its immunity. However, the waiver must be clear and incontrovertible. In this case, the CFA felt that there was no basis for finding that Congo had waived its state immunity. Simply agreeing to refer disputes to arbitration was insufficient.

### **Comment**

Despite ruling that state immunity in Hong Kong is absolute, the CFA's judgment will not be final until the SCNPC interpretation is known. Their interpretation is not expected until the end of the summer. We will report this decision once it is known. Until then, the law on state immunity in Hong Kong is not conclusive. However, given the PRC's approach to state immunity it seems likely that the SCNPC will affirm the majority view of the CFA and absolute immunity will apply.