

When The Court of Final Appeal's Decision is Not Final - The Congo Case & State Immunity

On 8 June 2011, a 3-2 majority of the CFA held in the Congo Case that the common law principle of State immunity, modified in accordance with the Basic Law, to be applied in the Hong Kong courts is that of absolute immunity. This decision is “provisional” as the CFA also held that the Hong Kong courts do not, by reason of the Basic Law, have jurisdiction over the determination of the PRC’s policy on State immunity. Accordingly, and for the first time, the CFA has referred to the Standing Committee of the National People’s Congress (“**SCNPC**”) a matter of interpretation of the Basic Law, and the ultimate determination on the application of State immunity in Hong Kong.

Historical Approach to State Immunity in the PRC and Hong Kong

Essentially, there are two approaches to State immunity - the restrictive and absolute immunity approach. Restrictive immunity recognises a commercial exception to the otherwise absolute immunity a foreign State is granted from jurisdiction and execution.

The PRC has long maintained an absolute approach to State immunity. Prior to July 1997, the State Immunity Act 1978 (UK) (the “**Act**”) applied to Hong Kong¹ which adopted a restrictive approach to sovereign immunity. It provided that foreign States were immune from the jurisdiction of the courts of

the United Kingdom except where a State submitted to the jurisdiction or the transaction entered into by the State was of a commercial nature.² The Act also provided for immunity from the process of execution unless the State consented to the same in writing and in respect of property in use for commercial purposes.³ On 1 July 1997, no legislation had been enacted by Hong Kong to mirror the provisions of the Act and as a result, Hong Kong’s position with regard to sovereign immunity has remained unclear since then.

The Congo Case: Background & Lower Court Decisions

In the Congo Case, two ICC arbitral awards for substantial sums were made against the Democratic Republic of the Congo (“**DRC**”). FG Hemisphere Associates LLC (“**FG Hemisphere**”), purchased the awards and sought to enforce them against the DRC in Hong Kong by executing against US\$104 million in entry fees payable by a consortium of Chinese Enterprises to the DRC in respect of mineral exploitation rights.

FG Hemisphere obtained an order allowing it to enforce the awards as a judgment of the Hong Kong court. The DRC subsequently applied to set aside the order on the basis that the Hong Kong courts had no jurisdiction to adjudicate as the DRC enjoyed absolute State immunity. The Secretary for Justice

1. as extended by the State Immunity (Overseas Territories) Order 1979.

2. sections 2 and 3 of the Act.

3. section 13(3) and 13(4) of the Act.

was granted leave to intervene in the proceedings on the basis that the case was in the public interest.

The Court of First Instance considered the transaction in question was not commercial but a cooperative venture between two sovereign States and as such the dealings would not fall within either the restrictive or absolute immunity doctrines. The Court of Appeal held by a 2-1 majority, that the doctrine of restrictive immunity has been widely accepted by foreign States so as to constitute a rule of customary international law and as such, the common law of Hong Kong as at 30 June 1997 recognised the doctrine of restrictive immunity.⁴

The CFA's Decision

The CFA (Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ; Mr Justice Bokhary PJ and Mr Justice Mortimer NPJ dissenting) overturned the Court of Appeal's decision on State immunity. In a joint judgment by the majority, the CFA held that, subject to the determination by the SCNPC, the Hong Kong Courts must adopt a doctrine of absolute immunity to be consistent with the PRC's approach to State immunity.

The CFA agreed with the Court of Appeal that the proper position adopted with respect to State immunity in Hong Kong is to apply the common law previously in force governing State immunity after the lapse of the Act. However the CFA held the common law must be subject to "*such modifications, adaptations, limitations or exceptions as are necessary to bring its rules into conformity with Hong Kong's status as a Special Administrative Region of the PRC and to avoid any inconsistency with the Basic Law*"⁵ and as such, it is not open to the Hong Kong courts "*to adopt a legal doctrine of state immunity which recognises a commercial exception to absolute immunity and therefore a doctrine on*

state immunity which is different from the principled policy practised by the PRC,"⁶ namely the doctrine of absolute immunity.

The CFA's decision was provisional as the majority also held it was under a duty to refer to the SCNPC questions of interpretation of Articles 13 and 19 of the Basic Law. Articles 13 and 19(3) provide respectively that the Central People's Government ("CPG") shall be responsible for foreign affairs relating to Hong Kong, and Hong Kong Courts have no jurisdiction over "acts of state" such as foreign affairs and questions of fact regarding the same require the CPG's determination. The majority of the CFA reached the provisional conclusion that the determination by the CPG of the PRC's policy of State immunity as a policy of absolute immunity is an "act of state such as defence and foreign affairs" within the meaning of Article 19(3).⁷ The Hong Kong courts therefore do not have jurisdiction over the determination of such policy.

Another question raised in the Congo Case was whether the DRC's submission to international arbitration constituted a waiver as to jurisdiction of the Hong Kong courts in respect of the execution of the arbitral award. The CFA held that where no legislation applies on this point (as is the case in Hong Kong), a party seeking to enforce an arbitration award against a State on the basis of waiver of State immunity must demonstrate the State has unequivocally waived its immunity. The majority of the CFA held the submission of the DRC to international arbitration did not constitute such waiver to jurisdiction or execution in the Hong Kong courts.

4. CACV 373/2008 and CACV 43/2009, dated 10 February 2010, para. 78.

5. see the SCNPC's Decision "On the Treatment of the Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law" dated 23 February 1997.

6. FACV 5,6& 7/2010, dated 8 June 2011, paras. 225,226.

7. *Ibid.*, para. 355.

Conclusion

Having regard to the majority of the CFA's provisional conclusions and the PRC's approach to State immunity, it appears likely the SCNPC's interpretation will be consistent with the CFA's majority judgment that absolute immunity applies to foreign States in Hong Kong. However, the CFA's judgment is not final until the SCNPC's interpretation is received and as such, the approach to State immunity in Hong Kong remains inconclusive.

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