

The practical implications of the CFA's decision in Democratic Republic of Congo v. FG Hemisphere Associates LLC

Introduction

In March 2010 we reported on the Hong Kong's Court of Appeal (CA)'s decision in the FG Hemisphere case in which the CA, by a majority decision (2:1), held that the restrictive approach of state immunity continued to apply in Hong Kong after the handover of Hong Kong to the PRC on 1 July 1997.

In March 2011, an appeal of the CA's decision was heard by the Hong Kong Court of Final Appeal (CFA). The CFA's judgment, given on 8 June 2011¹, has generated much debate in the political, academic and commercial worlds. The briefing discusses the practical implications of the CFA judgment.

Master Class

Clifford Chance will also be holding a Master Class within the next few weeks to discuss the issues raised by the CFA's judgment in more detail. Please contact Mary Kok (mary.kok@cliffordchance.com) if you would like to attend this Master Class.

The CFA judgment

Facts

The CFA judgment was concerned with FG Hemisphere's application to enforce two ICC arbitration awards against the Democratic Republic of Congo (DRC)'s assets in Hong Kong. The CFA considered: (1) *sovereign immunity* - whether the law of Hong Kong required application of the doctrine of absolute immunity from suit and execution (as adopted by the PRC), as opposed to the restrictive doctrine; and (2) *waiver of immunity* - whether, by agreeing to refer a dispute to arbitration, the DRC had waived such state immunity from suit and execution to which it might otherwise be entitled.

Sovereign immunity

There are two doctrines of sovereign (state) immunity:

Key issues

Sovereign immunity

Waiver of sovereign immunity

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¹ FACV Nos. 5, 6 & 7 of 2010.

1. **"absolute immunity"**: under the "absolute" doctrine, the domestic courts of one State would not normally have jurisdiction to adjudicate upon matters in which another State is named as defendant. This is subject only to the exception where the defendant State waives immunity before the forum State; and
2. **"restrictive immunity"**: by contrast, "restrictive" immunity recognises a commercial exception: (i) in the context of immunity from jurisdiction, States do not enjoy immunity from suit where they are engaged in purely commercial transactions and (2) in the context of immunity from execution, if the relevant assets are used for a commercial purpose they will not be immune from the process of execution.

CFA finding

Absolute immunity applies: Overturning the CA's decision, the CFA, by a majority (3:2), ruled on a provisional basis that Hong Kong cannot, as a matter of legal and constitutional principle, adhere to a doctrine of state immunity which differs from that adopted by the PRC. The doctrine of state immunity practised in Hong Kong, as in the rest of the PRC, is accordingly a doctrine of absolute immunity. Prior, however, to rendering a final judgment on this issue, the majority directed that specific questions relating to this issue be referred to the Standing Committee of the National People's Congress (**SCNPC**) for interpretation. This is the first time in Hong Kong that there has been a request for interpretation from the SCNPC. We anticipate that the SCNPC will affirm the CFA's provisional findings. The remainder of this bulletin proceeds on that basis.

As to waiver, the common law applies: Upholding the CA's findings on waiver, the majority confirmed that Hong Kong has reverted to the common law position on waiver of immunity from suit and from execution. Under common law principles, any such waiver must be given at the time when the forum State's jurisdiction is invoked against the impleaded state. In short, unless a relevant State to State treaty applies to establish waiver (which we return to at point 5 below), the defendant State must expressly consent before the forum State to that State's jurisdiction. Further, a waiver of state immunity must be established at two distinct stages: the impleaded state must have waived: (i) both its jurisdictional immunity from suit in the forum State (i.e. in the context of leave to enforce an arbitral award or judgment); and (ii) the immunity of its property from execution by the forum State's process.

Practical implications – a summary

The CFA judgment has raised a number of questions which are of practical importance, as well as concerns, some misplaced, which are addressed below.

In summary:

1. The Hong Kong courts continue to be judicially independent and the CFA's findings have not detracted from that in any way. The CFA's reference of specific questions to the SCNPC is consistent with the Basic Law (Hong Kong's constitution), and was triggered in limited circumstances under the "*one country, two systems*" principle that has applied since the handover.
2. The decision is also of limited application: it applies only in the context of enforcement of arbitral awards or court judgments against a foreign State's assets held in Hong Kong. In this respect, a foreign State's assets will be immune from execution in Hong Kong, unless the foreign State is found to have waived both immunity from suit and from execution.
3. An effective waiver of immunity can be established in one of two ways. First, the defendant State may waive its immunity "*in the face of the court*" by making an unequivocal submission to the Hong Kong courts at the time when Hong Kong jurisdiction is invoked against it: i.e. by submitting to the jurisdiction of the Hong Kong court when the suit and execution actions are pursued against that defendant State. In this case it was held at first instance, on appeal and again on final appeal that the DRC had not waived its immunity in the face of the court.

4. Importantly, the CFA's findings confirm that written waiver clauses given by foreign States in private agreements (including arbitration clauses) will not be sufficient to establish an effective waiver at the enforcement stage and will not confer jurisdiction upon the Hong Kong courts. This is not new law. The CFA were applying general common law principles.
5. Secondly, following comments made by the CA which were not disturbed by the CFA, it should also be possible to establish advance waiver in the form of consent given in an international treaty between the defendant State and China. Therefore, it is possible that if the defendant State and the State in which the arbitral award is rendered are both parties to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**New York Convention**), this will amount to an effective waiver in respect of the enforcement of that award in Hong Kong, noting that China (and through China, Hong Kong) is party to the New York Convention. The CFA did not, however, make a definitive finding on this question (crucially, the DRC is not a signatory to the New York Convention) and further clarification is required, ideally in a future court decision.
6. The FG Hemisphere case does not change the position in respect of enforcement against Chinese "crown" assets in Hong Kong. The case of *Hua Tian Long* (currently a first instance decision) is authority that sovereign immunity does not apply between the PRC and Hong Kong. Rather, after the handover, the PRC, and in turn the Central People's Government (**CPG**), enjoys "crown" immunity in Hong Kong, which is also absolute². Nonetheless, the common law principles on waiver of that crown immunity, discussed in the FG Hemisphere case, will apply³.
7. The FG Hemisphere case highlights the important role that arbitration, and agreements to arbitrate, play when contracting with a foreign State, or with the CPG. Although the CFA held that an agreement to arbitrate does not amount to an effective waiver when seeking to enforce an arbitration award against sovereign or crown assets in Hong Kong, the CFA did not overturn the CA's finding that an agreement to arbitrate operates to remove state immunity in respect of the jurisdiction of the arbitral tribunal over the State. The effect of this is that by agreeing to arbitrate (rather than litigate) in Hong Kong, the foreign State (or the CPG) cannot later claim to be immune from the jurisdiction of the arbitral tribunal. A Hong Kong arbitral award against the State will continue to be enforceable against that State's commercial assets in other jurisdictions which are signatories to the New York Convention and which adopt restrictive (rather than absolute) immunity, in accordance with the law of the jurisdiction in which enforcement is sought.
8. In this respect, therefore, Hong Kong's popularity as a venue for international arbitration remains unaffected by the CFA's findings in the FG Hemisphere case. There is, however, some possibility that the defendant State might have an argument available to it that the Hong Kong courts lack the usual supervisory jurisdiction in respect of a Hong Kong arbitration, although the CA appears to have thought otherwise and the CFA did not offer any commentary to suggest that the CA's view on this issue was wrong.

² By contrast, the Hong Kong Government of the HKSAR does not enjoy absolute immunity and proceedings can be brought against the Hong Kong Government in accordance with the provisions of the Crown Proceedings Ordinance (Cap. 300).

³ It should be noted that the New York Convention would not establish a waiver in the context of the enforcement of a (non-Hong Kong) Convention award against a PRC "crown" entity in Hong Kong. This is because the promise given by China to Hong Kong in respect of the enforcement of arbitral awards has been given pursuant to the Memorandum of Understanding on the "Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Mutual Enforcement of Arbitration Awards" and not pursuant to the New York Convention.

Questions

We will be discussing the questions above and related issues in more detail at our upcoming Master Class.

Questions can also be raised in advance; please send these directly to Mary Kok, Cameron Hassall or Kathryn Sanger (email contacts on page one).

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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