

# Important Legal Update: Sovereign and Crown Immunity in Hong Kong

## Overview

Recent decisions by the Hong Kong Court of Final Appeal (in the **Congo case**) and the Hong Kong High Court (in the **Hua Tian Long case**) regarding *sovereign* and *crown* immunity create some important issues which must be considered when dealing with foreign states, the PRC Government and those which may claim to be acting at the direction of a state, including State Owned Entities and Sovereign Wealth Funds.

**What is sovereign immunity?** It means that the courts of one state do not have jurisdiction over another state (i.e. the right to hear legal proceedings and execute judgment) in relation to claims against a foreign State party unless that foreign State has *waived* immunity. As a result of the decision in the Congo case, foreign states (since the handover) enjoy *absolute immunity* from the jurisdiction of the Hong Kong courts from both suit and execution of judgment.

**What is crown immunity?** It means that since the handover, the Central People's Government of the PRC (and its institutional units) has been entitled to *absolute immunity* from the jurisdiction of the Hong Kong courts from both suit and execution of judgment, unless that immunity is *waived*.

**Does absolute immunity apply to the Hong Kong Government?** The Hong Kong Government does not enjoy the same immunity in Hong Kong. Seek separate advice when dealing with the Hong Kong Government.

**What is the difference between restrictive and absolute immunity?** Prior to the handover Hong Kong adopted the doctrine of restrictive immunity, pursuant to which: (i) States did not enjoy immunity from suit in respect of transactions of a purely commercial nature; and (ii) execution was allowed against state assets used for a commercial (as opposed to sovereign or public) purpose. Now absolute immunity applies in Hong Kong, with the result that no claim (including a commercial claim) can be maintained in the Hong Kong courts against either the PRC Government or foreign states at the suit stage or at the execution stage (even in respect of commercial assets) unless the PRC Government / foreign state waives its right to immunity.

**Can an SOE or a SWF claim to be the state and thus claim immunity in Hong Kong?** Possibly, yes. The SOE or SWF will be entitled to immunity only if it can demonstrate to the Hong Kong court that it was acting under the control of the state at the time that it entered into the agreement. This will be a fact sensitive analysis on a case by case / deal by deal basis. An SOE or a SWF might act independently of the state on one deal and under its control on another.

## Key Issues

What is sovereign immunity?

What is crown immunity?

Does absolute immunity apply to the Hong Kong Government?

What is the difference between restrictive and absolute immunity?

Can an SOE or a SWF claim to be the state and thus claim immunity in Hong Kong?

When is the right to immunity waived?

Does sovereign or crown immunity apply to arbitration proceedings?

Does sovereign or crown immunity apply to enforcement of arbitration awards?

Who may claim to be acting at the direction of a state, including SOEs and SWFs when entering into agreements with foreign states?

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**When is the right to immunity waived?** A waiver of immunity clause commonly provided in commercial contracts with states, SOEs and SWFs will not be effective in Hong Kong. If properly drafted, such clause will be effective in the United Kingdom and other (usually developed) countries. In Hong Kong, immunity can only be waived in advance of a claim in a state-to-state treaty, as to which specific advice should be sought at deal stage. The state / PRC Government / SOE / SWF can also waive its right to immunity at the time that the suit and enforcement action is commenced by expressly submitting to the jurisdiction of the Hong Kong courts – ie by taking an active role in the proceedings without claiming immunity. A waiver at suit phase of proceedings does not automatically qualify as a waiver at the execution phase. Each phase requires a separate waiver.

**Does sovereign or crown immunity apply to arbitration proceedings?** No. The immunity applies only to courts. A state (including the PRC Government), SOE or SWF cannot claim immunity from the jurisdiction of a Hong Kong arbitral tribunal.

**Does sovereign or crown immunity apply to enforcement of arbitration awards?** Yes. Enforcement of foreign and Hong Kong arbitral awards in Hong Kong is undertaken through the Hong Kong courts. That means that the state (including the PRC Government), SOE or SWF might seek to claim immunity from execution of an arbitral award in Hong Kong, no matter where that award is made. However, the award can still be enforced against the defendant's commercial assets in the many other (mostly developed) jurisdictions that have legislation in place for the enforcement of foreign awards (usually through the New York Convention) and which also adopt restrictive immunity.

**When entering into agreements with foreign states, the PRC Government and those who may claim to be acting at the direction of a state, including SOEs and SWFs:**

1. Do not include Hong Kong court jurisdiction clauses. Instead, arbitration clauses should be utilised (eg Hong Kong, Singapore, London, Stockholm, Sydney) or otherwise court clauses from jurisdictions which adopt restrictive (and not absolute) immunity (eg London, Singapore, Sydney). The ability to enforce a court judgment across borders should also be considered if the preference is for courts and not arbitration.
2. Whilst a contractual waiver of immunity in the agreement will not be effective to waive either sovereign and crown immunity in Hong Kong, they should be included where possible as they can be effective in many other jurisdictions, and they are often necessary where the decision is taken to include a court clause from jurisdictions which adopts restrictive (and not absolute) immunity.
3. Investigate to the extent possible: (i) the level of state control in deals with those who may claim to be acting at the direction of a state, including SOEs and SWFs; and (ii) the location of the counter party's commercial assets - specifically, seek to confirm that the counter party has commercial assets in jurisdictions that adopt restrictive rather than absolute immunity. Hong Kong, China and many developing countries adopt absolute immunity whilst most developed countries adopt restrictive immunity.
4. Consider whether the deal can be structured so as to take advantage of a state-to-state treaty which protects the investment.
5. Take deal-specific legal advice.

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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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