

Hong Kong's State and Crown Immunity: Immunity for State-Owned Enterprises?

February 6, 2012

Long recognized as a unique interface for the People's Republic of China ("PRC") and its trading partners, Hong Kong has close ties with mainland China that continue to provide opportunities and challenges.

The years 2011 and 2010 delivered landmark decisions on crown and state immunity, provoking heated discussions in Hong Kong and farther afield, particularly with regard to doing business with state-owned enterprises ("SOEs"), including those of the PRC. This alert reviews the decisions and their practical impact.

Background

Sovereign immunity concerns the relationship between states and is based on the principle that the courts of one state may not exercise jurisdiction over another state. In Hong Kong, sovereign immunity relates to civil claims against foreign states, not civil claims against PRC entities.

Crown immunity, on the other hand, concerns the relationship between the crown and its own courts and is based on the principle that the crown enjoys immunity from being sued in its own courts. The origin is the concept that "the sovereign can do no wrong."

In *Democratic Republic of the Congo v. FG Hemisphere Associates [2011] HKCFA 41 (Congo)*, the Hong Kong Court of Final Appeal ("CFA") on September 8, 2011, following an interpretation of the Basic Law of the Hong Kong Special Administrative Region of the PRC by the Standing Committee of the National Peoples Congress, held that absolute sovereign immunity applies in Hong Kong (see "**Landmark Congo Decision may Hinder Enforcement of Arbitral Awards in Hong Kong Against Sovereign States**," September 2011).

And in *Hua Tian Long [2010] 3 HKC 557*, the Court of First Instance ("CFI") held that absolute crown immunity applies to the Central People's Government of the PRC in Hong Kong.

Implications for Dispute Resolution in Hong Kong Involving State Entities

- First and most important, sovereign immunity will not apply to arbitration proceedings seated in Hong Kong. Parties can therefore include Hong Kong arbitration clauses in their contracts with states, safe in the knowledge that sovereign immunity cannot be pleaded as a bar to jurisdiction of the arbitral tribunal, by virtue of the fact that the arbitral tribunal, not the Hong Kong courts, determine whether the tribunal has jurisdiction. There are also strong arguments that participation in a Hong Kong arbitration amounts to a waiver of immunity in relation to the supervisory jurisdiction of the Hong Kong courts. In addition, following the new Arbitration Ordinance, the Hong Kong courts have a significantly smaller role in the arbitral process.
- There is no issue of "state immunity" when an entity of the PRC government is sued in Hong Kong. Under the "one country, two systems" principle, Hong Kong is part of the PRC and the PRC is not therefore a foreign state and cannot claim state immunity.

- However, the CFI did recognize the pre-1997 concept of "crown immunity" so that the PRC government has enjoyed immunity from suit since the change of sovereignty under the concept of "crown immunity."
- If a PRC state entity requires authorization from a ministry prior to entering a particular contract, such an entity is more likely to be entitled to "crown immunity."
- In contrast, a PRC SOE established by the State-Owned Assets Supervision Committee ("SASAC") will generally not be able to claim immunity from proceedings in the Hong Kong courts. Such entities have independent management, ownership of assets and the capacity to independently assume civil liabilities. The test is one of control—whether the entity in question is able to exercise independent powers of its own.
- There is little point in bringing court proceedings against a foreign government in the Hong Kong courts. This includes proceedings for enforcement of an arbitration award against the Hong Kong-located assets of a foreign government, and this will be the position no matter where the actual arbitration took place. In the *Congo* case the awards were actually made in France and Switzerland.

Practical Steps When Contracting with State Entities

What does this mean when entering into a dispute resolution clause involving Hong Kong with a state enterprise?

- **Contracts with foreign governments.** Choose arbitration rather than litigation in the Hong Kong courts.
- **Contracts with foreign SOEs.** Neither sovereign nor crown immunity would be an issue provided the foreign SOE is independent from its government. Thus, you can choose arbitration or litigation in Hong Kong, although arbitration would be preferable for ease of subsequent enforcement.
- **Contracts with the PRC government.** Avoid adopting a Hong Kong court jurisdiction clause, as crown immunity can be claimed. Choose Hong Kong arbitration when the assets are outside the PRC. If the assets are in the PRC, choose arbitration in a New York Convention country.
- **All contracts.** Include an express waiver of immunity from suit and from enforcement clause when entering into a contract with a state counterparty. These clauses continue to be effective in jurisdictions around the world that adopt a doctrine of restrictive immunity, where the state counterparty may have assets against which an award may be enforced.

In 2005 the PRC signed the United Nations Convention of Jurisdictional Immunities of States and their Property, which recognizes the restrictive doctrine of state immunity. (Restrictive immunity recognizes the existence of an exception for purely commercial transactions.) The convention has not yet been put into effect, nor has the PRC ratified it, but if and when this occurs, parties may once again be able to enforce against sovereign assets held in Hong Kong and the mainland.

Conclusion

Despite the scaremongering in some quarters, sovereign immunity will not apply to arbitration proceedings seated in Hong Kong. In fact, its implications for enforcement of arbitration awards against the assets of governments may be short-lived.

Elsewhere, Hong Kong's pro-enforcement credentials were on clear display in a number of cases upholding arbitral awards in Hong Kong. Examples are *Shandong Hongri Acron Chemical Joint Stock Company Limited v. Petrochina International (Hong Kong) Corporation Limited* CACV 31/2011 and *Gao Haiyan and another v. Keeneye Holdings Limited* CACV 79/2011 (reported December 28, 2011 "[Hong Kong Court of Appeal Enforces Chinese Arbitration Award](#)").

Your Key Contacts



Keith Brandt

Office Managing Partner,
Hong Kong

D +852 2533 3622

keith.brandt@dentons.com