

CROWN IMMUNITY AND SOVEREIGN IMMUNITY IN HONG KONG - 10 KEY POINTS

Hong Kong

The Hong Kong Courts have recently handed down landmark judgments on the application of crown immunity and sovereign immunity in Hong Kong.

not exercise jurisdiction over another State. In Hong Kong, sovereign immunity relates to civil claims against foreign States, not civil claims against PRC entities.

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In *Democratic Republic of the Congo v FG Hemisphere Associates* [2011] HKCFA 41 (“*FG Hemisphere*”), the Hong Kong Court of Final Appeal (CFA) held that absolute sovereign immunity applies in Hong Kong. This decision followed the Court of First Instance decision of Justice Stone in *Hua Tian Long* [2010] 3 HKC 557, in which it was held that absolute Crown immunity applies to the Central People’s Government (CPG) of the Peoples’ Republic of China (PRC) in Hong Kong.

In this briefing, we explain 10 key points which arise from these two cases.

Background

Sovereign immunity is concerned with the relationship between different States. It is based on the principle that the courts of one State may

Crown immunity is concerned with the relationship between the Crown and its own courts. It is based on the principle that the Crown enjoys immunity from being sued in its own courts. It originates from the concept of the inequality of the ruling and the ruled - “*the sovereign can do no wrong*”.

10 key points

1. In *FG Hemisphere*, a 3:2 majority of the CFA provisionally held that absolute sovereign immunity applies in Hong Kong. This means that a Hong Kong Court does not have jurisdiction in relation to claims against a State party (including commercial claims), unless the State party waives immunity. This is compared with the doctrine of restrictive immunity, which recognises the existence of an exception for purely commercial



transactions. The majority of the CFA held that Hong Kong could not adopt an approach to the doctrine of sovereign immunity which differed from the rest of the PRC - there should be “one State, one immunity”. Since Hong Kong is an administrative region of the PRC, it should apply the same doctrine of State immunity as the Mainland, which favours absolute sovereign immunity.

2. The CFA has referred the question of the application of absolute sovereign immunity to the Standing Committee of the National People’s Congress (SCNPC), before a final judgment is rendered. However, this is unlikely to provide the claimant with much comfort. Given that the CFA’s decision is in line with the PRC’s practice of affording absolute sovereign immunity to foreign States, it appears likely that the SCNPC will confirm the CFA’s decision.
3. In *Hua Tian Long*, Justice Stone held that the CPG of the PRC is entitled to absolute Crown immunity in Hong Kong. On Handover in 1997, one sovereign power in Hong Kong (the British Crown) was replaced by another (the CPG of the PRC). Accordingly, Justice Stone held, the immunity which was previously enjoyed by the British Crown in Hong Kong was transferred on Handover to the CPG of the PRC.
4. However, the application of Crown immunity in Hong Kong remains unclear. It may be tempting to assume that since the CFA has now found that absolute sovereign immunity applies in Hong Kong,

so must absolute Crown immunity also apply. However, Justice Stone’s decision in *Hua Tian Long* is based on a contentious finding that Crown immunity survives in post-colonial Hong Kong. It is possible that an appellate court in Hong Kong will disagree.

5. Sovereign immunity and Crown immunity may be invoked when the courts of the forum State seek to assume jurisdiction, in relation to an application to enforce a foreign judgment or arbitral award, or when execution is sought against assets in the forum State. Therefore, a State party may invoke immunity with respect to enforcement and execution in Hong Kong, even if a foreign judgment was validly obtained against a State party. A claimant may need to establish that the State party has waived their entitlement to immunity at the relevant stage.
6. In order to waive immunity, there must be express, unequivocal submission to the jurisdiction of the Hong Kong courts “in the face of the court”. The findings of the CFA in *FG Hemisphere* suggest that contractual waivers, such as exclusive jurisdiction clauses or express waiver clauses, may be insufficient to waive immunity. In other words, a State party can only waive immunity at the time when the Hong Kong Court’s jurisdiction is invoked. In *Hua Tian Long*, the PRC defendant was held to have waived Crown immunity by filing a counterclaim in the Hong Kong proceedings and, despite being aware of its right to claim immunity, not raising this argument in good time.

7. The CFA’s decision in *FG Hemisphere* should not affect the choice of Hong Kong as the seat of arbitration for claims involving State parties. This is because the CFA has confirmed that an agreement to arbitrate does not constitute a submission to any State’s jurisdiction. It involves merely the assumption of contractual obligations to the other party to the agreement.
8. However, if an arbitral award is made in Hong Kong, this does not in itself amount to a waiver of immunity with respect to enforcement of the award against State assets in Hong Kong. As indicated above, enforcement of an arbitral award in the Hong Kong Courts requires a separate, distinct waiver. This has the effect that although an award may be made against a State party in Hong Kong, the enforcement of the award against State assets may need to occur in a jurisdiction that does not recognise absolute sovereign immunity. However, it is possible that an exception exists if the defendant is from a State that is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.
9. Identifying whether an entity is part of a State or the Crown, and therefore entitled to immunity, may be difficult in some cases. In *FG Hemisphere*, the position was clear cut, because the claimant was seeking to enforce an arbitral award against the Democratic Republic of Congo (i.e. the State itself). Further, it would appear that an institutional unit or department of a State or



the Crown (being the CPG) would be protected by immunity. In *Hua Tian Long*, Justice Stone held that Guangzhou Salvage Bureau was entitled to Crown immunity, but had waived its claim to immunity. Ultimately, the degree of control that the State or the Crown has over the defendant is likely to be the determining factor in deciding whether it is entitled to immunity.

10. It may be difficult for State-owned enterprises to invoke immunity, particularly if their commercial operations are managed separately from the State or the Crown. This is demonstrated in a number of cases. In *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 All ER 881, the English Court of Appeal held that a bank, which had been created as a separate legal entity under statute, was not entitled to sovereign immunity. Further, in the *China Aviation Oil* case (2005), the Singapore High Court dismissed an application by a PRC State-owned enterprise claiming an entitlement to sovereign immunity. The Court held that there was no evidence that the PRC State-owned enterprise performed acts under the PRC's sovereign authority, as its activities were mainly commercial.

Conclusion

The decisions in *FG Hemisphere* and *Hua Tian Long* limit the jurisdiction of the Hong Kong Courts to adjudicate cases involving State parties, including PRC entities. However, in relation to Crown immunity, it should be kept in mind that *Hua Tian Long* is a first instance decision that has not been considered by the appeal courts.

Further, in relation to both sovereign immunity and Crown immunity, the courts are yet to consider to what extent they will allow entities, which are State-owned or operated but have commercial activities, to invoke immunity. The full commercial implications of *FG Hemisphere* and *Hua Tian Long* are still to be determined.

Holman Fenwick Willan acted for the plaintiff in *Hua Tian Long*.

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