

## International Arbitration Newsflash: Immunity for State-Owned Enterprises?

Following last week's Newsflash reporting on the *Congo case*<sup>1</sup>, we have received queries on whether Mainland state-owned enterprises ("SOE"s) can claim immunity in the Hong Kong Courts.

The *Congo case* did not deal with the status of SOEs or other government-related entities (instead the case dealt with the Congo as a State).

As discussed below, while it is unlikely that SOEs could claim immunity from proceedings in the Hong Kong Courts, a recent case at the Court of First Instance ("CFI") (which is under appeal) sheds some light on this area of law.

### State Immunity v Crown Immunity

In the case of *Hua Tian Long*<sup>2</sup>, the CFI held that an entity of the PRC government being sued in the Hong Kong Courts involved the exercise of jurisdiction over its *own* sovereign state under the "one country, two systems" principle. Accordingly, there was no issue of "State immunity" as granted to a *foreign State*.

However, the CFI did recognise the pre-1997 concept of "Crown immunity" and the valid substitution of the "Crown" by the PRC government, so that the PRC government has enjoyed immunity from suit in its own Courts since the change of sovereignty.

### Crown Immunity in Hong Kong

The issue in the *Hua Tian Long* case was whether the Guangzhou Salvage Bureau ("GZS"), as the owners of a vessel named "*Hua Tian Long*", was entitled to claim Crown immunity in Hong Kong on the basis that it is an entity of the Chinese government.

The CFI decided that GZS was distinguishable from an SOE and that accordingly, GZS was entitled to claim Crown immunity. In coming to his decision, the judge considered at some length the issue whether GZS constituted a separate

legal entity, or whether it formed "*a part of the Crown of the PRC*" entitled to Crown immunity. Stone J found that GZS lacked all the essential features of an SOE, taking into account factors such as the basic constitutional setup of GZS, its "control" and its "function", and found that "*GZS was not set up by the State-owned Assets Supervision Committee ('SASAC'), which is the body representing the state as investor in state-owned enterprises, which enterprises enjoy powers of independent management and freedom from interference, with ownership of its assets and the capacity independently to assume civil liabilities*"<sup>3</sup>.

The above finding is consistent with the proposition that SOEs will generally not be able to claim immunity from proceedings in the Hong Kong Courts.

In the *Hua Tian Long* case, however, the CFI found that GZS had waived its right to claim Crown immunity, given that GZS had taken out a counterclaim and had actively taken part throughout the course of the proceedings.

As stated above, this case is now under appeal. It remains to be seen whether any of the above findings will be overturned by the Court of Appeal.

### Position of the PRC Government

As early as 1979 in the *Fireworks case*<sup>4</sup>, the PRC Government submitted to the New York Courts that SOEs were independent legal persons with their own rights and duties, which can sue and be sued in the Courts independently. In that case, the PRC Government was the defendant in a law suit involving product liability arising from fireworks. In its submissions, the PRC Government stated that the SOE (known as the China National Native Produce and Animal By-Products Import and Export Company, ("CNNA")) was engaged in the fireworks exporting trade and that CNNA could, and should be the party being sued in this case, rather than the PRC Government.

The above position is consistent with an Article published in 1987<sup>5</sup> by Mr Wang Houli, who is the former Director of

<sup>1</sup> Democratic Republic of the Congo, China Railway Group (Hong Kong) Limited, China Railway Resources Development Limited, China Railway Sino-Congo Mining Limited, China Railway Group Limited and the Secretary for Justice vs FG Hemisphere Associates LLC [FACV Nos 5, 6 & 7 of 2010]

<sup>2</sup> Intraline Resources Sdn Bhd v The Owners of the Ship or Vessel "Hua Tian Long" CACV131/2010 (HCAJ59/2008)

<sup>3</sup> Stone J at paragraph 112

<sup>4</sup> *Scott v. People's Republic of China*, No. CA3-79-0836-d (N. D. Tex. filed 29 June 1979).

<sup>5</sup> Wang Houli, *Sovereignty Immunity: Chinese Views and Practices*, 1 J. Chinese L. 23, 30 (1987).

---

Department of Treaties and Law in the PRC Ministry of Foreign Affairs.

In 2005, the PRC Government signed the *United Nations Convention on Jurisdictional Immunity of States and Their Property*, which adopted restrictive immunity (meaning that States could not claim immunity for private/commercial acts). Although this appears to contradict the PRC Government's position of absolute immunity (clearly stated in the *Congo case*), in fact, the Convention currently has no legal effect. The Convention has not yet come into force, nor has the PRC Government ratified it. In any event, the status of the Convention should have little effect on SOEs (which, according to the above analysis, are generally not in a position to claim any immunity).

### **Conclusion**

Although it is unlikely that SOEs could claim immunity from proceedings in the Hong Kong Courts, when dealing with large companies from the PRC (especially those with strong connections with the State), it would be prudent to consider whether the company in question is an SOE, or whether the company in question is in fact an instrument of the State (in which case the issue of Crown Immunity or State Immunity may be relevant).

If in doubt, it may be prudent to protect your business by inserting relevant clauses in your contract, including a suitable jurisdictional clause, dispute resolution or arbitration clause, as well as a suitable waiver of the relevant rights (although the Congo case has cast some doubt about its validity).

### **Contact**

If you would like further information on any aspect of this note please contact a person mentioned below or the person with whom you usually deal:

Allan Leung, Partner  
allan.leung@hoganlovells.com  
+852 2840 5061

Timothy Hill, Partner  
timothy.hill@hoganlovells.com  
+852 2840 5023

Mark Lin, Partner  
mark.lin@hoganlovells.com  
+852 2840 5091

Damon So, Partner  
damon.so@hoganlovells.com  
+852 2840 5018

Chris Dobby, Partner  
chris.dobby@hoganlovells.com  
+852 2840 5629

Terence Wong, Consultant  
terence.wong@hoganlovells.com  
+86 21 6122 3827

20 June 2011