

ARBITRATION UPDATE

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THE DEMOCRATIC REPUBLIC OF CONGO & Ors v FG HEMISPHERE ASSOCIATES LLC [8 September 2011]

Brief Introduction

This landmark decision concerned the enforcement of two International Chamber of Commerce (ICC) arbitration awards against

The core question of law was whether, after China's resumption of the exercise of sovereignty on 1st July 1997, it was open to the Hong Kong

This decision raises doubt as to the continued suitability of Hong Kong as an appropriate forum for investor/state arbitrations in circumstances where it will not be possible to seek judicial assistance in aid of arbitration against foreign states.

the Democratic Republic of Congo's ('the Congo') assets in Hong Kong. This was the first time that the Final Court of Appeal had referred questions pertaining to foreign affairs (in this case sovereign immunity) to the Standing Committee of the National People's Congress.

courts to adopt a doctrine of state immunity which recognizes a commercial exception to absolute immunity and therefore a doctrine on state immunity which is different from that practised by the Peoples Republic of China ('PRC').

Practical Implications

The **Doctrine of Absolute Immunity** now applies in Hong Kong, and a foreign states assets will be immune from execution in Hong Kong unless it is clear that it has waived both immunity from suit and from execution.

Hong Kong courts will not have jurisdiction over a suit to which a State was a putative defendant even if the State expressly waived immunity in the face of the court.

Written waiver clauses will not be effective to establish waiver at the enforcement stage.

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To understand the tensions evident in the Final Court of Appeal ('the FCA') decision it is necessary to recall that before 1 July 1997, the power of final adjudication on the laws of Hong Kong was vested in the Judicial Committee of the Privy Council in London. The sovereignty of Hong Kong was transferred from the United Kingdom to the People's Republic of China on 1 July 1997, and the Court of Final Appeal (the CFA) was then established in Central, Hong Kong.

There was no dispute that immediately prior to 1 July 1997 Hong Kong followed the restrictive approach. The complexity lay in determining Hong Kong's position following its reversion to the Mainland on 1 July 1997.

Facts

FG, a Delaware company, was the assignee of the benefit of two ICC arbitral awards dated 30 April 2003 made against the Democratic Republic of Congo (DRC). Inclusive of interest accruing on the principal amounts payable under each award, the sum claimed by FG from the Congo was over US\$100 million.

The Final Court of Appeal

Doctrine of Absolute Immunity Applies: In a 3-2 majority (including Sir Anthony Mason as a non-permanent sitting judge) the CFA overturned the Court of Appeal ('the CA') and held that the doctrine of absolute immunity was applicable. This is a complete reversal of the position prior to the transition of HK from a British Colony to a Special Administrative Region ('SAR') of the People's Republic of China ('PRC'). Critical to the

outcome was the fact that Hong Kong is an SAR, and not an independent sovereign state, therefore the FCA said that Hong Kong cannot seek to define the region's state immunity policy in a manner at variance with mainland China.

The result of the FCA decision is that 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.

Waiver of State Immunity, the Common Law Applies:

The CFA upheld the CA's findings in respect of waiver. The CFA confirmed that the common law applied to waiver of state immunity and that a party seeking to enforce an arbitration award (or a judgment) against a foreign State on the basis of a waiver of state immunity must establish a waiver at two distinct stages.

The State must have waived both its jurisdictional immunity from suit in the forum State, and the immunity of its property from execution by the forum State's process. When a State takes part in an arbitration, it is agreeing to submit to the contractual jurisdiction of the arbitrators. However, the CFA held that is not the same thing as submitting to the jurisdiction of another State's courts. Therefore written waiver clauses will not be effective to establish waiver at

the enforcement stage and will not confer jurisdiction upon the Hong Kong Courts.

It may be observed that both awards have been recognised and become enforceable as judgments in other jurisdictions including the United States, Canada, South Africa and in 2010 in Australia.

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As well as advising on arbitration clauses in cross-border agreements, to institutional and ad hoc court proceedings, Jennifer has substantial experience over a broad spectrum of legal areas, including: corporate and personal insolvency, commercial transactions, insurance, corporations law, competition law, employment, administrative, and revenue law.

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