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The Immunity of the PRC Government in Hong Kong: Obtain Waivers or Waive Goodbye

Justin D'Agostino (Herbert Smith Freehills) · Tuesday, September 7th, 2010 · Herbert Smith Freehills

Everyone is looking at China at the moment, and rightly so. It's a very exciting place to be. Many MNCs are already here and many others are determined to get a piece of the action. But where there's business, there are disputes. And where there's international business, there's arbitration.

There is no doubt that the position of the Hong Kong SAR is such that it is uniquely placed to offer foreign parties looking to invest in mainland China (and Chinese parties) a forum for dispute resolution that is more accessible than the mainland itself. Hong Kong continues to enhance its reputation. In November 2008, the ICC opened its first Asian office in Hong Kong of the Court's Secretariat, in response to increasing demand in the region for its services. And the Hong Kong International Arbitration Centre, which celebrates its 25th Anniversary later this year, recently adopted revised and very modern Arbitration Rules, has seen its caseload increase substantially in recent years and, earlier this year, recruited a new Secretary-General.

Thus, a recent case in Hong Kong on Crown immunity has proved somewhat controversial. The judgment (and a separate judgment on Sovereign Immunity) is particularly important to anyone entering into contracts with Chinese government parties and who might seek to bring proceedings (including by way of arbitration) in Hong Kong or to enforce any judgment or award in Hong Kong.

The historic position is interesting. Crown Immunity subsists as part of the common law of Hong Kong. This is not particularly surprising once you consider Hong Kong's history. Following the handover in 1997, when Hong Kong was returned to China upon expiry of the famous lease the privilege of Crown Immunity went largely unnoticed. That was until the novel judgment in Intraline Resources SDN BHD v. The Owners of the Ship or Vessel "Hua Tian Long" HCAJ59/2008. The Hong Kong Court of First Instance decided that the English common law doctrine still subsists in Hong Kong after the handover. The privilege has transferred to the Central People's Government of the PRC (CPG). As a consequence, the Hong Kong courts now lack the legal basis to challenge any act, whether functional or commercial in nature, of an agency of the CPG. In short, Government Agencies of the People's Republic of China can claim absolute immunity from suit when sued in Hong Kong even for commercial acts.

The case involved a vessel – apparently the largest floating derrick crane-barge based in Asia – which had been promised to a Malaysian-owned engineering company to work on offshore oil platform projects. The owner of the vessel, the defendant in the action, claimed that it was

ultimately owned by the CPG and that it should therefore enjoy Crown and/or Sovereign Immunity.

The Sovereign Immunity point was rejected, since the whole premise of such a doctrine is that no state can claim jurisdiction over the affairs of another and Hong Kong and the PRC are not separate states. (See the recent case of FG Hemisphere Associates LLC v. Democratic Republic of the Congo and Others CACV 373/2008 and CACV 43/2009, which is very interesting on the subject of Sovereign Immunity and its restrictive application to non-government entities in Hong Kong, although is, we understand, the subject of an appeal.)

However, the CFI in Hong Kong was clear in its views as to the applicability of Crown Immunity in the Hua Tian Long case. It was held that at all times Crown Immunity remained an attribute of the British Crown's sovereignty over her colonies (including Hong Kong) and the establishment of the new constitutional order following the handover did not alter this position. In colonial times, Hong Kong courts lacked the legal basis to challenge acts of the British Crown. While statute enabled certain proceedings to be brought against the British Government in Hong Kong, it did not remove the privilege of Crown Immunity available to the British Government in the United Kingdom. Crown Immunity originated from the concept that there was not supposed to be equality between a ruler and those that are ruled, represented by the maxim "the sovereign can do no wrong". The CFI decided that, under the constitution of the PRC, the Hong Kong SAR was an entity of the CPG and thus Crown Immunity applies to the CPG.

The upshot of all of this makes for interesting work for legal practitioners. In short, PRC Government agencies currently have absolute Crown Immunity in Hong Kong. This applies to both functional acts of state and acts of a commercial character. In practice, this means that unless they grant express waiver of immunity or such an entity submits to the jurisdiction of the Hong Kong courts or an arbitral tribunal seated in Hong Kong, say by actively participating in proceedings, they cannot be sued in Hong Kong or have judgments or arbitral awards executed over assets in Hong Kong. This is far from ideal for parties doing business with such state agencies. The potential solution of course is that contracts with these parties must contain express waivers of Crown Immunity over suit and execution. Alternatively, parties need to look at bringing such proceedings (or commencing arbitration) in other jurisdictions both in respect of the substantive proceedings or in relation to enforcement.

One obvious question in dealing with all of this is the extent to which it is possible to determine whether a contracting party is likely to be an entity of the CPG. This may be far from easy to ascertain, and there is no clear guidance on the extent to which this applies. In fact, it remains an open question and one which is likely to be decided on a case by case basis.

As ever when contracting with businesses in this region, it is a good idea to undertake as much due diligence as possible, and to do so as early as possible. In Hua Tian Long, the court considered evidence regarding the fact that the defendant crane owner had no shareholders; was registered with the State Administration of Industry and Commerce; and was under the control of the Ministry of Communications. The way in which an entity was set up; how it is able to run its business; and which Ministry of the PRC Government oversees it, are all relevant questions. From experience, it is not always possible to answer all of these questions, but it worth giving them some serious consideration at the time a contract is entered into. If in doubt, make sure you give that dispute resolution clause a bit more thought!

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