Beijing’s “Congo” Interpretation: Commercial Implications

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In August 2011, the Standing Committee of the National People’s Congress’ (the NPCSC’s) Draft Interpretation of the law of state immunity in Hong Kong (hereafter, “Congo Interpretation”) was put to a vote. It contained nothing of surprise and was always likely to contain little detailed guidance about the handling of individual cases. A unanimous vote ensued. Hong Kong’s Court of Final Appeal (CFA) went on to confirm its preliminary judgment in Democratic Republic of Congo v FG Hemisphere Associates LLC (2010) FACV Nos 5, 6, 7 (the Congo case). That preliminary judgment was discussed at (2011) 127 L.Q.R. 495. The present note concerns Beijing’s confirmation that the doctrine of absolute state immunity applies in Hong Kong.

The CFA had never before referred an issue to the NPCSC although it was not the first time that the NPCSC has issued an interpretation; Chan and Lim (eds), Law of the Hong Kong Constitution (Hong Kong: Sweet & Maxwell, 2011), at p.53. For its part, the CFA had previously ruled on the legal effect of an interpretation which it never requested (Law of the Hong Kong Constitution, at p.62), so the courts have had some experience handling Beijing’s interpretations. Successive CFA rulings since 1999 have avoided pronouncing on the existence of what in Europe would be understood as a doctrine of acte clair. It requires no stretch of the imagination to see that the CFA had in that year tried to introduce the doctrine without calling it such (Law of the Hong Kong Constitution, at pp.62–65). Beijing’s reaction made plain that the CFA had been wrong to do so,
but did not go so far as to say it and the CFA has only responded by saying that it “may need” to revisit the matter (Lau Kong Yung v Director of Immigration (1999) HKCFAR 300).

If the doctrine of acte clair is now precluded, any ordinary commercial dispute which hints at foreign governmental involvement or interest—e.g. involving a ship which happens only to be owned by a foreign state or state enterprise (cf. The Porto Alexandre [1920] P. 30)—may have to go to Beijing (contra, s.10(2) of the UK State Immunity Act 1978 (SIA)). This could create a quagmire, equally so for Beijing and the Hong Kong courts since the courts would be reduced to the role of a post office and Beijing could end up deciding some very difficult individual cases. Never before has the relationship between the Hong Kong courts and Beijing been more important from a practical, commercial point of view. Saying that a rule of absolute immunity applies is clear enough since what the rule means is fairly evident, but whether an entity is to be equated with a “foreign state” for the purposes of that rule has never been clear at common law (cf. SIA, s.14).

Questions abound at common law. Is an entity to be treated as a “foreign state” or department or agency thereof because it is owned, controlled or directed by one? Does foreign state direction in relation to a particular transaction make that transaction immune from proceedings in Hong Kong even where the entity as a whole is not immune in its other, everyday activities? Such issues have been raised, and others can easily be imagined. There will be answers to them; but insofar as they involve common law questions, these are from an age now largely forgotten.

In The Parlement Belge (1879) 4 P.D. 129, the Court of Appeal’s rejection of Sir Robert Phillimore’s view in the court below—first stated in The Charkieh (1873) L.R. 8 Q.B. 197—meant England went on to firmly adopt the rule of absolute immunity. It was sufficient that the Parlement Belge was sovereign property, regardless of the purpose of its voyage. Despite signs of change in Compania Naviera Vascongada v The Cristina [1938] A.C. 485, the Tass News Agency’s immunity from a claim in libel in Krajina v Tass Agency [1940] 2 All E.R. 274 did much to stir public comment. Yet Tass was not an entity separate from the Soviet State. The significance of separate legal personality is that it suggests agency, not a governmental organ. The high point of absolute immunity was not reached until Baccus Srl v Servicio Nacional del Trigo [1957] 1 Q.B. 438. There, the relevant grain trading department of the Spanish Ministry was an independent legal person and the transaction was of a commercial nature. Nonetheless, a majority of the Court of Appeal, with Singleton L.J. dissenting, rejected the separate legal personality test and upheld immunity. The rule began to pivot around the supposed governmental status of an entity howsoever defined under its domestic law, not its legal independence. Lord Denning rejected this view in Mellenger v New Brunswick Development Corp [1971] 2 All E.R. 593, believing the governmental “functions and control” of an entity to be the more appropriate indicia in determining the entity’s true status; see also Trendtex Trading Corp v Central Bank of Nigeria [1977] Q.B. 529. All that was before the current era of restrictive immunity.

Thus, in the absence of a waiver of immunity in the face of the court by the foreign sovereign, which is what Hong Kong law now requires—see (2011) 127 L.Q.R. 495 at 497—or a case where what is involved can only be a “foreign state”
and its claim to title is not a mere façade—cf. *Juan Ismael v Republic of Indonesia [1955] AC 72*—there will be actual cases to decide. The same issues exist under a regime of restrictive immunity, but become more significant under an absolute immunity rule. The Vice-Chairman of the NPCSC’s Legislative Affairs Commission, Mr. Li Fei, was apparently not unaware of some of this, but considered it a question for another day (*South China Morning Post*, August 27, 2011). That the NPCSC has not provided closer guidance could mean that it has left such matters to the courts. The less sanguine view is that Beijing was simply crossing the river by feeling the stones, has not left it to the courts, and has not said so.

In its request for the “Congo Interpretation”, the CFA had asked:

1. Does Beijing decide China’s rule or policy on state immunity?
2. If so, are Hong Kong and its courts bound to apply or give effect to that rule or policy?
3. Would Beijing’s power to determine such act or policy fall within “acts of state such as defence and foreign affairs”?
4. Would the common law in Hong Kong need to be changed to reflect a rule of absolute immunity?

In each case, Beijing answered “yes”. Mr. Li Fei’s explanation to the NPCSC stressed that: (i) this is “a legal issue as well as a policy issue”; (ii) Hong Kong must “apply and give effect to the rules or policies on state immunity” that Beijing “has determined to adopt and must not depart from such rules or policies nor … adopt rules that are inconsistent with them”; (iii) the Hong Kong courts “have no jurisdiction over acts of state involving foreign affairs”; (iv) they “have no jurisdiction over the act of the Central People’s Government in determining the rules or policies on state immunity”; and (v) “if” Hong Kong were to apply or give effect to “inconsistent” rules, that would “contravene” the Basic Law.

In short, the Hong Kong courts must follow Beijing’s lead, avoid determining matters entrusted to Beijing and, apparently, should avoid deciding the prior question whether an issue truly involves state immunity and should be sent to Beijing. Here lies a significant development, regarding an issue which has festered since 1999. Much depends on how intrepid the courts will be in distinguishing jurisdiction over “rules and policies”, and the need to decide individual cases. It recalls the CFA’s attempt in 1999 to decide whether a case truly involves affairs that are within the responsibility of Beijing or which concern the relationship between Beijing and the Hong Kong Special Administrative Region (HKSAR). (art.158, Basic Law). In the *Congo* case, Beijing has responded in clear terms. Asking whether a particular matter concerns Beijing was always arguably a question which already concerns the relationship between Beijing and the HKSAR, but state immunity questions are now stated, categorically, as those which immediately concern an act of state involving foreign affairs.

How then will all this work in the adjudication of everyday commercial cases, involving entities which may—but may not on closer investigation—be taken to be a part of a “foreign state”? By posing the questions it did to the NPCSC, and receiving a robust response coupled with little further guidance, the CFA has come close in the *Congo* case towards precluding its own role in deciding commercial
disputes on the individual facts of each case. Saying that it is still for the court to recognize the existence of an act of state, as it did in the Congo case, may no longer hold true for state immunity cases in light of the Congo Interpretation.

The better approach may be to rely on a provision which the CFA had paid too little attention to in the Congo case—art.19 of the Basic Law. Article 19 requires certification from Hong Kong’s Chief Executive in matters involving “foreign affairs”, which Beijing now says is what state immunity is about. If it is Beijing that decides ultimately, then having such a protocol saves the judges the need to grapple with thorny questions while constantly risking a request for further interpretation from the NPCSC, and litigants the attendant delay and expense. As a result of the Congo ruling that a letter from the Chinese Foreign Ministry can perform the same function as an art.19 certificate, the continued use of such letters cannot be precluded. But they are less satisfactory. A certificate from the Chief Executive, issued upon the obtainment of a certifying document from the Central People’s Government, has the colour of legal authority under the Basic Law. A letter from the Foreign Ministry arguably has none in respect of some of the questions which tend to arise in such cases. That is since, from a common law viewpoint, these are often legal questions as much as they may be factual. Was the Central Bank of Nigeria an alter ego or an organ of the Nigerian State? Was it sufficient that the Parlement Belge was owned by the King of the Belgians? But a certificate from the Chief Executive may not go far enough. The problem is two-fold since a letter which goes too far could also exceed the terms of art.19, which merely states that:

“The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People’s Government.”

It would be best to leave it to Beijing to decide on the proper scope of art.19, bearing in mind that the CFA is unlikely to challenge Beijing’s view (Ng Ka Ling v Director of Immigration (No 2) (1999) 2 HKCFAR 141). The result would be similar to that under the “Kelantan” rule: [1924] AC 797.

We shall see. But in reviewing existing contracts involving “state-like” counterparties, any lawyer who thinks there may be simple answers to questions about what a “foreign state”, or the department or agency of one, looks like should think twice. The answers may not lie in the common law cases. Since China’s absolute immunity doctrine applies, it may well mean that Chinese law’s doctrine of absolute immunity applies notwithstanding common law, international law and the foreign state’s constitutional and other laws. Mr. Li Fei is correct in saying that having clarity is better than its absence, but Beijing has only provided political
clarity, which unwittingly or otherwise is a poor substitute for commercial certainty and no great guarantor of justice between merchants.

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