Two recent court decisions in Hong Kong have clarified the circumstances in which sovereign states and sovereign-controlled entities will be entitled to claim immunity from jurisdiction and execution in the Hong Kong courts. These decisions have reinforced the need to be careful when contracting with such entities. This memorandum examines the recent court decisions and their ramifications.

The Congo Case

This is a decision of the Court of Final Appeal (CFA), Hong Kong’s highest court.

The case concerned certain arbitral award claims against the Democratic Republic of the Congo (Congo) that had been purchased by the plaintiff. The arbitral awards arose out of certain credit agreements under which funds had been lent to Congo — clearly a commercial transaction.

The plaintiff sought to enforce the awards in the Hong Kong courts against the assets of Congo in Hong Kong. Congo claimed sovereign immunity before the Hong Kong courts — and thus sought to argue that the Hong Kong courts had no jurisdiction over it in respect of this matter.

What the CFA had to decide was whether the courts of Hong Kong should apply the doctrine of restrictive sovereign immunity (as in the U.K. and various other jurisdictions) or the doctrine of absolute sovereign immunity (as in the People’s Republic of China (PRC)). Under the doctrine of restrictive sovereign immunity, states do not enjoy immunity from suit or execution in respect of transactions of a purely commercial nature. Under the doctrine of absolute sovereign immunity, states do not enjoy immunity in respect of transactions of a purely commercial nature.

The CFA provisionally decided that, although prior to the handover of Hong Kong from Britain to China on June 30, 1997, the courts of Hong Kong, following the position of Britain, had practiced restrictive sovereign immunity, since the handover in 1997 the courts of Hong Kong should have followed the position of the PRC in practicing absolute sovereign immunity, with the result that no claim (including a claim in respect of a commercial matter) can be maintained in the Hong Kong courts against a foreign state or sovereign body unless the foreign state or sovereign body voluntarily waives its right to immunity at the time of the proceedings brought against it — prior consent (for example in a prior contract) is not effective.

Accordingly, the CFA decided that the Hong Kong courts had no jurisdiction over Congo in this matter and, further, that Congo had not waived its immunity in respect of this matter.

The CFA’s decision was initially only provisional because it decided that it was under a duty to refer certain legal questions to the Standing Committee of the National People’s Congress (SCNPC) of the PRC. These matters were referred to the SCNPC, which gave its decision in August 2011 confirming the CFA’s decision; as a result of this, in September 2011, the CFA affirmed its original provisional opinion.
The Hua Tian Long Case

Hua Tian Long is a crane-barge owned by the Guangzhou Salvage Bureau (the defendant). The defendant entered into a contract with the plaintiff to make Hua Tian Long available to the plaintiff on hire. The defendant failed to make Hua Tian Long available when required to do so under the contract and the plaintiff sued the defendant in the Hong Kong courts for breach of contract and damages.

After taking various steps in the litigation (including issuing a counterclaim), the defendant raised a defense in the Hong Kong courts claiming to be entitled to immunity from suit on the grounds that the Guangzhou Salvage Bureau was controlled by, and was an organ of, the PRC and therefore could not be sued in the courts of Hong Kong by virtue of the doctrine of crown immunity (being the immunity from suit accorded to a sovereign state by the courts of that state).

The judge held:

- that the PRC was entitled to crown immunity in the Hong Kong courts (Hong Kong being part of the PRC) and therefore could not be sued in the Hong Kong courts;
- that the PRC government had sufficient control over the Guangzhou Salvage Bureau (which was part of the PRC Ministry of Communications and not a separate legal entity) to make it an entity of the PRC government for these purposes and consequently that the Guangzhou Salvage Bureau was prima facie entitled also to plead crown immunity in the Hong Kong courts; and
- that in the present case the defendant, by its conduct in issuing a counterclaim in the proceedings and taking an active part in the proceedings, had waived its immunity, and thus was not entitled in this matter to claim immunity from the Hong Kong courts.

The case was decided by the Honorable Mr. Justice Stone in the Court of First Instance and may possibly be subject to appeal.

What lessons should we learn from these decisions?

- If you are entering into a contract with a sovereign state or a sovereign-controlled entity, it is very important that you take legal advice early on in the process — this will help you to frame the jurisdiction and dispute resolution clauses of the documentation to give you maximum protection.

- If you are entering into a commercial transaction with a sovereign state or a sovereign-controlled entity, do not include a submission to Hong Kong court jurisdiction in your documentation. Rather, include a jurisdiction clause for a legal jurisdiction (such as England and Wales) that adopts restrictive (as opposed to absolute) immunity such that the impleaded state or state-controlled body cannot claim immunity in respect of a commercial transaction.

- Include a contractual waiver of immunity in the contractual documentation — although this will not be effective to waive immunity in the Hong Kong courts, it should, if properly drafted, be effective in the relevant courts if your contract includes a jurisdiction clause submitting to the jurisdiction of the courts of a country that practices the doctrine of restrictive (as opposed to absolute) immunity.
• Depending on the type of contract involved, consider selecting arbitration proceedings (rather than court proceedings) to be the chosen dispute resolution method as sovereign and crown immunity only apply to proceedings before courts and not to proceedings before arbitral bodies (although sovereign or crown immunity may potentially apply at a later stage if you attempt to enforce any arbitral award in a court).

• If you are dealing with an entity related to a state, investigate as far as you can the level of state control over that entity — this will help determine whether that entity is likely to be treated as a sovereign-controlled entity for the purposes of claiming immunity in court proceedings.