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**STATE IMMUNITY IN COMMERCIAL DISPUTES – AN  
OVERVIEW OF SINGAPORE LAW & A RE-VISIT TO THE  
ABSOLUTE DOCTRINE OF STATE IMMUNITY**

Justice Woo Bih Li<sup>1</sup>  
Judge  
Supreme Court of Singapore

**Introduction**

1 The theme of this paper is state immunity in *commercial* disputes. Today, many countries recognize an exception for *commercial* matters in their laws on state immunity: a State cannot claim immunity from adjudication on disputes arising from its commercial transactions; nor can it claim immunity from execution against property used for a commercial purpose. This is known as the restrictive doctrine of state immunity. The absolute doctrine of state immunity, on the other hand, does not recognize an exception for commercial matters.

**Singapore law**

2 Singapore adopts the restrictive doctrine of state immunity. The general immunity from adjudication is provided in s 3(1) of the State Immunity Act (Cap 313, 2014 Rev Ed) (“the SIA”). The commercial exception to a foreign State’s immunity from adjudication is found in s 5(1)(a)

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of the SIA, which provides that “A State is not immune as respects proceedings relating to a commercial transaction entered into by the State”.

3 In defining a “commercial transaction”, Singapore has followed the United Kingdom in adopting a “list approach”.<sup>2</sup> This is as opposed to the international law’s dichotomy between acts *jure imperii* (activities undertaken in the exercise of sovereign authority) and acts *jure gestionis* (transactions of the kind which might appropriately be undertaken by private individuals instead of sovereign States).<sup>3</sup> A “commercial transaction” is defined in s 5(3) of the SIA as follows:

- (a) any contract for the supply of goods or services;
- (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
- (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

4 The third limb of s 5(3) of the SIA, *viz* s 5(3)(c), has been described as a “residuary category”. The interpretation of this subsection is to be made with reference to the international law concepts of acts *jure imperii* (activities undertaken in the exercise of sovereign authority) and acts *jure gestionis*.<sup>4</sup> To this extent, the SIA retains its link with traditional international law concepts.

5 Besides the exception for commercial matters in s 5(1)(a) of the SIA, other provisions of the SIA also deal specifically with exceptions for other

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<sup>2</sup> Hazel Fox, *The Law of State Immunity* (Oxford University Press, 3<sup>rd</sup> Ed, 2013) at p 193.

<sup>3</sup> *Alcom Ltd v Republic of Colombia* [1984] AC 580, *Per* Lord Diplock at 597–598, 600.

<sup>4</sup> Hazel Fox, *The Law of State Immunity* (Oxford University Press, 3<sup>rd</sup> Ed, 2013) at p 194; *I Congreso del Partido* [1983] 1 AC 244 at 80, *per* Lord Wilberforce.

subject matters under certain conditions. This includes contracts of employment (s 6 of the SIA), intellectual property (s 9 of the SIA) and ships (s 12 of the SIA). I will be focusing on s 5 of the SIA, the general exception to immunity for commercial transactions.

6 Sections 5(1)(a) and 5(3) of the SIA are *in pari materia* with ss 3(1)(a) and 3(3) of the United Kingdom's State Immunity Act 1978 ("the UKSIA"), except for a minor proviso which I need not elaborate on at present. In Australia, there is also a definition of "commercial transaction" in s 11(3) of the Foreign States Immunities Act 1985 ("the FSIA").

7 Section 11(3) of the FSIA states:

In this section, commercial transaction means a commercial, trading, business, professional or industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged and, without limiting the generality of the foregoing, includes:

- (a) a contract for the supply of goods or services;
- (b) an agreement for a loan or some other transaction for or in respect of the provision of finance; and
- (c) a guarantee or indemnity in respect of a financial obligation; but does not include a contract of employment or a bill of exchange.

8 It appears that s 11(3) of the FSIA does not have the equivalent of s 5(3)(c) of the SIA, which defines "commercial transaction" to include "any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages *otherwise than in the exercise of sovereign authority*" (emphasis added). This was based on the Australian Law Reform Commission recommendation to remove reference to "exercise of sovereign authority", as the term "has no precise meaning and may indeed be impossible to define":

Australian Law Reform Commission, *Foreign State Immunity*, Report No 24 (1984) at para 94. However, the FSIA's approach to the commercial transaction exception was largely based on the UKSIA, even though the language is not identical: *Firebird Global Master Fund II Ltd v Republic of Nauru* [2015] HCA 43 at [53], [72] and [178].

9 I turn now to the immunity from execution against a State's property. This immunity is provided for in s 15(2) of the SIA. The commercial exception to this aspect of state immunity is found in s 15(4) of the SIA, which provides that a foreign State's immunity from execution against its property does not apply to "property which is for the time being in use or intended for use for commercial purposes". This needs to be read together with s 15(5) of the SIA which states:

The head of a State's diplomatic mission in Singapore, or the person for the time being performing his functions, shall be deemed to have authority to give on behalf of the State ... for the purposes of subsection (4), his certificate to the effect that any property is not in use or intended for use by or on behalf of the State for commercial purposes shall be accepted as sufficient evidence of that fact unless the contrary is proved.

10 Section 2 of the SIA then defines "commercial purposes" as "purposes of such transactions or activities as are mentioned in section 5(3)". Section 5(3) of the SIA, it will be recalled, defines "commercial transaction" for the purpose of the commercial transactions exception to state immunity from adjudication. Thus, under the SIA, there is a link between "commercial purposes" and "commercial transaction". This link is also present under the UKSIA (see ss 13(4), 17(1) and s 3(3) of the UKSIA) on which the SIA is based. This link is not present under the FSIA. The definition in s 3(5) of the FSIA states that a commercial purpose "includes a reference to a trading, a business, a professional and an industrial purpose."

11 I proceed now to discuss one case where the commercial exception in s 5(1)(a) was raised in Singapore.

12 Section 5(1)(a) of the SIA was considered by the High Court in *WestLB AG v Philippine National Bank and others* [2007] 1 SLR(R) 967 (“*WestLB*”) at [59]–[70] (albeit *obiter*).

13 *WestLB* concerned a sum of money (“the Funds”) that was part of the gains accumulated by the late Ferdinand E Marcos when he was the President of the Republic of Philippines. The Funds were originally in bank accounts in Switzerland. Steps taken by the Republic of Philippines (“the Republic”) and the Swiss authorities eventually led to the Funds being released in 1997 to the Philippines National Bank (“PNB”) as an escrow agent. PNB, in turn, was to release the Funds only when a competent court made a final and enforceable decision as to the Fund’s ownership. In the meantime, PNB was also obliged under the agreement with the Swiss authorities to place the Funds with institutions with a Standard and Poor’s rating of at least “AA”. PNB thus placed the Funds into a bank in Singapore (“WLB”).

14 In 2003, the Supreme Court of Philippines ordered the Funds be forfeited to the Republic. PNB instructed WLB to release the funds to it, but WLB refused, as it had received competing claims from the original holders of the Swiss bank accounts, and human right victims who had sued Marcos in the United States of America. WLB then took out an Interpleader Summons to determine the ownership of the Funds. WLB’s application was granted on March 2004 without any objection from either PNB or the Republic, which was fully aware of the application. In March 2006, the Republic was added as a defendant to the interpleader proceedings. Five months later in August 2006,

it applied for the proceedings to be stayed on the grounds of state immunity, invoking section 3 of the SIA.

15 One argument raised by parties resisting the stay application was that the Republic's act of placing of the Funds into the escrow account with WLB through PNB was a commercial act and hence the exception to immunity applied.

16 The High Court, however, disagreed. The court referred to Lord Wilberforce's famous passage in the House of Lords' decision in *I Congreso del Partido* [1983] 1 AC 244 ("*I Congreso*") at 267,<sup>5</sup> which stated that:

... in considering, under the "restrictive" theory whether state immunity should be granted or not, *the court must consider the whole context in which the claim against the state is made, with a view to deciding whether the relevant act(s) upon which the claim is based, should, in that context, be considered as fairly within an area of activity, trading or commercial, or otherwise of a private law character, in which the state has chosen to engage, or whether the relevant act(s) should be considered as having been done outside that area, and within the sphere of governmental or sovereign activity.* [emphasis added]

17 Agreeing with Lord Wilberforce's instructive passage, the Singapore High Court held that the placing of the Funds into the account must be looked at in the "whole context in which the claim against the state is made". Looking at the whole context, the court held that the placement of the Funds into the account was "an integral part of the exercise of its sovereign powers to recover the Funds and are not commercial transactions undertaken by the

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<sup>5</sup> It may be usefully noted that *I Congreso del Partido* was decided under the common law (at 261), but Lord Wilberforce's passage remains much-cited both for cases decided under the statute and common law: Hazel Fox, *The Law of State Immunity* (Oxford University Press, 3<sup>rd</sup> Ed, 2013) at p 195.

Republic”. Thus, the commercial exception did not apply. This point was not pursued on appeal.

18 On the other hand, s 15(4) of the SIA, which deals with the execution of judgment against the property of a State, has yet to receive judicial attention in Singapore.

***Considerations in granting an injunction against a foreign State***

19 I will now come to an important and interesting point about the granting of an injunction against a foreign State which the Singapore courts had to address recently.

20 The immunity of foreign States to injunctions is covered in s 15(2)(a) of the SIA, which provides that “relief shall not be given against a State by way of injunction”. However, this immunity is qualified by s 15(3) of the SIA, which states that “[s]ubsection (2) does not prevent the giving of any relief ... with the written consent of the State concerned”.

21 The issue of whether a court should grant an interim injunction against a foreign State arose in *Maldives Airports Co Ltd and another v GMR Malé International Airport Pte Ltd* [2013] 2 SLR 449 (“*Maldives Airports*”). The salient facts are as follows. The Maldives Government and Maldives Airport Company Limited (“MACL”) (collectively, “the Appellants”) had granted a 25-year concession to a consortium to rehabilitate, expand, modernize and maintain the Malé International Airport through a concession agreement entered into on 28 June 2010 (“the Concession Agreement”). The consortium then incorporated GMR Malé International Airport Private Limited (“the Respondent”). The Concession Agreement contained an arbitration clause,

which provided for arbitration with its seat in Singapore and Singapore law as the *lex arbitri*.

22 Subsequently, there was a dispute as to whether provisions in the Concession Agreement which allowed the Respondent to impose a fee on departing passengers were contrary to a piece of Maldivian legislation. On 8 December 2011, the Maldives Court held that the provisions were indeed inconsistent with the legislation. Following this, the Appellants each issued a letter dated 5 January 2012 consenting to a variation of the fee payable by the Respondent to MACL under the Concession Agreement to take into account the Respondent's expected loss of revenue from the Maldives judgment.

23 On 7 February 2012, there was a change of government in the Maldives. MACL then issued a letter on 19 April 2012 stating that its 5 January 2012 letter had been issued by its former chairman without authority. The Maldives Government also wrote on 26 April 2012 to withdraw the consent in its letter of 5 January 2012. Nevertheless the Respondent continued to operate the Concession Agreement on the basis of the 5 January 2012 letters. On 5 July 2012, the Respondent commenced arbitration proceedings to seek a declaration that it was entitled to adjust the fees payable to MACL.

24 Subsequently, the Appellants informed the consortium that the Concession Agreement was void *ab initio*, or alternatively that it was frustrated. The consortium was given seven days' notice to vacate the airport. Shortly after this, the Appellants commenced another arbitration ("the second arbitration") to seek a declaration that the Concession Agreement was void. The Respondent then sought an interim injunction from the Singapore High Court to restrain the Appellants and their directors, officers, servants or agents from taking any step to:



(a) interfere either directly or indirectly with the performance by the Respondent of its obligations under the Concession Agreement; and

(b) take possession and/or control of the Airport or its facilities pending further order by the Singapore court or an arbitral tribunal constituted to resolve the dispute.

25 This injunction was to have effect until the tribunal in the second arbitration was in a position to determine the matter. On 3 December 2012, the High Court granted an injunction in the terms sought in relation to (a) above.

26 The High Court was persuaded to grant an injunction in view of clause 21.5 of the Concession Agreement which stated:

Notwithstanding anything herein to the contrary, during the pendency of any Dispute and the resolution thereof, both Parties shall continue to perform all their respective obligations under this Agreement (including for [the Respondent] continuing [sic] to carry out the Airport Services and to perform the Works in accordance with the provisions of this Agreement, the Works Construction Contracts and the Works Plan) except to the extent that the obligation constitutes the subject matter of such Dispute.

27 On the other hand, the Court of Appeal was of the view that the clause did not assist the Respondent when the dispute concerned the entire contract. The Court of Appeal noted that the contractual requirement to continue to perform all obligations applied except to the extent that the obligation constitutes the subject matter of the dispute. Furthermore, even an obligation to continue performing a contract despite a dispute would not give rise to a contractual right amounting to an asset that may be preserved by way of an interim injunction unless the breach would not be adequately compensable by damages.

28 The decision of the High Court was reversed on the grounds that the injunction did not satisfy the test of balance of convenience. The Court of

Appeal was of the view that the sheer width of the terms of the injunction presented practical problems. It would have been inevitable that disputes would arise over a broad spectrum of acts and the parties would have to return repeatedly to the Singapore court for clarification whether a particular act did or did not contravene the injunction. Also, the scope of the injunction restricted the operations and duties of domestic regulators on the operations of the airport, and might also affect other Maldivian governmental bodies involved in the regulation of transportation, tourism and even defence.

29 I suggest that the considerations which the Court of Appeal had set out should give some pause for thought before an injunction is in fact granted against a foreign State especially where the acts to be restrained are acts which would be done in the territory of the foreign State and also where infrastructure projects are concerned.

30 I would further mention that the Court of Appeal also addressed a threshold issue of whether the SIA granted the Appellants immunity against the injunction. The Appellants had relied on s 15(2)(a) of the SIA to claim state immunity against an injunction. The Respondent, on the other hand, argued that the Appellants had waived immunity by providing written consent under s 15(3) of the SIA.

31 The Concession Agreement did contain a waiver clause. Clause 23 of the Concession Agreement stated:

To the extent that any of the Parties may in any jurisdiction claim for itself ... immunity from service of process, suit, jurisdiction, arbitration ... or other legal or judicial process or other remedy ..., such Party hereby irrevocably and unconditionally agrees not to claim and hereby irrevocably and unconditionally waives any such immunity to the fullest extent permitted by the laws of such jurisdiction.

32 The Appellants sought to argue that the waiver clause was inapplicable as the Concession Agreement was void *ab initio*. This argument was rejected by the Court of Appeal for two reasons. First, the argument required the court to assume that the Concession Agreement was void, when the validity of the Concession Agreement was the very subject of the second arbitration. Second, the Court of Appeal held that the waiver clause was part of the dispute resolution mechanism of the Concession Agreement, and was thus severable and would survive the possible avoidance of the Concession Agreement. The Court of Appeal, however, left open the possibility that such clauses might not be severable if the basis for alleging that the Concession Agreement was void *ab initio* in the sense that the contract never came into existence in the first place in that no offer was made or, if made, there was no acceptance. As that was not the case of the Appellants, the court saw no need to express a view on the matter (at [19]—[22]).

33 The *Maldives* case also engaged several other issues, including whether the injunction sought offended the act of State doctrine such that the court would have no jurisdiction to grant the injunction (at [23]–[31]); and whether the court had the power to grant the injunction under s 12A of the International Arbitration Act (Cap 143A, 2007 Rev Ed) (at [32]–[52]). However, for the purposes of this paper, I shall confine myself to the issues discussed above.

### **Restrictive Immunity and a Re-visit to Absolute Immunity**

34 I have mentioned that there is legislation in Singapore, in the United Kingdom and in Australia that provides for restrictive state immunity. The position in Hong Kong was that it too adopted the restrictive doctrine of state immunity.

35 However, the position of the Hong Kong Special Administrative Region (“Hong Kong SAR”) after the handover to the People’s Republic of China (“the PRC”) was not resolved until recently in the landmark decision of *Democratic Republic of Congo v FG Hemisphere Associates* [2011] HKFCA 41 (“*Congo*”). By a majority of 3 to 2, the Court of Final Appeal decided that Hong Kong SAR applies the absolute doctrine of state immunity, which is consistent with the position of the PRC. I will now summarize the facts before attempting to summarize the gist of the arguments and reasons leading to the judgments of the majority and the minority.

36 *Congo* concerned an attempt by FG Hemisphere Associates LLC (“FG”) to enforce two arbitration awards against the Democratic Republic of Congo (“the DRC”). The arbitration in question concerned loans provided in the 1980s to the DRC and a Congolese state-owned electricity company by Energoinvest JNA (“Energoinvest”), a company incorporated in what was then Yugoslavia with its headquarters in Sarajevo. For simplicity, I will refer only to the DRC as the defaulting party. The DRC defaulted, and Energoinvest successfully obtained two arbitration awards against them in 2003. In the next year, Energoinvest assigned its rights in the arbitration awards and underlying debts to FG, a Delaware company dealing in “distressed assets”, for an undisclosed sum.

37 Separately, the PRC and the DRC entered into cooperation agreements for a development scheme in the DRC where the PRC would finance and construct infrastructure in return for a right to exploit certain DRC natural resources. A Joint Venture Agreement dated 22 April 2008 was also entered into. The parties representing DRC interests in the agreement was a DRC state-owned company which was referred to as Gécamines and an individual, one Mr Gilbert Kalamba Banika. The counter-parties were three

Chinese subsidiaries of China Railway Group Limited (“China Railway”). The subsidiaries were liable to pay the DRC a sum of money labeled the “Entry Fees”. As China Railway was listed on the Hong Kong SAR’s stock exchange, payment of the Entry Fees was disclosed on 22 April 2008 pursuant to the stock exchange’s listing rules.

38 FG then brought proceedings to enforce the arbitration awards in Hong Kong SAR against the Entry Fees payable to the DRC. FG successfully obtained an *ex parte* injunction to restrain China Railway and its subsidiaries from paying the Entry Fees to the DRC and obtained leave to enforce the arbitration awards as well as consequential orders. The DRC subsequently issued a summons to dispute the court’s jurisdiction on the grounds of state immunity.

39 At first instance, Reyes J found in favour of the DRC, holding that the Entry Fees were not commercial in nature. As a result, Reyes J did not need to make a finding on whether Hong Kong SAR adopted a restrictive or absolute doctrine of state immunity, though he expressed *obiter* views that the restrictive doctrine applied. He was also of the view that there was no waiver of state immunity. The main decision of Reyes J was reversed by a 2-1 majority by the Court of Appeal, which found that there was a good arguable case that the Entry Fees were intended for commercial purposes, and that the restrictive doctrine of state immunity applied in Hong Kong SAR. The Court of Appeal also unanimously decided that if immunity applied there was no waiver of immunity by the DRC.

40 On appeal to the Court of Final Appeal, the majority comprising Mr Justice Chan PJ, Mr Justice Ribero PJ and Sir Anthony Mason NPJ reached the provisional conclusion (at [183(a)]) that Hong Kong SAR

“cannot, as a matter of legal and constitutional principle, adhere to a doctrine of state immunity which differs from that adopted by the PRC. The doctrine of state immunity practised in the HKSAR, as in the rest of the PRC, is accordingly a doctrine of absolute immunity”.

41 The majority identified three main questions that arose on that appeal. The questions (at [182]) were:

(i) What is the legal doctrine of state immunity applicable in the Hong Kong Special Administrative Region (“HKSAR”)? In particular, can the HKSAR validly adhere to a doctrine of state immunity which is inconsistent with the doctrine adopted by the People’s Republic of China (“PRC”)?

(ii) In the present case, has state immunity in any event been waived?

(iii) What steps, if any, should the Court take in the light of the provisions of Article 13, Article 19(3) and Article 158(3) of the Basic Law respectively?

42 I will be focusing on the first two questions for the purpose of this paper.

### ***History of state immunity in Hong Kong SAR***

43 The majority began by tracing the history of the law of state immunity in Hong Kong SAR. Before 1975, the traditional common law doctrine of absolute immunity applied in Hong Kong. The first step towards a restrictive doctrine of state immunity was taken in 1975, when the Privy Council heard an appeal from Hong Kong in *The Philippine Admiral* [1977] AC 373. The Privy Council there applied the doctrine of restrictive immunity to Admiralty *in rem* actions, while retaining the absolute doctrine for *in personam* actions.

44 Two years later, in 1977, a majority of the English Court of Appeal in *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529

(“*Trendtex*”), comprising Lord Denning MR and Shaw LJ, adopted the principle of restrictive immunity and held that the Nigerian Central Bank could not enjoy immunity from a claim based on a letter of credit issued to pay for a shipment of cement. The other judge, Stephenson LJ, favoured restrictive immunity but held that absolute immunity was the rule until reversed by the House of Lords or the legislature.

45 The next year, in 1978, the United Kingdom Parliament enacted the UKSIA, which adopted the restrictive doctrine of state immunity. The UKSIA was made applicable to Hong Kong by the State Immunity (Overseas Territories) Order 1979 (“the 1979 Order”).

46 Three years later, in 1981, the House of Lords in *I Congreso* clarified that the position at common law was also the restrictive doctrine of state immunity. In arriving at this position, Lord Wilberforce cited (at 262) two foundations for that doctrine:

(a) It is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts.

(b) To require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions.

47 On 1 July 1997, the PRC resumed the exercise of sovereignty over Hong Kong, and the 1979 Order ceased to have any effect. The majority of the Court of Final Appeal was prepared to accept that, whether on the basis of *The Philippine Admiral*, *Trendtex* and *I Congreso* or the UKSIA and the 1979 Order, Hong Kong had applied the restrictive doctrine of state immunity up to 30 June 1997.

***State immunity in Hong Kong SAR after the PRC's resumption of sovereignty***

48 The majority then turned its attention to what it called the “fundamental question” (at [225]):

... whether, after China’s resumption of the exercise of sovereignty on 1<sup>st</sup> July 1997, it is open to the courts of the HKSAR to adopt a legal doctrine of state immunity which recognizes a commercial exception to absolute immunity and therefore a doctrine on state immunity which is different from the principled policy practised by the PRC.

49 Therefore, it was not in dispute that the PRC adopted the absolute doctrine of state immunity. The question was whether Hong Kong SAR could adopt the restrictive doctrine instead. The majority concluded that it was not open to Hong Kong SAR courts to take such a course.

50 It was clear from three letters from the Office of the Commissioner of the Ministry of Foreign Affairs of China in Hong Kong (“OCMFA”) that the PRC adopted the absolute doctrine.

51 The majority discussed the nature of state immunity and highlighted the following three aspects (at [264]–[266]).

52 First, state immunity concerns relations between States and forms an important component in the conduct of a nation’s foreign affairs with other States.

53 Secondly, different States may, according to their constitutional arrangements, allocate to different organs of government the responsibility for laying down the policy on state immunity. Such allocation may change over time.



54 Thirdly, the third letter from the OCMFA asserted that the doctrine of state immunity adopted in a unitary state applies to the whole State. While, at common law, it has been held that a federal constitution may vest sovereignty in a member State or province in such terms as to enable it separately to claim state immunity in a court, there is nothing at common law to suggest that a region that is part of a unitary State can establish its own state immunity practice that varies from that of the State to which it belongs. Hong Kong SAR lacks the attributes of sovereignty which might enable a State or province to establish its own practice of state immunity. Thus, any such attempt would embarrass the State in the conduct of its affairs. This must be avoided by adhering to a “one voice principle” where the courts speak with “one voice” with the executive.

55 The majority also addressed five arguments raised by FG in support of the restrictive doctrine, which I shall summarize as follows:

- (a) Deferring to the executive will risk replacing principled decisions of law with unprincipled decisions based on political expediency.
- (b) The restrictive doctrine of immunity is more consonant with justice.
- (c) The restrictive doctrine of state immunity does not prejudice the state’s sovereignty.
- (d) State immunity is a matter for the courts of Hong Kong SAR to determine as a matter of common law, not for the executive to determine as a matter of policy.
- (e) Reverting to absolute state immunity is damaging to the fundamental values protected by the Basic Law.

56 These arguments were considered and dismissed by the majority, for reasons which I summarize as follows:

- (a) The majority did not accept that the courts are the most appropriate organ of government for determining a nation's state immunity policy.
- (b) The argument about justice, while having a lawyerly appeal, did not take into account policy considerations in the national and international plane. It also ignored the fundamental issue whether the Hong Kong SAR courts can validly seek to define the region's immunity policy in a manner at variance with that of the nation.
- (c) The question of prejudice to the PRC's sovereignty was addressed in the third OCMFA letter which was sent to rebut the suggestion made by the Court of Appeal that a divergent policy would cause no prejudice to the PRC. The effect of such conduct was a matter peculiarly within the cognizance of the Central People's Government which conducts the foreign affairs of the PRC.
- (d) The argument that it was for the courts to determine the applicable doctrine of state immunity suffered from the same flaw of ignoring the Hong Kong SAR's status as a local administrative region of the PRC. Statements in the OCMFA letter were properly treated as determining "facts of state"

which are peculiarly within the cognizance of the executive as mentioned by Professor F A Mann.<sup>6</sup>

- (e) The majority referred to three decisions of the European Court of Human Rights which held that whilst a limitation in the right of access to court must pursue a legitimate aim and must be proportionate, the grant of state immunity in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between States through respect for another State's sovereignty (as summarized in *Dicey Morris & Collins on the Conflict of Laws* vol 1 (Lawrence Collins gen ed) (Sweet & Maxwell, 14th Ed, 2006) at para 10-003). Therefore any suggestion that absolute immunity was objectionable or regressive was rejected.

57 As regards an argument that there could be a separate state immunity policy for Hong Kong SAR on the principle of "one country, two systems", the majority was of the view that the status of Hong Kong SAR as a local administrative region of the PRC prevailed so that the commercial exception could no longer be maintained as it was inconsistent with that adopted by the PRC.

58 On the question of waiver, the majority noted FG's argument that the DRC had impliedly waived its immunity by entering into an agreement with Energoinvest for arbitration under the 1998 version of the International Chamber of Commerce ("ICC") rules of arbitration. In particular, ICC Rule 28.6 states:

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<sup>6</sup> F A Mann, *Foreign Affairs in English Courts* (Clarendon Press, 1986), p 23.

Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

59 The majority did not think that this provision amounted to a submission to the jurisdiction of the courts in Hong Kong SAR where leave to enforce the awards was being sought. The majority pointed out that there was a difference between a State's submission to the contractual jurisdiction of arbitrators and a State's submission to the jurisdiction of the courts of another State.

60 The majority also considered (at [378]–[380]) the Hong Kong SAR's Arbitration Ordinance s 2GG, which states:

(1) An award, order or direction made or given in or in relation to arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award, order or direction.

(2) Notwithstanding anything in this Ordinance, this section applies to an award, order and direction made or given whether in or outside Hong Kong.

61 However, the majority was of the view that this provision gave only the right to the party with the benefit of an award the right to apply for leave to enforce the award. An impleaded State may still claim state immunity.

62 As for implied waiver, the majority noted (at [386]) that Hong Kong SAR has no applicable state immunity legislation. The common law rules are chary about implying any waiver. They cited *Mighell v Sultan of Johore* [1894] 1 QBD 149 at 159-160 and *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797 (“*Duff Development*”) at 829 for the proposition that

a waiver of state immunity must be effected at the time when the forum State's jurisdiction is invoked against the impleaded State. As Lopes LJ put it in the former case (at 161), it would have to be a submission in the face of the court.

### ***The judgments by the minority***

63 I shall now summarize the minority's position on the legal doctrine of state immunity applicable in the Hong Kong SAR. I begin first with the judgment by Mr Justice Bokhary PJ ("Bokhary PJ"), before turning to the judgment by Mr Justice Mortimer NPJ ("Mortimer NPJ").

64 Bokhary PJ's starting point is similar to the majority: that state immunity in Hong Kong before 1 July 1997 was restrictive in that it did not extend to commercial transactions (at [62]). His key disagreement with the majority was his view that in "deciding whether state immunity available in the courts of Hong Kong is absolute or restrictive, a court administering Hong Kong law was to decide that issue independently on its own and without consulting the executive" (at [85]). Bokhary PJ cited the *The Philippine Admiral*, where the Privy Council warned against consulting the executive as it "may end in cases being decided irrespective of any principle in accordance with the view of the executive as to what is politically expedient".

65 Bokhary PJ did not think that the principle that the judiciary and executive should "speak with one voice" would apply to the question of whether state immunity extends to commercial transactions (at [96]). Referring to the cases cited by the DRC, Bokhary PJ confined the "speak with one voice" principle to cases where the question involved either issues of recognition (*eg*, whether a foreign entity is an independent State) or issues of territory (*eg* whether a collision at sea took place within a State's territorial waters). These could be distinguished from the issue of state immunity. Issues

of recognition, in particular, are clearly a matter of foreign affairs for the executive. But recognition was not in issue here; the question of whether the immunity was absolute or restrictive was a question of law for the judiciary (at [114]).

66 Bokhary PJ also addressed the argument that Hong Kong SAR must adopt the same position on state immunity as the PRC because “there can only be one system of state immunity within one state” (at [118]). In response, Bokhary PJ pointed out that Hong Kong SAR is under a “one country, two systems” situation. Relying once again on the distinction between issues of recognition and the issue of state immunity, he explained the significance of the “one country, two systems” situation as follows (at [123]):

The part of state immunity which involves recognition is a matter of “country”. And the part which involves whether immunity is absolute or restrictive is a matter of “systems”. Under Hong Kong’s system, it is for the judiciary to decide independently, without consulting the executive, whether the immunity available in the courts of Hong Kong is absolute or restrictive. It is never a contest between “one country” and “two systems”. The principle does not admit of such a contest. At all times and in all matters, the principle operates as a whole.

67 Having found that the judiciary was free to independently decide on the question of state immunity, Bokhary PJ then proceeded to survey various jurisdictions before concluding that the present common law position in Hong Kong SAR is also the restrictive doctrine of state immunity.

68 On the question of waiver, it is interesting to note that Bokhary PJ concluded that even if the DRC’s state immunity was absolute, there was an effective waiver of such immunity. In reaching this conclusion, the learned judge reached a conclusion different from that of Reyes J, the unanimous decision of the Court of Appeal and the majority of the Final Court of Appeal.

Like the majority he referred to ICC Rule 28.6 and s 2GG of the Arbitration Ordinance, as well as s 42 of the Arbitration Ordinance, which provides:

(1) A Convention award shall, subject to this Part, be enforceable either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 2GG.

(2) Any Convention award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Hong Kong and any reference in this Part to enforcing a Convention award shall be construed as including references to relying on such an award.

69 He also referred to various other academic opinions and reports. In his view a State's submission to arbitration in a commercial dispute is a waiver of any immunity from an application for leave to enforce.

70 This view was subject to the question whether a waiver of state immunity can only be made before the court. After referring to some more cases and academic opinion, Bokhary PJ concluded that although a waiver made otherwise than in the face of the court may not always be as easy to establish as one made in the face of the court, once it is established, it would be a denial of justice to treat it as ineffective. He noted that it might have been awkward for Reyes J and the Court of Appeal to depart from the decision of the House of Lords in *Duff Development* but the position was different for the Court of Final Appeal. He concluded that waiver could be effected at an earlier stage and was in fact so effected in *Congo*.

71 I turn now to the judgment of Mortimer NPJ. Mortimer NPJ agreed with Bokhary PJ's judgment, but also wrote a substantial judgment in light of the "constitutional importance" of the decision.

72 Mortimer NPJ disagreed with the submission that state immunity involved questions of “foreign affairs” and thus lay outside of the Hong Kong SAR court’s jurisdiction. He pointed out that it was inconsistent for the DRC to argue that “immunity is a matter of foreign affairs, outwith the court’s jurisdiction under Article 13 [of the Basic Law], and yet the Court must apply absolute immunity”. In his view, if immunity was a matter of foreign affairs, then the court would have no jurisdiction to rule upon any question of state immunity, absolute or restrictive (at [448]).

73 The learned judge also rejected the application of the principle that the judiciary and executive should “speak with one voice” to state immunity, confining the principle to questions of fact as recognized by the executive. Examples included the questions of whether the executive recognizes an entity as a foreign State or whether the executive views an act of a foreign State as violating the sovereignty of the State in which the court is sitting (at [483]–[484]).

74 As for waiver, Mortimer NPJ agreed with Bokhary PJ’s conclusions and reasons.

75 The question of waiver in the face of the court was not specifically raised in *Maldives Airports*. Perhaps this was because such an argument would have been addressed by s 15(3) of the SIA itself which provides that the written consent of the State concerned may be contained in a prior agreement. Section 4(1)–(2) of the SIA might also have been relevant. The provisions state:

(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of Singapore.



(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement; but a provision in any agreement that it is to be governed by the law of Singapore is not to be regarded as a submission.

76 Section 11 (1) of the SIA should also be considered. It states:

Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts in Singapore which relate to the arbitration.

### ***Conclusion on Congo***

77 I had earlier mentioned that the Court of Final Appeal's judgment was "provisional". This was because the Court of Final Appeal referred certain questions on the interpretation of Hong Kong SAR's Basic Law to the Standing Committee of the National People's Congress (a committee of the PRC's legislature) ("the Standing Committee"). This referral was necessary as, according to the majority, the case raised questions relating to the interpretation of Hong Kong SAR's Basic Law provisions on foreign affairs and the relationship between Hong Kong SAR and the PRC. The Standing Committee responded on 26 August 2011, and the Court of Final Appeal declared the provisional judgment final on 8 September 2011.