

DEMOCRATIC REPUBLIC OF THE CONGO v FG
HEMISPHERE: WHY ABSOLUTE IMMUNITY SHOULD
APPLY BUT A REFERENCE WAS UNNECESSARY

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In this Comment, the author advances the following arguments: (1) the law of state immunity does not fall within the common law act of state doctrine as enshrined in Art 19 of the Basic Law; (2) as a matter of comity, even though the determination of state of immunity is not an act of state, the judiciary and the executive should speak with one voice on foreign affairs, and therefore the HKSAR courts should observe the doctrine of absolute immunity; and (3) the CFA does not have to refer the interpretation of Arts 13 and 19 to the SCNPC as the Court would not need to rely or apply either Arts 13 or 19 in resolving this dispute as the “one voice” principle on international affairs follows from the application of another common law principle and not the common law act of state doctrine encapsulated under Art 19.

Introduction

The Hong Kong Court of Final Appeal (CFA) recently handed down its long-anticipated decision in *Democratic Republic of the Congo v FG Hemisphere*¹ which concerned the law of state immunity in Hong Kong. In essence, the CFA (by a 3-2 majority) provisionally held that (1) the law of state immunity in Hong Kong was an act of state enshrined under Art 19 of the Basic Law; (2) Hong Kong could not, as a matter of legal or constitutional principle, adhere to a doctrine of state immunity that was at variance with the People’s Republic of China (PRC) and therefore the doctrine of absolute immunity as practiced in the PRC should apply too in Hong Kong; and (3) the CFA had a duty herein to refer the interpretation of Arts 13² and 19³ of the Basic Law to the Standing Committee of the National People’s Congress (SCNPC) as the CFA needed to

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¹ [2011] 4 HKC 151 (CFA).

² Article 13(1) reads: The Central People’s Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region.

³ Article 19(3) reads: The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs.

interpret these said provisions, which were provisions concerning affairs falling within the responsibility of the Central People's Government or the relationship between the Central Authorities and the Region, when adjudicating this case in question.

The facts and procedural history of the case may be briefly stated. The respondent, FG Hemisphere, was the assignee of the benefit of debts owed by the Democratic Republic of the Congo in consequence of two ICC arbitration awards made against it. The respondent had sought to enforce these awards against money said to be payable in Hong Kong to the Congo by China Railway and its subsidiaries. The Congo, China Railway and its subsidiaries had sought to resist enforcement on the basis that the Congo, as a sovereign state, enjoyed immunity. In the High Court, Reyes J held that the transactions between China Railway and the Congo were not commercial in nature, and therefore even if Hong Kong recognised the restricted doctrine of immunity, the transaction did not fall within the exception to sovereign immunity recognised by the restrictive approach. The Court of Appeal, by a 2-1 majority, held that the restrictive principle of immunity applied in Hong Kong and the Congo was not immune in relation to its commercial transactions.

In this Comment, I shall advance the following arguments: (1) the law of state immunity does not fall within the common law act of state doctrine as enshrined in Art 19; (2) as a matter of comity, even though the determination of state immunity is not an act of state, the judiciary and the executive should speak with one voice on foreign affairs, and therefore the HKSAR courts should observe the doctrine of absolute immunity; and (3) the CFA did not have to refer the interpretation of Arts 13 and 19 to the SCNPC as the Court would not need to rely or apply either Art 13 or 19 in resolving this dispute as the "one voice" principle on international affairs follows from the application of another common law principle⁴ and not the common law act of state doctrine encapsulated under Art 19.

State Immunity Falls Outside the Common Law Act of State Doctrine

Article 19(3) states that "The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs". According to the majority judges (Chan PJ, Ribeiro

⁴ *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation (HL)*, [1978] 2 W.L.R. 81.

PJ and Sir Anthony Mason NPJ), Art 19(3) is “consistent with the common law doctrine of act of state”⁵ and therefore they applied the common law understanding of what constituted an act of state. In particular, they endorsed the views advanced by the learned editors of Dicey, Morris and Collins that the “courts will not investigate the propriety of an act of the executive ‘performed in the course of its relations with a foreign state’”.⁶ In the same vein, they endorsed Lord Wilberforce’s views in *Buttes Gas and Oil Co v Hammer (No 3)* that the act of state doctrine in the context of foreign affairs was part of a “more general principle that courts will not adjudicate upon the transactions of foreign sovereign states”.⁷

Undeniably, the doctrine of state immunity is concerned with the relations between states. Therefore the majority judges reasoned that state immunity fell within the common law understanding of an act of state as enshrined under Art 19. Unfortunately, this is where the majority judges erred at law.

Certainly, the majority judges were right that state immunity implicated the relations between sovereign states. But that does not mean that it automatically falls within the scope of the common law act of state doctrine. At common law, even though state immunity does concern the relationship between the state and foreign nations, it has also been accepted by judicial practice that the determination of the nature and extent of immunity accorded to a foreign state, in the absence of legislation, is for the courts to decide. In 1975, the Privy Council of Hong Kong in *Philippine Admiral v Wallem Shipping (Hong Kong) Ltd*⁸ established that a restrictive approach to immunity should be adopted in relation to immunity claimed for vessels arrested in Admiralty *in rem* actions. Subsequently, in 1977, the English Court of Appeal in *Trendex Trading Corp v Nigeria*⁹ extended the restricted view of immunity to *in personam* cases. Finally, in the House of Lords decision in *Playa Larga v I Congreso del Partido*,¹⁰ Lord Wilberforce also endorsed the courts’ earlier assumption of the role to define the doctrine of state immunity prior to any legislative enactment. In all these cases, even though the judicial policy on immunity implicated the relationship between sovereign nations, there was no suggestion that this was an act of state for which the courts were denied jurisdiction or that they had exceeded jurisdiction by making such a determination.

⁵ See n 1 above at para 345.

⁶ See n 1 above at para 348.

⁷ [1982] A.C. 888 at 931 (HL).

⁸ [1977] A.C. 373 (PC).

⁹ [1977] Q.B. 529 (CA).

¹⁰ [1983] 1 A.C. 244 (HL).

Assuming that the majority judges in *FG Hemisphere* were indeed applying the common law doctrine of act of state, then they must also accept its parameters, which had always deemed the law on state immunity as falling outside the scope of this doctrine even though it concerned foreign affairs. The issue therefore is not whether state immunity concerns foreign affairs; the issue is whether state immunity is a foreign affairs issue that falls within the common law act of state doctrine over which any jurisdiction is denied to the courts. If the majority judges were indeed endorsing Lord Wilberforce's definition of the common law act of state doctrine in *Buttes Gas and Oil Co v Hammer (No 3)*, surely to be consistent, they must also accept Lord Wilberforce's endorsement in *I Congreso del Partido* that the courts had the jurisdiction to determine the policy on state immunity. Surely, a jurist as eminent as Lord Wilberforce could not have been contradicting himself or recanting his view within a space of months; his Lordship clearly must not have deemed state immunity as falling within the scope of the common law act of state doctrine. Therefore, assuming the majority judges were applying the common law act of state doctrine, *a fortiori* they must also accept that under the common law, the law on state immunity is a subject-matter that common law courts have consistently ruled on and it is not an act of state on which courts have been denied jurisdiction to decide.

Absolute Immunity and the "One Voice" Principle

Even though state immunity falls outside the scope of the common law act of state doctrine, this does not necessarily mean that the Hong Kong courts should necessarily apply the restrictive approach to immunity.

The dissenting judges in *FG Hemisphere* (Bokhary PJ and Mortimer NPJ) argued that the restrictive approach to immunity should apply in Hong Kong because this had been the state of affairs under the common law as decided by the English courts in *Trendex Trading Corp* and *I Congreso del Partido*.

On the other hand, counsel for the Secretary of Justice (as intervener) had argued that the PRC government observes the doctrine of absolute immunity and therefore the judiciary and the executive should speak with "one voice" on foreign affairs issues. The minority judges had two inter-related responses to this argument.

First, the dissenting judges argued that, under the common law, the English courts had never consulted the executive on their position on state immunity. In fact, Bokhary PJ cited the Privy Council's warning in *Philippine Admiral* that "if the courts consult the executive on such

questions, what may begin by guidance as to the principles to be applied may end in cases being decided irrespective of any principle in accordance with the view of the executive as to what is politically expedient”.¹¹

Unfortunately this is where the minority judges erred. In *Philippine Admiral, Trendex* and *I Congreso del Partido*, the courts were free not to apply an absolute approach to immunity because the executive never took a contrary stance. The executive never intervened in any of those proceedings and naturally there was no need for the courts to seek guidance from the executive and the judges were free to make their own determinations. Whichever way the courts decided, the “one voice” principle would not have been infringed as the executive never took a stand. However, on the facts in *FG Hemisphere*, the Secretary of Justice had intervened on behalf of the Hong Kong government, and had insisted on the application of the doctrine of absolute immunity. If the Hong Kong courts had instead applied the restricted approach to immunity, the “one voice” principle on foreign affairs would clearly have been violated.

Second, the minority judges distinguished the House of Lords decision in *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation*¹² from which the “one voice” principle was derived, on the basis that the facts in *FG Hemisphere* were wholly different and the “one voice” principle was never applied in state immunity cases. In that case, there was an application for letters rogatory to obtain evidence from witnesses in England for the purposes of an American anti-trust dispute. The Attorney General had intervened and argued that the execution of these letters rogatory should be disallowed as the United States courts were seeking to exercise extra-territorial jurisdiction in penal matters which, in the view of Her Majesty’s Government, was prejudicial to the sovereignty of the United Kingdom. In response, Lord Wilberforce agreed that the “courts should in such matters speak with the same voice as the executive”.¹³ The minority’s attempt to distinguish *Rio Tinto Zinc Corporation* is wholly unconvincing. The “one voice” principle was never applied in the English state immunity cases because the executive never intervened to argue a contrary stance. Therefore, the state immunity cases do not assist the minority’s position. Herein, the Secretary of Justice, on behalf of the Hong Kong government, was arguing that the absolute approach to immunity should apply. It is also very telling that the dissenting judges could not identify a single precedent whereby the

¹¹ See n 8 above at 399.

¹² [1978] 2 W.L.R. 81 (HL).

¹³ *Ibid.*, at 617.

courts had adopted a different stance on foreign affairs from the one preferred by the executive.

This author must emphasise that the “one voice” principle is a common law principle whereby judges display comity by choosing to speak with the same voice as the executive on foreign affairs. Courts do so out of judicial modesty and not because they are denied jurisdiction to decide as they are in those acts of state cases. Lord Wilberforce, who also adjudicated over the common law act of state doctrine in *Buttes Gas and Oil Co v Hammer*, never claimed that the dispute in *Rio Tinto Zinc Corporation* was an act of state for which the courts were denied jurisdiction to hear. The act of state doctrine was never discussed by any of the English judges. Instead, this “one voice” principle is a doctrine of comity, unlike the common law act of state doctrine which is a jurisdiction-stripping mechanism obligatory on the courts.

Some critics might ask why the Hong Kong courts should speak with same voice as the executive branch of government in the PRC. After all, they may claim, under the “One Country, Two Systems” model, Hong Kong should be free to depart from the position observed by the PRC government. This is an interesting question but wholly irrelevant on the facts in *FG Hemisphere*. Herein, the Secretary of Justice had intervened on behalf of the executive branch of government in Hong Kong to advance the doctrine of absolute immunity. Therefore, the doctrine of absolute immunity is the view taken not only by the PRC government but also by the executive branch of government in Hong Kong. Hence, the “one voice” principle remains relevant and unassailable. This would also mean that if in the future the executive branch of the Hong Kong government does not take a stance on this issue, the courts would be free to adopt the doctrine of restrictive immunity on its own initiative.

Therefore, in *FG Hemisphere*, the majority judges were right for now to depart from the common law position on state immunity and argue for the absolute approach to immunity in Hong Kong. But they should have done so not because state immunity is an act of state but because, as a matter of comity, the courts should speak with the same voice as the executive on foreign affairs.

Reference to SCNPC was Unnecessary

According to the majority judges, state immunity fell within the common law doctrine of act of state and therefore Art 19 of the Basic Law was engaged. In the same vein, state immunity implicated foreign affairs for which Art 13 had assigned responsibility to the Central People’s Government (CPG). Since the CFA needed to interpret these

said provisions, which concern affairs falling within the responsibility of the CPG or the relationship between the Central Authorities and the Region, when adjudicating this case in question, a reference to the SCNPC was required.

As this author has argued earlier, at common law, even though state immunity does concern the relationship between states, it has also been accepted by judicial practice that the determination of the nature and extent of immunity accorded to a foreign nation, in the absence of legislation, is for the courts to decide. If the majority judges in *FG Hemisphere* were indeed applying the common law doctrine of act of state, then they must also accept its scope, which has always deemed the law on state immunity as falling outside the parameters of this doctrine even though it implicated foreign affairs. The issue therefore is not whether state immunity is concerned with foreign affairs; the issue is whether state immunity is a foreign affairs issue that falls within the common law act of state doctrine over which the courts have been denied jurisdiction under Art 19.

Therefore, since the law of state immunity falls outside the scope of Art 19 of the Basic Law, there was no need for the CFA to interpret or apply this provision when adjudicating this case and a reference to the SCNPC was not required. In the same vein, Art 13 of the Basic Law was irrelevant to the adjudication of this case. It merely states that the CPG shall be responsible for the foreign affairs relating to the HKSAR. It does not state that the CPG shall have *sole* responsibility over the HKSAR's foreign affairs nor does it define or limit the jurisdiction of the courts over foreign affairs. Therefore, again there was no need for the CFA to apply or interpret this Basic Law provision for the purposes of the adjudication. Therefore, a reference to the SCNPC on this point was also unnecessary. In my view, the majority judges were right to apply the doctrine of absolute immunity in Hong Kong, but this could have been done solely on the basis that under the common law, the courts and the executive should speak with the same voice on foreign affairs. Since this result followed from the application of another common law principle and not the common law act of state doctrine enshrined within the Basic Law, no reference to the SCNPC would be required.

Conclusion

Certainly, one must appreciate why the CFA felt compelled to apply the doctrine of absolute immunity in Hong Kong. The Office of the Commissioner of the Ministry of Foreign Affairs in the HKSAR had placed three letters before the courts, arguing that the doctrine of restrictive

immunity was inconsistent with the stance taken by China and a contrary position adopted in Hong Kong would prejudice the nation's sovereignty. If the CFA had insisted on applying the doctrine of restrictive immunity in Hong Kong, this surely would trigger another constitutional crisis and the Court would be quickly rebuked and overruled via a binding SCNPC Interpretation.

Unfortunately, in an attempt to avoid a turf war with the Central People's Government that the CFA knew it could not win, the Court had ceded more ground than it needed to. Just because the PRC government wanted Hong Kong to observe the doctrine of absolute immunity does not mean that the CPG necessarily require the CFA to make a reference to the SCNPC on this point. In fact, counsel for the Secretary of Justice did not argue that a reference to the SCNPC was necessary if the courts had applied the doctrine of absolute immunity.¹⁴ The problem with a reference was that the SCNPC could easily overreach and hand down an Interpretation that is broader and more intrusive on Hong Kong's autonomy than the CFA would have conceded on its own accord. Surely, the CFA must have entertained this possibility and it could easily have, on the basis of the common law "one voice" principle, applied the doctrine of absolute immunity, and avoided altogether the application of the excluded Basic Law provisions that would trigger the SCNPC reference mechanism.

It would remain a mystery (for now, anyway) why the majority judges decided as they did.¹⁵ One can only wait with bated breath for the SCNPC's response and in hope that the CFA's choice, to take the road less travelled by, would make no difference at all.

¹⁴ See n 1 above at para 53.

¹⁵ For an interesting discussion of the CFA's interpretive choices, see Cora Chan, "Reconceptualising the Relationship between the Mainland Chinese Legal System and the Hong Kong Legal System" (2011) 6(1) *Asian Journal of Comparative Law* 1 at 22.