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**Enforcing arbitration awards in
Hong Kong
Chinese SOEs and crown immunity**

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The legislative framework



- June 2011: The new Arbitration Ordinance came into force, giving effect to the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law 2006
- Hong Kong continues to be a party to the New York Convention 1958 post-Handover (1 July 1997).
- Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the HKSAR
- Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards between the HKSAR and the Macao Special Administrative Region

Types of arbitral awards



- Convention awards
 - New York Convention 1958
- Mainland awards
 - Awards made in mainland China by a recognised tribunal authority in accordance with the PRC Arbitration Law
- Other domestic and foreign awards
 - Other awards that do not fall in the above two categories.

Enforcement of Arbitral Awards in Hong Kong



- An award, whether made in or outside Hong Kong [including all three types of awards] is enforceable in the same manner as a judgment of the Court that has the same effect, but only with the leave of the Court.
- If permission is granted, the Court may enter judgment in terms of the award.
- For Convention and Mainland awards, a party may also enforce the award by bringing an action in the Court. However this route is not very popular as it is procedurally cumbersome.

Enforcement of Arbitral Awards in Hong Kong



Procedure

- Ex parte application (i.e. without notice to the respondent) supported by an affidavit or on notice.

Documentary requirements:

- an authenticated original or certified copy of the award;
- an original or certified copy of the arbitration agreement;
- Translation of any document that is not in English.

Refusal of enforcement

- Grounds - Party to arbitration agreement under some incapacity, arbitration agreement invalid etc.
- HK Court's approach - pro-arbitration and pro-enforcement approach, enforcement is usually a matter of mechanical application if formalities are satisfied.

A possible ground for resisting enforcement? – Crown immunity



- A common law doctrine based on the principle that the Crown enjoys immunity from being sued in its own courts.
- Crown immunity is not limited to immunity from suit, but also extends to immunity from execution.
- The meaning of “crown” extends from the person of the sovereign to a body corporate established by the executive arm of the Crown.
- The issue then is how to determine whether a body corporate was or was not part of the Crown.

***The "Hua Tian Long" [2010] 3 HKLRD
611***

**Considering Crown Immunity post-Handover for the very
first time**

Background (1)



- The “Hua Tian Long”: Then, the largest derrick crane-barge based in Asia.
- Owners: Guangdong Salvage Bureau (“**GZS**”)
- GZS entered into a Memorandum of Agreement with Intraline Resources Sdn Bhd (“**Intraline**”) to work on offshore Malaysian and Vietnamese projects. GZS failed to honour its commitment. Intraline suffered losses.
- 21 April 2008: Intraline arrested the “Hua Tian Long” in Hong Kong.

Background (2)



- 30 April 2008: GZS's application to set aside the arrest was dismissed. In GZS's Counsel's skeleton argument, GZS stated that it did not seek to invoke sovereign immunity but reserved the right to do so in the future.
- 21 October 2009: GZS applied for immunity from suit



- GZS has no shareholder.
- GZS is part of a governmental entity, 'Guangzhou Salvage Bureau of the Ministry of Communications'.
- GZS's assets are state-owned (public) assets. GZS only has the right to possess and use of its assets. They must apply to the Ministry of Transportation and the Ministry of Finance for approval for the use and disposal of the state-owned assets.
- GZS has no ability to assume independent civil liabilities.

The decision – key points



- Crown immunity continued to exist at common law in Hong Kong, through the PRC as the new sovereign entitled to enjoy Crown immunity.
- Any assertion of Crown immunity must come from the “Crown”, which in Hong Kong now means the PRC Central People’s Government (“**CPG**”).
- On the facts, GZS entitled to assert crown immunity.
- However, by their conduct, they had submitted to the jurisdiction of the Hong Kong Court and waived its right to claim immunity against jurisdiction.

***TNB Fuel Services Sdn Bhd v
China National Coal Group Corporation
[2017] HKEC 1184***

**Chinese State Owned Enterprises (“SOEs”) Crown
immunity and enforcement of arbitral awards in Hong
Kong**

Background - Facts



- 17 December 2014 – TNB won an arbitral award against China Coal, which was ordered to pay US\$5.3 million by way of damages for breach of contract.
- April 2016 – to enforce the award, TNB obtained a charging order over nearly 2 million shares in a Hong Kong company which was owned by China Coal (“**Shares**”).
- China Coal challenged the application.

Background – The Dispute



- China Coal opposed TNB's application on the ground that:
 - China Coal is a wholly stated-owned enterprise and is considered part of the PRC Central People's Government ("**CPG**").
 - Therefore, China Coal is entitled to Crown immunity against the execution of the Shares, such that the Hong Kong Court lacked jurisdiction to make the charging order absolute.

The Court's Decision – Assertion of Crown immunity



- China Coal had the burden of establishing its entitlement to Crown immunity against the execution of the Shares.
- The Court found no evidence that the CPG authorised China Coal to assert Crown immunity.
- In fact, a letter from the Hong Kong and Macao Affairs Office of the State Council ("**HK Affairs Office**") was put forth to the Court as evidence, which stated that:
 - *"China Coal was an independent legal entity, with no special status or interests superior to any other enterprises, and that as an SOE, China Coal was not considered as part of the CPG, nor is was China Coal deemed as performing functions on behalf of the SPG when carrying out commercial activities."*

The Court's Decision – Control by CPG



- The Court also considered the assertion of Crown immunity by reference to:
 - (1) the laws of the country of incorporation
 - (2) the common law control test

The Court's Decision – Control by CPG



- **Laws of the country of incorporation**
 - The laws of the country of the company establish whether the entity, is treated as an agent or instrumentality of the Crown.
 - As a matter of fact under PRC Law, it was held that China Coal is not part of the CPG because:
 - China Coal has a separate corporate entity under PRC Company and Assets Law.
 - China Coal enjoys rights to possess, use, profit from and dispose of its property, operational autonomy, and is able to exercise independent powers of its own which are safeguarded by law.

The Court's Decision – Control by CPG



- **Common law control test**
 - The common law control test operates on a case-by-case basis, which looks for the nature and degree of control exercised by the Crown.
 - An enjoyment of independent discretion in a company's operation has consistently been held to be a powerful indicator of a company's independence from the Crown.
 - The Court viewed that it was apparent from PRC Assets Law and from the Articles of China Coal, that China Coal is able to use, profit from and dispose of property and to use its annual profits and common reserves to cover its own losses and expand its business.

The Court's Decision



- **Held:**
 - Taking into account the laws of the country of incorporation and the common law control test, China Coal's business and operational autonomy are enshrined in and guaranteed under the applicable PRC law. Therefore, China Coal is not entitled to invoke Crown immunity.

Comparison with *The Hua Tian Long* (No 2)



Guangzhou Salvage Bureau ("GZS")	China Coal
Public institution performing public duties / objects	Private company (SOE), performing private duties / objects
At all times under the control of PRC Ministry of Communications	Not controlled by the CPG or any other PRC Ministry
No separate legal entity	Independent legal entity by law
No shareholders or paid-up capital	Has shareholder and paid-up capital
Mere right to possess such assets as allocated to it by the CPG, no right to dispose of assets	Can dispose of assets in any manner it chooses
No ability to assume independent civil liability	Can assume independent civil liability

Importance



- First time that the Hong Kong Court addressed Crown immunity since *The Hua Tian Long (No 2)* in 2010.
- Provides guidelines for the use of the control test to examine the circumstances under which a PRC state entity will be able to assert Crown immunity in Hong Kong, including the following 5 factors to be considered in future cases:
 - independent control enjoyed by an entity;
 - control exercised by the “Crown” as an investor in the entity;
 - separate legal personality of the entity;
 - power of the “Crown” to appoint or remove senior officers of the entity; and
 - the financial autonomy of the entity.

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Evangeline specialises in the dispute resolution of commercial, international trade and shipping disputes. In the shipping sphere, her expertise includes charterparty, cargo defence, shipbuilding, bunkering and ship financing disputes. She has practiced in Singapore and Hong Kong and is now a partner based in Shanghai. She is instructed regularly by P & I Clubs and shipowners and charterers in Hong Kong, Taiwan and the PRC. Evangeline is currently qualified to practice English and Hong Kong law and has considerable experience of court proceedings and arbitrations in Singapore, Hong Kong and England. She has also managed court proceedings and arbitrations in various jurisdictions such as the PRC and India. She speaks fluent Chinese and conversational Cantonese.