

Milbank

September 19, 2011

# Client Alert

NEW YORK LOS ANGELES WASHINGTON, DC LONDON FRANKFURT MUNICH BEIJING HONG KONG SINGAPORE TOKYO SÃO PAULO

## THE PRINCIPLE OF ABSOLUTE SOVEREIGN IMMUNITY NOW APPLIES IN HONG KONG

On September 8, 2011, Hong Kong's top court issued a final judgment finding that foreign states in Hong Kong enjoy absolute immunity, meaning that they cannot be sued absent an express, unequivocal waiver of immunity<sup>1</sup>. This was the first time that the issue of sovereign immunity has been examined by the Court of Final Appeal since the 1997 handover<sup>2</sup>. The decision reverses Hong Kong's longstanding policy of allowing sovereigns to be sued under certain exceptions.

Many jurisdictions, including Hong Kong prior to this decision, apply the principle of restricted sovereign immunity. This means that states can be sued in court when they act as commercial participants, rather than in their sovereign capacity. Hong Kong's new policy of absolute immunity removes this otherwise ubiquitous exception to sovereign immunity. This decision brings Hong Kong's policy of sovereign immunity in line with the PRC's policy, as noted by the court in a related proceeding:

“Chinese domestic courts claim no jurisdiction over foreign States or governments and have never in fact entertained any case in which claims have been brought against a foreign State or its property, irrespective of the nature of the act of the foreign State founding the claim or the nature, purpose or use of its property.”

This decision has significant implications for companies contracting with foreign states, their agencies and subdivisions, or state-owned entities. If a party sues a foreign state, or its agencies or subdivisions in Hong Kong, or seeks to enforce an arbitration award against a foreign state, that state or agency could be ruled to be immune from any proceedings. This rule applies to suits against the PRC and its agencies in Hong Kong as well. It is unclear, however, as to how Chinese state-owned entities or corporations are to be considered under Hong Kong's new rule. The PRC has emphasized that Chinese state-owned entities are independent legal persons with the capacity to sue and be sued in the courts independently<sup>3</sup>.

For further information about this Client Alert, please contact:

Michael Nolan  
+1-202-835-7524  
mnolan@milbank.com

Dieter Yih  
+852-2971-4878  
dyih@milbank.com

Edward Baldwin  
+1-202-835-7547  
ebaldwin@milbank.com

Please feel free to discuss any aspect of this Client Alert with your usual Milbank contact or with any of the contacts provided at the end of this alert.

In addition, if you would like copies of our other Client Alerts, please visit our website at [www.milbank.com](http://www.milbank.com) and choose “Client Alerts under “News.”

This Client Alert is a source of general information for clients and friends of Milbank, Tweed, Hadley & McCloy LLP. Its content should not be construed as legal advice, and readers should not act upon the information in this Client Alert without consulting counsel. © 2011 Milbank, Tweed, Hadley & McCloy LLP. All rights reserved.

Attorney Advertising. Prior results do not guarantee a similar outcome.

[www.milbank.com](http://www.milbank.com)

<sup>1</sup> *Democratic Republic of Congo v. FG Hemisphere Associates LLC*.

<sup>2</sup> In fact, the last pre-1997 Hong Kong decision on sovereign immunity was delivered in 1977 by the Privy Council in *Wallem Shipping and others v. The Owners of the Ship “Philippine Admiral”*.

<sup>3</sup> *Scott v. People's Republic of China*, No. CA3-79-0836-d (N. D. Tex. filed 29 June 1979).

September 19, 2011

---

The decision likewise addressed the issue of waiver. The court was unclear as to whether a waiver of immunity made in a contract would be upheld. The court indicated that the only effective waivers could be made in connection with the specific court proceeding, finding that:

“the common law rule as to waiver is consonant with elementary good sense by requiring an unequivocal submission to the jurisdiction of the forum State at the time when the forum State’s jurisdiction is invoked against the impleaded State.” In any event, the court noted that any waiver had to be express and unequivocal.

In view of the PRC’s confirmation of absolute immunity applying to Hong Kong, parties should give careful analysis and take expert legal advice when considering using Hong Kong’s law or jurisdiction to govern a contract with a sovereign entity. Parties should also consider ways to protect themselves when dealing with sovereign entities that have significant assets primarily in Hong Kong.

# Milbank

---

Please feel free to discuss any aspect of this Client Alert with your regular Milbank contacts or with any of the contacts below.

---

## Beijing

Anthony Root +86-10-5969-2777 aroot@milbank.com  
Edward Sun +86-10-5969-2772 esun@milbank.com

## Frankfurt

Norbert Rieger +49-89-25559-3620 nrieger@milbank.com

## Hong Kong

Anthony Root +852-2971-4842 aroot@milbank.com  
Gary Wigmore +852-2971-4815 gwigmore@milbank.com  
Dieter Yih +852-2971-4878 dyih@milbank.com  
Joshua M. Zimmerman +852-2971-4811 jzimmerman@milbank.com

## London

Tom Canning +44-20-7615-3047 tcanning@milbank.com  
Julian Stait +44-20-7615-3005 jstait@milbank.com

## Los Angeles

Linda Dakin-Grimm +1-213-892-4404 ldakin-grimm@milbank.com  
Robert J. Liubicic +1-213-892-4525 rliubicic@milbank.com  
Jerry L. Marks +1-213-892-4550 jmarks@milbank.com  
Mark Scarsi +1-213-892-4580 mscarsi@milbank.com

## Munich

Peter Nussbaum +49-89-25559-3430 pnussbaum@milbank.com

## New York

Wayne M. Aaron +1-212-530-5284 waaron@milbank.com  
Thomas A. Arena +1-212-530-5328 tarena@milbank.com  
Sander Bak +1-212-530-5125 sbak@milbank.com  
James N. Benedict, Chair (Litigation) +1-212-530-5696 jbenedict@milbank.com  
James G. Cavoli +1-212-530-5172 jcavoli@milbank.com  
Christopher E. Chalsen +1-212-530-5380 cchalsen@milbank.com  
Scott A. Edelman +1-212-530-5149 sedelman@milbank.com  
Christopher J. Gaspar +1-212-530-5019 cgaspar@milbank.com  
David R. Gelfand +1-212-530-5520 dgelfand@milbank.com  
Douglas W. Henkin +1-212-530-5393 dhenkin@milbank.com  
Michael L. Hirschfeld +1-212-530-5832 mhirschfeld@milbank.com  
Lawrence T. Kass +1-212-530-5178 lkass@milbank.com  
Sean M. Murphy +1-212-530-5688 smurphy@milbank.com  
Daniel Perry +1-212-530-5083 dperry@milbank.com  
Stacey J. Rappaport +1-212-530-5347 srappaport@milbank.com  
Richard Sharp +1-212-530-5209 rsharp@milbank.com  
Alan J. Stone, Litigation Practice Group Leader +1-212-530-5285 astone@milbank.com  
Errol B. Taylor +1-212-530-5545 etaylor@milbank.com  
Andrew E. Tomback +1-212-530-5971 atomback@milbank.com  
Fredrick M. Zullo +1-212-530-5533 fzullo@milbank.com

## São Paulo

Andrew Janszky +55-11-3927 7701 ajanszky@milbank.com

## Singapore

David Zemans +65-6428-2555 dzemans@milbank.com  
Naomi Ishikawa +65-6428-2525 nishikawa@milbank.com

## Tokyo

Mark Plenderleith +813-5410-2842 mplenderleith@milbank.com

## Washington, DC

David S. Cohen +1-202-835-7517 dcohen2@milbank.com  
Robert J. Koch +1-202-835-7520 rkoch@milbank.com  
Andrew M. Leblanc +1-202-835-7574 aleblanc@milbank.com  
Michael D. Nolan +1-202-835-7524 mnolan@milbank.com