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**Paper for the House Committee Meeting
on 7 October 2011**

**Legal Service Division Report on
Interpretation of Paragraph 1, Article 13 and Article 19
of the Basic Law of the Hong Kong Special Administrative Region
of the People's Republic of China by the Standing Committee
of the National People's Congress (L.N. 136 of 2011)
gazetted on 16 September 2011**

Background

At the House Committee meeting on 17 June 2011, a view was expressed that the procedure to be followed for seeking an interpretation of the Basic Law by the Standing Committee of the National People's Congress (SCNPC) as ordered by the Court of Final Appeal (CFA) in the case of *FG Hemisphere Associates LLC (FG) v Democratic Republic of Congo & Ors (DRC)* was a matter of great importance and worthy of discussion by the Legislative Council.

2. No information has been provided by the Administration on the actual procedure that was followed in relation to this CFA case. In the CFA judgment dated 8 June 2011¹, the judges expressed the view that it would be for the Secretary for Justice to refer to SCNPC the questions set out by CFA for an interpretation of the Basic Law, through the Office of the Commissioner of the Ministry of Foreign Affairs, along with a list of Court documents which included the reasons for judgment delivered by CFA, the provisional orders of CFA, the judgments of the Court of Appeal (CA), and the judgment of Reyes J in the Court of First Instance (CFI).

3. In light of the above, and following the publication of SCNPC's Interpretation of Paragraph 1, Article 13² and Article 19³ of the Basic Law

¹ [2011] HKCU 1049

² Article 13 of the Basic Law provides that -

"(1) The Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region.

(2) The Ministry of Foreign Affairs of the People's Republic of China shall establish an office in Hong Kong to deal with foreign affairs.

(3) The Central People's Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with this Law."

³ Article 19 of the Basic Law provides that -

(Interpretation) as L.N. 136 in the Gazette on 16 September 2011, Legal Service Division has written to the Administration to ask for a brief to be issued on the procedure that has been adopted for making the reference to SCNPC for an interpretation of the relevant Basic Law articles in this case, in order that Members are informed about the procedure that has been followed.

Details about the CFA case

4. As part of a massive investment programme in DRC, a consortium of Chinese state-owned companies acquired mineral exploitation rights there. In return, the consortium was to pay entry fees to DRC. FG obtained an ex parte order from CFI granting leave to enforce arbitral awards against DRC and to join three Hong Kong limited companies within the consortium as defendants and also interim injunctions restraining the consortium from paying the entry fees to DRC. DRC applied to set aside the relevant CFI order, claiming immunity from the jurisdiction and from the process of execution. CFI⁴ accepted DRC's claim of immunity and set aside the order. FG appealed. CA⁵ reversed CFI's decision. The matter then went before CFA.

5. CFA considered that the core question of law in this case is about the extent of the state immunity from suit and execution available in the courts of Hong Kong. CFA came to the view that the case cannot be resolved without a determination of the questions of interpretation affecting the meaning of Articles 13 and 19 of the Basic Law, in particular in relation to the words "acts of state such as defence and foreign affairs" and that it is bound to make a reference under Article 158(3)⁶ of the Basic Law to SCNPC of questions of interpretation of Articles 13(1) and 19 of the Basic Law.

"(1) The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication.

(2) The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.

(3) The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government."

⁴ [2009]1 HKC111

⁵ [2010] 2 HKC487

⁶ Article 158(3) of the Basic Law provides that "The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected."

6. For the purpose of making a reference to SCNPC of questions of interpretation as mentioned above, CFA set out the following questions -

- (a) whether on the true interpretation of Article 13(1), the Central People's Government (CPG) has the power to determine the rule or policy of the People's Republic of China (PRC) on state immunity;
- (b) if so, whether, on the true interpretation of Articles 13(1) and 19, the Hong Kong Administrative Region (HKSAR), including the courts of HKSAR -
 - (i) is bound to apply or give effect to the rule or policy on state immunity determined by CPG under Article 13(1); or
 - (ii) on the other hand, is at liberty to depart from the rule or policy on state immunity determined by CPG under Article 13(1) and to adopt a different rule;
- (c) whether the determination by CPG as to the rule or policy on state immunity falls within "acts of state such as defence and foreign affairs" in the first sentence of Article 19(3) of the Basic Law; and
- (d) whether, upon the establishment of HKSAR, the effect of Article 13(1), Article 19 and the status of Hong Kong as a Special Administrative Region of PRC upon the common law on state immunity previously in force in Hong Kong (that is, before 1 July 1997), to the extent that such common law was inconsistent with the rule or policy on state immunity as determined by CPG pursuant to Article 13(1), was to require such common law to be applied subject to such modifications, adaptations, limitations or exceptions as were necessary to ensure that such common law is consistent with the rule or policy on state immunity as determined by CPG, in accordance with Articles 8 and 160 of the Basic Law and the Decision of SCNPC dated 23 February 1997 made pursuant to Article 160.

7. On 8 June 2011, CFA issued a judgment with Orders provisionally made (provisional judgment), subject to SCNPC's interpretation of the provisions mentioned above. Such Orders include that the appeal be allowed and the Orders of the Court of Appeal dated 10 February 2010 be set aside and a declaration be granted that HKSAR courts have no jurisdiction over DRC in the present proceedings.

SCNPC's Interpretation and CFA's judgment on 8 September 2011

8. The Interpretation was issued by SCNPC on 26 August 2011. The effect of the Interpretation is to answer the four questions referred by CFA to SCNPC mentioned in paragraph 6 above. As indicated in paragraph 7 of CFA's judgment on 8 September 2011, the answers are as follows -

- (a) Question (1) : that on the true interpretation of Article 13(1), CPG has the power to determine the rules or policies of PRC on state immunity to be given effect uniformly in the territory of PRC.
- (b) Question (2) : that on the true interpretation of Articles 13(1) and 19, the courts of HKSAR must apply and give effect to the rules or policies on state immunity determined by CPG and must not depart from such rules or policies nor adopt a rule that is inconsistent with the same.
- (c) Question (3) : that the words "acts of state such as defence and foreign affairs" in Article 19(3) of the Basic Law include the determination by CPG as to rules or policies on state immunity.
- (d) Question (4) :
 - (i) that according to Articles 8⁷ and 160⁸ of the Basic Law, the laws previously in force in Hong Kong shall be maintained except for any that contravene the Basic Law;
 - (ii) that according to paragraph 4 of the Decision of SCNPC dated 23 February 1997 made pursuant to Article 160, laws previously in force which have been adopted as the laws of HKSAR shall be applied as from 1 July 1997 subject to such modifications, adaptations, limitations or exceptions as are necessary to bring them into conformity with the status of Hong Kong after resumption of by PRC of the exercise of sovereignty

⁷ Article 8 of the Basic Law provides that "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

⁸ Article 160 of the Basic Law provides that -

"(1) Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law.

(2) Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognized and protected by the Hong Kong Special Administrative Region, provided that they do not contravene this Law."

over Hong Kong, and to bring them into conformity with the relevant provisions of the Basic Law;

- (iii) that accordingly, the laws previously in force in Hong Kong relating to the rules on state immunity may continue to be applied after 1 July 1997 only in accordance with the aforesaid requirements; and
- (iv) that in consequence, the laws previously in force concerning the rules on state immunity as adopted in HKSAR must be applied as from 1 July 1997 subject to such modifications, adaptations, limitations or exceptions as are necessary to make them consistent with the rules or policies on state immunity that CPG has determined.

9. As the provisional judgment is consistent with the Interpretation, CFA in its judgment dated 8 September 2011 has declared its provisional judgment final and made the Orders set out in paragraph 415 (a) to (e) of the provisional judgment as final Orders⁹.

Conclusion

10. Members are invited to note the content of this report.

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⁹ FACV Nos 5, 6 & 7 of 2010, para. 8 :
http://legalref.judiciary.gov.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=78113&QS=%2B&TP=JU