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GREATER CHINA LAW UPDATE

大中华法律快讯

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Amendments to Consumer Protection Laws Enhance Protection of Chinese Consumers

Background

China's Consumer Rights and Benefits Protection Law ("Consumer Law")[1], promulgated in 1993, established guidelines for merchants in order to limit abuses in China's rapidly developing market economy. The Consumer Law has officially entered a second round of amendments. China's State Administration for Industry and Commerce ("SAIC") is currently reviewing and discussing the draft Consumer Law for final submission to the State Council of the National People's Congress. Key amendments to the Consumer Law are summarized below:

Consumer Cooling-Off Period

Under the amendments, consumers purchasing goods through telephone, door-to-door sales, and other non-fixed place-of-sale methods are entitled to a 30-day "cooling-off period," wherein they will be allowed to return the goods subject only to limited restocking fees.

Consumer Privacy

The draft amendments create an explicit right to protection of personal consumer information. Marking the importance of this addition, the amendment is interposed with an existing provision enumerating rights to personal dignity, national customs, and traditions. Protected information includes consumer names, sex, age, occupation, contact information, health status, family status, property status, and consumption records. Under this proposed amendment, sale of consumer data is prohibited, seriously limiting existing consumer data-mining operations. Further, the draft amendments impose penalties (including damages for actual loss and emotional distress) upon entities violating these new provisions.

1 中华人民共和国消费者权益保护法, 1993年10月31日

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Defective Goods

Amendments to Article 18 impose strict requirements upon merchants who are discovered to be producing substandard or dangerous products. Merchants will be required to not only halt production and pull these products from distribution channels but to also make public announcements warning consumers of a defect. Losses under normal use conditions that are attributed to defects are to be compensated by merchants. Further, merchants are required to publish "true, accurate, and complete" information about their products to avoid misleading advertising. Victims of false advertising are entitled to civil compensation from the merchant.

Warranties

The draft amendments enhance warranty protection for consumers. Under the amendments, merchants are required to provide substitutes during repair periods, free replacements or refunds if they fail to repair within established warranty periods, and must shoulder the burden of transporting "big-ticket" items in need of repairs.

Advance Payments

Advance payments, installment payments, and other transactions involving merchants' management of consumer funds will require the establishment of earmarked, trusteeship accounts at commercial banks.

Dispute Resolution

As a first step to resolving merchant-consumer disputes, the amendments promote the use of court-enforceable mediation and arbitration as the primary methods of dispute resolution. Further, settlements and judgments will carry through reorganization of corporate entities. Such reorganizations cannot be used to prejudice the legitimate interests of consumers. Consumer judgment and settlement creditors are to hold super priority in bankruptcy. Joint and several liability rules will apply to all responsible parties in the supply chain.

Fraud & Coercive Practices

Merchants engaging in fraudulent or coercive practices when providing their products to consumers may be liable for multiples of actual damages. These undefined multiples will apply where merchants transact in adulterated, spoiled, or deteriorated goods; willfully mislead consumers; manipulate pricing; use deception to reduce standards; unreasonably split the sale of goods and services; or commit other forms of fraud. In addition, the government may order merchants to correct existing problems and may impose substantial fines up to 500,000 RMB.

In extreme cases criminal liability may be imposed upon merchant executives and other responsible parties.

Impact & Analysis

Following the recent tainted milk scandal and other major national incidents, it is clear that the Chinese government seeks to modernize and enhance enforcement of consumer protection standards. These latest amendments to the Consumer Law represent considerable developments in the field and, if approved by the State Council, will lead to increased local and national enforcement efforts.

However, pending the promulgation of enabling legislation, it remains to be seen whether the inspection and investigation strategies of existing regulatory bodies under the SAIC and its local counterparts will change. Essential to the development of consumer protection standards are an effective consumer reporting system and active consumer interest groups.

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Currently, consumer reporting channels are available but of questionable effectiveness as a lack of consumer education limits popular use of these services. Thus, the government is often unaware of problems until they reach national proportions.

Similarly, while the draft amendments provide that consumer protection groups "have the right to social supervision of goods and services[2]," the impact of this new right may be *de minimis*, as civil society is still quite limited in China.

Nevertheless, foreign businesses operating in the Chinese consumer goods sector should consider these amendments as part of the Chinese government's recent initiative to clean up the domestic market and improve public sentiment. Following implementation, the amendments may yield increased consumer protection claims and government inspection of manufacture and retail facilities.

China Tort Liability Law

Background

In December 2009, the Standing Committee of the National People's Congress ("NPC") passed China's first Tort Liability Law. The law, which took effect on July 1, 2010, presents important issues for both domestic and foreign businesses operating in the Chinese retail sector.

While the new law is, in large part, a restatement of existing Chinese tort rules, the law adds to the existing framework and fills several gaps in what was previously a decentralized area of the law. The following is a brief summary of the pertinent changes in the Chinese tort framework.

Joint & Several Liability

Following the collapse of a building and death of a worker in Shanghai last year and several complex product liability cases, lawmakers revised the existing draft tort law to cover situations where multiple parties share responsibility for an injury. Previously, joint and several liability was a concept exclusive to the product liability area; however, under the new law, this concept extends to all aspects of business.

Essentially, where a defective product or service causes an injury, all parties in the supply chain can be held liable for the assessed damages.

The articles of Chapter II of the new law cover a variety of situations where multiple parties are found to have acted negligently. Under these articles, the damages assessed against multiple parties are to be based upon the degree to which each party is deemed to be responsible for the injury.

However, as is the case with these rules in many common law jurisdictions, where one party is unavailable or unable to make a compensatory payment, the remaining parties are responsible for the entire amount of the assessed damages.

The likely result of this change is that nationally recognized businesses with large numbers of smaller, independent suppliers would become the primary targets of tort litigation.

Punitive Damages

A second important change, particularly for retailers, is the inclusion of punitive damages in product liability cases. Chinese law typically does not permit the assessment of punitive

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2 "消费者协会和其他消费者组织有权对商品和服务进行社会监督，保护消费者的合法权益."

damages; however, following the tainted milk scandal of 2009, it is clear that Chinese lawmakers seek to clamp down on consumer abuse in the retail and manufacturing industries.

While Article 47 provides for punitive damages where a product defect causes "serious harm or death," the specific methodology for calculation of these damages is not laid out in the new tort law. Clarification is expected through subsequent regulations and circulars.

Environmental Damages

Articles 65 through 68 of the new tort law target environmental damages. The most important changes with regard to environmental torts are a shift in the burden of proof and liability for the acts of third parties.

Typical Chinese tort claims require the government or other claimant to first allege a *prima facie* case against the defendant and then allow the defendant to present rebuttal evidence to refute this case. However, under the new tort law, alleged polluters carry the burden of proving that they were *not* responsible for the alleged damages. This shift in the burden of proof signals a key policy shift toward heightened environmental enforcement and is likely to increase the volume of environmental tort claims.

In addition, Article 68 of the new Tort law provides that principals may be responsible for pollution caused by third-parties. While the mechanics of third-party liability are yet unclear, this provision is likely to cover agency issues that often arise in situations where subcontractors are employed. This change is particularly important for businesses that employ third-parties for waste disposal, transport, cleaning, maintenance, and other secondary services.

Expanded Product Recall Requirements

Under the existing tort law framework, product recall is limited to automotive, pharmaceutical, food products, and toys. Article 46 of the new tort law expands recall requirements to all products.

The new tort law provides that if any product defect is discovered after distribution, all parties involved in the manufacture and distribution of the product are required to take remedial measures, including the issuance of consumer warnings and timely product recalls. Failure to do so at any link in the manufacturer-to-consumer chain will result in liability. Again, the updated joint and several liability rules will apply.

It is important to note, however, that product defects that are undiscoverable due to current scientific limitations will not trigger recall liability. Businesses are, however, expected to maintain current and effective quality control standards, incorporating the latest technologies and industry best practices.

Vicarious Liability

While the Supreme People's Court has held employers liable for the actions of their employees, this rule was not codified under Chinese law. Article 34 of the new tort law explicitly states the vicarious liability rule, which mimics the well-established common law concept of *respondeat*

superior: "Employers are responsible for the tortuous acts of their employees while they are acting under the direction of the employer." The new tort law does not, however, detail the scope of employment activities covered; therefore, pending clarification, it should be interpreted to apply to a broad spectrum of employee activities.

Conclusions

While the tort law is now official, it is uncertain whether it will take immediate practical effect. Current Chinese tort law is quite fragmented and complex. The new law seeks to condense this amorphous body of law, representing decades of rulemaking, into a 25-page document. Courts may be slow to supplant their existing tort rules and, as always, a substantial lag in implementation procedures may delay application of the new law.

Nevertheless, the consolidation of Chinese tort law and expression of several new tort policies requires the careful attention of parties conducting business in China. In the near future, tort reform and public awareness is likely to lead to a rapid expansion of litigation in this field.

Chinese Officials Seek to Calm Fears of Foreign Investors

Issue

On April 13, the State Council released updated policy directives for the promotion of foreign investment. The policy directives shed further light upon upcoming changes to the Catalogue for Guidance of Foreign Investment Industries (the "Catalogue"), which were first announced in February 2010. Contrasting the Indigenous Innovation Policy, which has been perceived as threatening foreign interests, the recent State Council release appears to ease restrictions and encourage foreign investment. The new guidelines are to serve as a framework for future legislation and appear to be a direct response to investor concerns expressed in recent opinion letters submitted by various foreign chambers of commerce and other business associations.

The State Council announcement identifies the following policy changes:

Amendments to Foreign Investment Catalogue

The State Council announcement indicates that upcoming revisions to the Catalogue will include expansion of foreign investment opportunities in high-end manufacturing, high-technology, the modern service industries, new energy, and projects improving energy efficiency.

Regional Headquarters and R&D Centers

In order to increase the physical investments of foreign businesses, the State Council announcement encouraged foreign companies to establish regional headquarters, R&D, procurement, finance management, and accounting centers in China. Certain qualified R&D centers will be permitted to take advantage of exemption from customs duties, VAT, and other taxes when importing products necessary for technological development. The announcement also proposes the expansion of the outsourcing in China but provides no details as to incentives or other programs to promote this industry.

Private Equity and M&A

Foreign investors are encouraged to participate in the reorganization and reform of domestic enterprises. Further, the State Council proposes to establish a new, as yet undefined, security examination system for M&A involving foreign investment. In addition, the development of private equity and venture capital funds will be encouraged, including the implementation of improved exit options for foreign capital.

Access to Chinese Capital Markets

Qualified Foreign Invested Enterprises will gain access to domestic and overseas stock-market listings and will be permitted to issue corporate bonds and negotiable instruments. In addition, access to RMB bond issuance will be expanded for certain offshore entities.

Focus on Central and Western Regions

In response to the mounting economic disparity between the Coastal and Central/Western regions of China, the State Council seeks to promote better distribution of foreign investment by providing tax and other incentives. Specifically, foreign investors are encouraged to develop labor-intensive industries in Central and Western China. Foreign banks are also encouraged to establish branches in these regions. The State Council indicates that additional special development zones will be established, infrastructure is to be improved, and other measures are to be taken to make these regions more attractive for foreign investment.

Relaxation of Approval Procedures

The State Council has also indicated that approval procedures and requirements will be softened to facilitate foreign investment. Foreign Invested Enterprise approval procedures and foreign exchange settlement procedures are to be simplified, approval times shortened, and access to electronic filings improved. In addition, most projects with total investments in permitted or encouraged categories below US $300 million will require local government approval only. This substantially raises the previous cap of US $100 million and drastically reduces the regulatory complexity of larger investments. Finally, certain undercapitalized Foreign Invested Enterprises will be granted extensions to allow for capital contributions to bring operations into compliance.

Fresh perspectives on Indigenous Innovation procurement policies:

Ministry of Science and Technology Modifies Proposed Requirements

In a notice, published April 10, the Ministry of Science and Technology ("MOST") toned down proposed requirements that foreign products are required to meet in order to qualify for Chinese government procurement. Under the guidelines previously released in November, entities seeking to participate in government procurement had to use Chinese intellectual property and proprietary brands and needed to be entirely independent of overseas businesses or individuals. The amended guidelines simply require that entities seeking to engage in government procurement be legally registered in China (including foreign-invested enterprises), comply with relevant Chinese law, and own the intellectual property and exclusive trademark rights for the product in China. Companies will not be required to demonstrate that their products were developed or first licensed in China. Due to the size and scope of government in China, national procurement policies are particularly important for many companies seeking to do business in China, and the relaxation of the Indigenous Innovation procurement policy is likely to have a positive effect on business outlook in affected sectors.

Conclusions

The almost simultaneous release of the State Council guidelines and amended MOST requirements suggest that the Chinese government is actively seeking to counter recent policy signals that left many foreign businesses and observers concerned about the future of foreign investment in China. The releases do not provide substantial detail or major departures from current practices; therefore they should be viewed more as a political move than a true policy realignment. While investors may find some new limitations in already-saturated areas of the Chinese market, the recent releases may lead to the opening of new areas for foreign investment and provide substantial incentives for foreign businesses seeking to invest in targeted industries or regions.

Ministry of Health Issues Orders on Food Safety and Licensing

On March 16, 2010, the PRC Ministry of Health ("MOH") issued two orders establishing standards and licensing requirements for food service businesses. Order number 70 *Food Service License Management Guidelines* ("Licensing Order") and order number 71 *Food Service Safety Supervision Guidelines* ("Safety Order") become effective on the first of May. The Licensing and Safety Orders are to serve as implementing regulations for *The Administrative Licensing Law of the People's Republic of China* ("Administrative Licensing Law") and *The Food Safety Law of the People's Republic of China* ("Food Safety Law"), respectively.

The Licensing Order (No. 70)

The Licensing Order outlines the relevant departments, procedures, inspection processes, supervision, and penalties for failure to adhere to licensing requirements. The Licensing Order applies to entities engaged in catering services, including production, processing, and end-consumer sales of food products.

Businesses seeking a license to engage in the catering industry must apply to the food and drug supervision department of the MOH. The application is to provide details of the business plan— including (among others) food storage, processing, contamination prevention procedures, and staff food safety training. Upon submission, the MOH is to conduct an on-site verification and is to render a licensing decision within 20 days of the initial submission. Under certain undefined circumstances, the process can be extended for an additional 10 days. Licenses are nontransferable and are valid for three years from the date of issuance. Renewal, replacement, or modification of a catering service provider license will require submission of the original license, as well as documents explaining any changes to service.

Failure to disclose relevant information or providing false materials to the MOF will result in non-issuance of a license and a one-year ban on reapplication. Further, instances of fraud, bribery, and other improper practices may result in termination of a license, a one-year suspension, and potential criminal prosecution. In a case where these rules are violated, both the applicant business and the person primarily responsible for the business will receive one-year bans on operation.

The Safety Order (No. 71)

The Safety Order seeks to improve food safety by increasing "consumer self-protection" capabilities, strengthen self-discipline, disseminating food safety knowledge, and establish standards for the operation of food-related businesses. Generally, the Safety Order provides basic guidelines to ensure that businesses comply with the Food Safety Law.

While many of the guidelines appear routine, there are several areas of interest under the Safety Order. Food service providers are instructed to maintain a detailed record-keeping system for supplier purchases, storage, and distribution. The Safety Order also requires reporting for "food safety incidents" and provides guidance on the management of such events. Inspection is to include examination of relevant licensing documents, staff food safety knowledge and training, the cleanliness of facilities, water sanitation, product labeling implementation of procedures and business records. Post inspection, a food service provider is entitled to receive test results within 10 days. If a business fails an inspection, reexamination may be requested and is to be considered by a separate reviewing body within the local MOF inspection department. Licensing orders, inspection results, and other information is to be published by the MOF on a regular basis.

The Safety Order also outlines potential liabilities for failure to follow relevant Food Safety Law provisions. For instance, adulteration of food products, failure to maintain clean work environments, using food outside of its expiration date, utilizing animal or fish products where the animal or fish died of unknown causes, the use of uninspected meat and exceeding safe heavy-metal or other pollutant limits will require remediation and may carry substantial penalties. Businesses may face substantial fines, suspension of business licenses, and/or criminal liability in the most egregious cases. Actions taken to mitigate harm may be taken into consideration when punishment determinations are made. Finally, the Safety Order provides for an internal MOH appeals process for businesses subject to negative findings.

Conclusions

Following several high-profile food safety scandals, there has been substantial pressure on the government to respond. The Licensing and Safety Orders constitute one of many steps taken by the PRC government to improve consumer protection. For businesses operating in the Chinese food and beverage market, it is important to review existing operating procedures in the coming months to ensure compliance with these orders. As is often the case in China, initially the application of these orders may be slow and inconsistent; however, foreign-invested businesses are likely to be early targets in enforcement so early compliance is essential in managing potential licensing and liability issues.

Changes to Arbitration Rules Relevant to Hong Kong

Rule Changes

July 2010 has brought the release of revised arbitration rules by both the United Nations Commission on International Trade Law ("UNCITRAL") and the Singapore International Arbitration Centre ("SIAC"). Both sets of rules are relevant to Hong Kong, because UNCITRAL rules are the basis of the Hong Kong International Arbitration Centre's own Administrated Arbitration Rules and are also the default rules, where none are named for a Hong Kong arbitration. Moreover, Singapore has established itself as a worthy competitor to Hong Kong for the resolution of disputes involving commercial matters in China. For a period of several years after the change in sovereignty over Hong Kong and until the matter was clarified by legislation in 2000, there was a substantial question as to whether a Hong Kong

arbitral award was enforceable in China under the New York Convention, since the Hong Kong award, post July 1, 1997, was no longer "foreign" with respect to China. During this period of ambiguity, Singapore emerged, and promoted itself, as a logical jurisdiction, with no New York Convention issues, for dealing with China mattes.

UNCITRAL

The UNCITRAL Arbitration Rules were first adopted in 1976 and have always enjoyed great popularity because they were promulgated by an UN body. Although they are most well known for use with *ad hoc* arbitration, they have become popular for investor-state disputes under bilateral investment treaties and have long been the rules applied by the Iran-US Claims Tribunal.

The revisions, which are not earth-shattering, came into force on Aug. 15, 2010. Among the significant changes include the fact that Article 1 no longer contains a requirement that an arbitration agreement must be in writing. The procedures for notice and calculation of time periods have been updated to take into account modern forms of communication, such as e-mail. A new Article 4 sets out a revised required form and content of a response to a notice of arbitration. The sections of the rules dealing with the composition of the arbitral tribunal have been changed to clarify disclosure by arbitrators and their liability, as well as the role of the appointing authority in appointing, challenging, and replacing arbitrators. Article 10 now addresses the appointment of three arbitrators where they are multiple parties as claimant or respondent, something which happens with relative frequency. Modern technology is also addressed in the sections governing the conduct of the arbitral proceeding by allowing the giving of evidence via videoconference and similar technologies. Also, Article 27 expressly states that any person can be a witness, thus removing ambiguity under civil law as to whether a party can testify as a witness. Article 41 inserts provisions aimed at providing parties with a mechanism to review whether arbitrators' fees are excessive. Prior practice allowed arbitrators to fix their own fees outside the control of the parties. Finally, Article 34 includes express wording stating that, by adopting the UNCITRAL Rules, the parties waive their right to any form of appeal to any court, except for an application to set aside the award.

All and all, the revisions are likely to be seen in a positive way and to have been required in many instances, given the simple passage of more than 30 years.

SIAC

The changes to the SIAC rules took effect on July 1, 2010. The SIAC most recently revised its rules in 2007. Increased speed and efficiency is the focus of most of the SIAC efforts.

The 2010 revisions introduce an expedited procedure for which a party can apply if the amount in dispute does not exceed U.S.$5 million, or if all parties agree. Under the expedited procedure, the award is to be made within six months from the date the tribunal is constituted and the reasons for the award are only to be given in summary form.

There is also an emergency arbitrator procedure designed to assist parties in obtaining emergency relief pending the constitution of the tribunal. The application for an emergency arbitrator can be made concurrent with or following the filing of a notice of arbitration. An emergency arbitrator will be appointed within one business day.

Other speed and efficiency steps include the shortening of the time period by which a party must nominate an arbitrator from 21 days to 14 days, if three arbitrators are to be appointed. There are also revised procedures for appointment of three arbitrators where there are more than two parties to an arbitration. In addition, the requirement for a memorandum of issues defining

the issues to be determined in the arbitration has been removed. This is another efficiency step, although some feel further clarification of the issues to be decided is useful in certain arbitrations.

All in all, the current revisions reflect the continuing attention paid by SIAC to its procedures and its willingness quickly to make changes it finds potentially useful.

One Country, Two Systems in the Hong Kong Courts

Introduction

Prior to the change over of sovereignty over Hong Kong from the United Kingdom to China, which occurred on July 1, 1997, one of the areas of concern was whether the Hong Kong judicial system could stand up to its new sovereign in cases where China had a strong economic or political interest, as well as cases near the border line of foreign affairs and defense, two areas reserved to China under Articles 13 and 19 of the Basic Law, Hong Kong's mini-constitution. For the most part, since 1997 up to the present, Hong Kong courts have admirably maintained their independence and, to be fair, the new sovereign, China, has often shown restraint with respect to Hong Kong judicial matters.

FG Hemisphere Case

A recent case, *FG Hemisphere Associates LLC v Democratic Republic of the Congo*, CACV 373/2008 and CACV 43/2009, where a ruling was announced in February 2010 by the Court of Appeal of Hong Kong, is an example of one country, two systems operating and is a strong performance by the Hong Kong Judiciary. Since the Hong Kong Court of Appeal is the SAR's intermediate appellate court, a decision by Hong Kong's highest appellate court, the Court of Final Appeal, is possible, and indeed likely, down the road. Nevertheless, the opinion of the Court of Appeal in the FG Hemisphere case is instructive.

Facts

The case involves two 2003 arbitration awards made in France and in Switzerland against the Democratic Republic of the Congo ("DRC"). The original plaintiff was a Yugoslavia company, Energoinvest; FG Hemisphere is an assignee of Energoinvest's awards. FG Hemisphere, a Delaware company, specializes in investing in emerging markets and distress assets. The total of both awards exceeds US$34 million, and, with interest, and less certain recoveries accomplished by FG Hemisphere in other jurisdictions, the amount payable stands at US$102,656,647.96.

China Involvement

Hong Kong became involved when it came to FG Hemisphere's notice that a massive investment program in the DRC was being undertaken by Chinese state-owned companies. Under this program, these companies would acquire mineral exploitation rights for which sizeable entry fees were payable by them to the government of the DRC. The Chinese group included three companies incorporated in Hong Kong, each a wholly owned subsidiary of the China Railway Group Limited, a state-owned company established in the PRC, whose shares

are listed on the Hong Kong and Shanghai's stock exchanges. FG Hemisphere's effort was first to freeze the payment of the entry fees to the DRC and then to seize them.

Initial Decision

FG Hemisphere's initial effort resulted in a decision by the Court of First Instance that the entry fees did not constitute a commercial transaction. The court found that the transaction was a cooperative venture became two sovereign states, China, and the DRC. Accordingly, the court ruled in December 2008 that it had no jurisdiction because of sovereign immunity. The case at hand is the appeal from this decision.

Sovereign Immunity

The centerpiece of the Court of Appeal decision is an analysis of the doctrine of sovereign immunity under Hong Kong law. From 1978 until the change in sovereignty, the Hong Kong law on sovereign immunity was stated in the State Immunity Act of 1978 of the UK, which was extended to Hong Kong by the State Immunity (Overseas Territories) Order 1979. The analysis is complicated by the PRC's resumption of sovereignty with the effect that, except for statutes enumerated in an Annex to the Basic Law, UK statues ceased to have effect in Hong Kong as of July 1997. Accordingly, the court determined that Hong Kong law on sovereign immunity is the Common Law and eventually concluded that the Common Law recognizes the doctrine of restrictive sovereign immunity. Broadly, under the doctrine of restrictive immunity, a state can be sued for its commercial activities. Historically, China has been a leading proponent, along with a number of African countries, of the doctrine of absolute sovereign immunity. That is, states simply cannot be sued without their consent in the courts of another state. The Secretary for Justice of the Hong Kong Special Administrative Region had intervened in the FG Hemisphere case for the purpose of pointing out the Chinese's views on absolute immunity and to advise the court that under the Basic Law, the immunity of states from judicial process was a matter of foreign affairs and, therefore, to be decided by China, the sovereign. In addition, China's Ministry of Foreign Affairs also provided two letters to the court setting forth the view that China adhered to the doctrine of absolute sovereign immunity.

Decision

In a closely reasoned, 2-1 opinion that runs some 67 pages, the Court of Appeal concluded that the resolution of FG Hemisphere's claims in a Hong Kong court was not a matter of Chinese foreign affairs. Rather, the court concluded that Hong Kong law applied and that the doctrine of restrictive immunity was the law of Hong Kong. The court went on to consider whether the DRC could have been said to have waived whatever immunity it might have by submitting to arbitration, and decided that submission to arbitration did not constitute a waiver with respect to the jurisdiction of the Hong Kong courts to consider an application for leave to enforce the resulting arbitral awards. The court continued the injunctions and remitted portions of the case to the trial court for a determination as to whether some of the entry fees due to the PRC might be intended to be used for sovereign purposes, a question not previously considered.

Conclusions

The FG Hemisphere case should be reassuring to those concerned about the independence of Hong Kong's judiciary, more than a decade into Chinese rule. The case is a classic example of old school, common law judicial analysis, which includes a thoughtful rejection of two representations by China's Ministry of Foreign Affairs, as well as arguments of the Hong Kong Government in favor of the Chinese position. While further developments are possible and a further appeal to the Court of Final Appeal is likely, as things now stand, the FG Hemisphere case is a good example of Hong Kong's judicial system operating as it was designed.