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## PRC's New Foreign State Law Marks Shift From Absolute to Restrictive State Immunity

***Foreign states are no longer immune from suit or execution in the PRC (including Hong Kong and Macau) in respect of their commercial activities.***

### Key Points:

- With effect from January 1, 2024, non-PRC foreign states (foreign states) and their assets will no longer enjoy absolute immunity in the PRC. Instead, the restrictive approach to immunity will apply, pursuant to which it will be possible to sue foreign states and enforce against their assets in respect of commercial activities and in other specified circumstances.
- The same state immunity approach is expected to be followed in Hong Kong and Macau.

The Standing Committee of the National People's Congress (NPCSC) has passed the Foreign State Immunity Law (FSIL), which is intended to "develop the foreign state immunity legal regime of the PRC and provide legal basis for the PRC courts to hear civil cases involving foreign states and their assets," according to the Ministry of Foreign Affairs of the PRC.

Foreign states and their assets are in principle still immune from adjudication and enforcement in the PRC, however several exceptions apply, the most significant being when the relevant acts or assets relate to "commercial activities." The NPCSC has also confirmed that Hong Kong and Macau are expected to follow the rules and policies in the FSIL.

The FSIL represents a significant shift in the PRC's state immunity policies, from absolute to restrictive state immunity.

### Position Before FSIL: Absolute Immunity

As early as 2005, the PRC acceded to the United Nations Convention on Jurisdictional Immunities of States and Their Property, which enshrines the restrictive doctrine of immunity. However, to date, the Convention has not reached the necessary number of signatory states for its entry into force, nor has it been ratified by the PRC.

Within the PRC's statutes, very few laws are intended to address the issue of state immunity and their scope of application is limited. For example, the Law of Immunity on Assets of Foreign Central Banks

from Judicial Enforcement deals only with assets of foreign central banks and provides that such assets are immune from judicial enforcement, unless the relevant central banks or states expressly waive the immunity in writing, or have designated such assets for judicial enforcement.

In practice, the PRC has always adopted “absolute” state immunity. This means that the Chinese courts do not have jurisdiction over any foreign state activities or acts, irrespective of their nature. The same position is followed in Hong Kong, as confirmed in the landmark decision of the Hong Kong Court of Final Appeal in *Democratic Republic of the Congo v. FG Hemisphere Associates* [2011] HKCFA 41.

## Key Provisions of FSIL

FSIL is the first legislative document in the PRC that sets out a clear and comprehensive framework of state immunity. Under the FSIL, whilst foreign states and their assets generally still enjoy state immunity, exceptions may apply if the foreign states’ acts are “non-sovereign” in nature, or if their assets are “commercial assets” as opposed to “sovereign assets.”

### 1. General Principles of State Immunity

The FSIL sets forth a general principle that foreign states and their assets are immune from both jurisdiction and execution before the Chinese courts, unless provided otherwise in the FSIL (elaborated in the section below).

The FSIL also provides for the principle of reciprocity. If a foreign state offers the PRC a less favourable state immunity regime than what is outlined in the FSIL, the PRC will take relevant countermeasures, including to adjust the scope of civil jurisdiction that the Chinese courts may exercise over that foreign state and its assets.

### 2. Exceptions to Foreign State Immunity

Under the FSIL, there are two circumstances in which the general principle of state immunity will not apply: (i) express waivers of immunity, and (ii) other statutory exceptions including commercial activities. These exceptions are explained in detail below:

- **Express Waivers:** A foreign state may expressly waive the immunity from the jurisdiction of the Chinese courts and/or judicial enforcement against their assets in the PRC.
  - **Jurisdiction of Chinese courts:** A foreign state may voluntarily accept the jurisdiction of the Chinese courts by expressly waiving state immunity. This can be achieved through international treaties, written agreements, written submissions to the Chinese court hearing the underlying case, written submissions to the PRC through diplomatic channels, or other ways of expressly or voluntarily accepting the jurisdiction of the Chinese courts, such as by filing substantive claims, responses, or counterclaims in a Chinese court. The FSIL further clarifies that merely filing a jurisdiction objection based on state immunity, sending representatives to testify before a Chinese court, and/ or agreeing to adopt PRC laws as the governing law are not considered voluntary acceptance of the jurisdiction of the Chinese courts.
  - **Judicial enforcement:** Similarly, a foreign state may voluntarily waive immunity from judicial enforcement by the PRC courts in the same way as noted above. In addition, the Chinese courts are expressly permitted to take enforcement measures against (i) assets that a foreign state has specifically designated for potential judicial enforcement in the PRC, and (ii) assets

within the territory of the PRC that have been used for commercial activities and are connected to the underlying court proceedings heard by the Chinese court. Assets used for military purposes and assets of foreign central banks are expressly excluded from the types of commercial assets that may be subject to judicial enforcement.

- **Commercial Activities:** If a foreign state has engaged in commercial activities, either (i) within the territory of the PRC or (ii) outside the territory of the PRC but causing a direct effect in the territory of the PRC, the foreign state will not enjoy immunity in relation to such commercial activities. Pursuant to the FSIL, commercial activities include transactions, investments, lending and borrowing of goods or services, and other acts of a commercial nature outside the exercise of sovereign power. When assessing whether the relevant state activities are “commercial activities,” the purpose and nature of the activities should be considered.
- **Employment, IP-related Disputes, Personal Injury, and Property Damages:** Foreign states may be sued before the Chinese courts for:
  - (i) disputes arising from employment contracts performed or to be performed in the PRC;
  - (ii) disputes involving intellectual property protected under Chinese laws, e.g., IP ownership and other rights and interests; and
  - (ii) acts carried out in the PRC that cause personal injury, deaths, or damage to movable or immovable properties.
- **Arbitration-related Matters:** In the case of (i) arbitration agreements in commercial contracts between foreign states and organisations/individuals of other states; (ii) international and bilateral investment treaties that require disputes between the foreign states and investors of other states to be submitted to arbitration, the Chinese courts may exercise jurisdiction over the relevant arbitration-related matters, including the validity of arbitration agreements, recognition and enforcement of arbitral awards, and the setting aside of arbitral awards. The relevant foreign states will not be immune from the jurisdiction of the Chinese courts.

### 3. Special Civil Procedure Rules

The FSIL clarifies that for civil procedures involving a foreign state, process may be served on the foreign state in accordance with the relevant international treaties to which both the PRC and the foreign states are signatory parties (e.g., the Hague Service Convention, if applicable). Process may also be served by other methods as long as the foreign state accepts service via such method, and provided Chinese law does not prohibit such method.

The FSIL also allows the Chinese courts to enter civil judgment against a foreign state by default, i.e., if the foreign state does not appear before the Chinese court, provided that process has been duly served on the foreign state for more than six months. The foreign state may lodge an appeal within six months of the service of the default judgment.

### Key Implications

The FSIL provides clarity as to when foreign states are subject to the jurisdiction of the Chinese courts and judicial enforcement in the PRC. The new law represents the PRC’s shift from the long-standing adoption of absolute state immunity to the restrictive doctrine of state immunity thereby bringing the PRC more in line with global practice, including that of most common law jurisdictions. For instance, the FSIL

finally provides a domestic legal basis for investors to seek recognition and enforcement of investor-state arbitral awards (e.g., Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID) awards) against foreign states in the PRC.

Notably, the FSIL sets out an express exception to sovereign immunity for arbitration proceedings arising out of commercial activities. This seems to suggest that as long as the arbitral awards arise from commercial activities, even if the commercial activities neither take place within the PRC nor cause any direct effect within the PRC, the parties can seek enforcement of such arbitral awards against foreign states in the PRC. If so, such provision will expand the scope of foreign and Hong Kong arbitral awards that can be enforced against foreign states in Hong Kong.

The types of disputes that the Mainland PRC and Hong Kong courts may determine going forward are likely to expand significantly to include civil cases involving foreign states in relation to their commercial activities. In this regard, we expect further clarifications through future judicial interpretation, practice, or cases on what would constitute “commercial activities” and what kinds of state assets would be considered to be “connected commercial assets,” and hence subject to judicial enforcement under the FSIL.

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If you have questions about this Client Alert, please contact one of the authors listed below or the Latham lawyer with whom you normally consult:

**Hui Xu**

hui.xu@lw.com  
+86.10.5965.7006  
Beijing

**Dominic Geiser**

dominic.geiser@lw.com  
+852.2912.2738  
Hong Kong

**Truman Mak**

truman.mak@lw.com  
+852.2912.2735  
Hong Kong

**Charlotte Wong**

charlotte.wong@lw.com  
+852.2912.2516  
Hong Kong

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