

## Enforcement of Arbitral Awards Against a State-Owned Entity: A Tale, Two Jurisdictions

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ABSTRACT: When a private party enter into arbitration with a State Owned Enterprise (S.O.E.), there always a concern as to how the arbitral award might be enforced. It becomes even more worry some if the assets of the S.O.E. are mainly located in its own country or in a country, which practices absolute immunity principle and treats S.O.Es as part of a State. Such practice creates an uncertainty for the private parties who are doing businesses with S.O.Es. On a practical side it is also well known that S.O.Es are big market player as buyer or seller and therefore they cannot be ignored at least in commercial sense. This paper analyses the two distinctive approaches adopted by courts in the U.K. and in Hong Kong on a similar set of facts in which the same group of S.O.Es were involved. As both Hong Kong and the U.K. are part of the same common law tradition, this paper also attempts to highlight that courts are now ready to see S.O.Es as a pure commercial entity rather that as an instrumentalities of a State so far as enforcement of arbitral awards are concerned.

KEYWORDS: *Enforcement of Awards; Sovereign Immunity and Enforcement of Awards; Effect of Absolute and Restrictive Sovereign Immunity on of Awards; Enforcement Against SOEs, Treatment of State Assests and SOEs Assets for Enforcement of Awards.*

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## 1. INTRODUCTION

When a private party enter into arbitration with a State Owned Enterprise (S.O.E.), there always a concern as to how the arbitral award might be enforced. It becomes even more worry some if the assets of the S.O.E. are mainly located in its own country or in a country, which practices absolute immunity principle and treats S.O.Es as part of a State. Such practice creates an uncertainty for the private parties who are doing businesses with S.O.Es. On a practical side it is also well known that S.O.Es are big market player as buyer or seller and therefore they cannot be ignored at least in commercial sense. In recent Transpacific Partnership Agreement (T.P.P.) an attempt is made to control this unruly horse, S.O.Es, though not from commercial arbitration point of view.<sup>1</sup> This paper analyses the two distinctive approaches adopted by courts in the U.K. and in Hong Kong on a similar set of facts in which the same group of S.O.Es were involved. As both Hong Kong and the U.K. are part of the same common law tradition, this paper also attempts to highlight that courts are now ready to see S.O.Es as a pure commercial entity rather that as an instrumentalities of a State so far as enforcement of arbitral awards are concerned.

## 2. WORLDWIDE ENFORCEMENT PROCEEDINGS BY F.G. HEMISPHERE

F.G. Hemisphere, a Delaware company, took out court proceedings in various jurisdictions to enforce the two International Chamber of Commerce (hereinafter I.C.C.) arbitral awards against the Democratic Republic of Congo (hereinafter D.R.C.). However, F.G. Hemisphere was not a party to the original

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<sup>1</sup> See Sean Miner, *Comments on State-Owned Enterprises*, in 2 *ASSESSING TRANSPACIFIC PARTNERSHIP-INNOVATIONS IN TRADING RULES*, 91-100 (Jeffrey J.Schott & Cathleen Cimino-Isaacs eds., 2016).

arbitral proceedings under which the awards were made. The arbitration agreement was between Energoinvest, a Yugoslavian company and the D.R.C. In the 1980s, Energoinvest had agreed to construct a hydro–electric facility and high tension electric lines in the D.R.C. The D.R.C. and the D.R.C.’s State Owned Enterprise (hereinafter S.O.E.), *Société Nationale d’Electricité* (hereinafter S.N.E.) entered into credit agreements with Energoinvest to finance the works. It was these credit agreements that contained I.C.C. arbitration clauses. The works were completed but the D.R.C. and S.N.E. defaulted on their payment obligations, despite revision and rescheduling. Energoinvest then instituted arbitral proceedings against the D.R.C. in Switzerland and France. Two awards were rendered on 30th April 2003 by the respective arbitral tribunals in favour of Energoinvest against the D.R.C. and S.N.E. for US\$11,725,000 and US\$22,525,000 respectively plus interest.

F.G. Hemisphere then entered the picture as a “vulture fund”. Vulture funds have been opportunistically profiting from the financial crisis that has been brewing in the past few years. They are particularly active in Africa, Latin America and now Europe. This lucrative enterprise involves the purchase of debts from distressed entities at large discounts.<sup>2</sup> This helps ease the burden of the assignor of the debt because at least part of the outstanding debt has been repaid by the vulture fund. The vulture funds then seek to enforce the purchased debts at their full value against the debtors’ assets in different jurisdictions. F.G. Hemisphere can thus be labelled as such a “vulture fund”.

### **3. F.G. HEMISPHERE FROM JERSEY TO THE U.K.**

#### **3.1. TARGETED ASSETS**

One of the proceedings instituted by F.G. Hemisphere was in Jersey, a British crown dependency. F.G. Hemisphere claimed that the D.R.C. had assets in

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<sup>2</sup> The actions of Vulture Funds have been criticized widely which can be summed up in the words of U.N. independent expert on foreign debt and human rights as “ It is illogical to grant debt relief to poor countries while at the same time allowing vulture funds to litigate against these countries and thereby dilute the gains from debt relief”. See JUBILEE AUSTRALIA, *Briefing Paper: Vulture Fund* (Jun. 2011), [http://www.jubileeaustralia.org/\\_literature\\_87200/Briefing\\_Paper\\_-\\_Preying\\_on\\_the\\_Poor\\_\(2011\)](http://www.jubileeaustralia.org/_literature_87200/Briefing_Paper_-_Preying_on_the_Poor_(2011)).

Jersey, which it could execute the outstanding amount of the awards against. The targeted assets were the 20% shareholding held by *La Générale des Carrières et des Mines* (hereinafter *Gécamines*), an S.O.E. of the D.R.C., in a joint venture mining company called *Groupement pour le traitement du Terril de Lumumbashi Ltd* (hereinafter G.T.L.).<sup>3</sup> Also targeted was the right of *Gécamines* to receive certain payments due to *Gécamines* by G.T.L. in respect of the supply of cobalt and copper-bearing slag.<sup>4</sup> F.G. Hemisphere accordingly argued that *Gécamines* was an organ of the state and so its assets could be equated with those of the D.R.C. in execution of the awards. *Gécamines*, on the other hand, argued that it was an entity wholly independent of the D.R.C. and it could not be held liable for the debts of the D.R.C.

### 3.2. RULING BY THE ROYAL COURT

The Royal Court of Jersey found on the facts that *Gécamines* was an organ of the D.R.C.<sup>5</sup> Therefore, it held that the assets of *Gécamines* could be equated with those of the D.R.C. and *Gécamines* could be held liable for the debts of the D.R.C. In determining whether *Gécamines* was an organ of the D.R.C., the Royal Court applied Lord Denning's two-limb test as set out in the *Trendtex* case<sup>6</sup> and considered (i) whether there was governmental control over *Gécamines* and (ii) whether *Gécamines* exercised governmental functions.<sup>7</sup>

In reaching its conclusion, the Royal Court examined (i) *Gécamines*' constitutional position and (ii) the occasions on which the D.R.C. took the assets of *Gécamines* for its own use without compensation. The Royal Court considered two main factors as supporting F.G. Hemisphere's contention that *Gécamines* was an organ of the state. First, the Royal Court was of the view that the review instigated by the D.R.C. of mining contracts since 2007 and the recommendations made by the D.R.C. for renegotiation of the mining contracts

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<sup>3</sup> See *F.G. Hemisphere Associates LLC v. The Democratic Republic of Congo and La Générale des Carrières et des Mines* [2010] JRC 195, para. 6 (hereafter referred to as the 'Royal Court judgment').

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*, paras. 140, 194.

<sup>6</sup> See *Trendtex Trading Corp v. Central Bank of Nigeria* [1977] 1 QB 529, 560C-D.

<sup>7</sup> See *supra* note 3, para. 16.

left little room for departure by *Gécamines*.<sup>8</sup> The renegotiated mining contracts required private sector partners to pay substantial or substantially increased premiums in order to enter into a joint venture with *Gécamines* to exploit mining rights in the D.R.C.<sup>9</sup> Under the renegotiated mining contracts, *Gécamines*' stance was that it was the rightful owner of these "entry fees", which constituted "part of its assets".<sup>10</sup> Instead of requiring all the "entry fees" to be remitted to the State Treasury, the D.R.C. agreed to have half remitted to the state and the other half to *Gécamines*.<sup>11</sup> The Royal Court took the unsuccessful bargaining by *Gécamines* with the D.R.C. in respect of its claim to the "entry fees" into account in concluding that the D.R.C. controlled *Gécamines*.<sup>12</sup>

Secondly, the Royal Court relied on its finding that *Gécamines* was used "as an instrument for the implementation of policies and projects of national importance".<sup>13</sup> The project concerned was a massive inter-state infrastructure project, which was to be funded by a Chinese consortium.<sup>14</sup> A joint venture company, Sicomin, was formed by *Gécamines* and the Chinese consortium to exploit mining rights in the D.R.C. However, revenue from Sicomin was to fund not *Gécamines*' activities, but the D.R.C.'s infrastructure project. The Royal Court saw the mining rights as being mortgaged by *Gécamines* as security for loan finance by the Chinese consortium for both the infrastructure project and the Sicomin project.<sup>15</sup> The Royal Court was of the opinion that were it not for the "overall direction and control" of the D.R.C., this project would not have been possible<sup>16</sup> and *Gécamines* would not have been able to afford the exploitation of these mining rights. The Chinese consortium was also required to pay "entry fees" of US\$350 million under the Sicomin project. Over 70% of the "entry fees" were designated to go to the D.R.C. and the remaining to

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<sup>8</sup> *Supra* note 3, para. 101.

<sup>9</sup> *Supra* note 3, para. 103.

<sup>10</sup> *Supra* note 3, para. 105.

<sup>11</sup> *Supra* note 3, para. 106.

<sup>12</sup> *Supra* note 3, paras. 103, 105.

<sup>13</sup> *Supra* note 3, paras. 109, 132.

<sup>14</sup> The Chinese consortium comprised the Export-Import Bank of China, China Railway and Sinohydro.

<sup>15</sup> *Supra* note 3, para. 130.

<sup>16</sup> *Supra* note 3, para. 129.

*Gécamines*.<sup>17</sup> Again, the Royal Court viewed this as supporting F.G. Hemisphere's contention of "the Government making free with *Gécamines*" revenue".<sup>18</sup>

Based on these two main factors, the Royal Court concluded that the two limbs of the Trendtex test were satisfied, in that *Gécamines* was under government control and carried out governmental functions. The Royal Court stated, using rather strong language:<sup>19</sup>

The picture that emerges strongly in *Gécamines*' case is that of an entity which has in many ways been dressed in the garb of an independent body, but whose formal constitution counts for little or nothing when the state so chooses: a creature that has sometimes been allowed a considerable autonomy but which, when it matters, can be and is unceremoniously subjected to the controlling will of the state.

As such, the Royal Court held that *Gécamines* could be regarded as an organ of the state and the assets of *Gécamines* were liable to execution in satisfaction or part satisfaction of the awards.<sup>20</sup>

### 3.3. RULING BY THE ROYAL COURT OF APPEAL

*Gécamines* then appealed to the Royal Court of Appeal, which affirmed the findings of the lower court on similar grounds.<sup>21</sup> Going further than the Royal Court, the Court of Appeal was of the view that governmental control and the exercise of government functions alone could not suffice to regard an entity as an organ of the state. It was necessary that "the principal functions and activities of the entity are properly to be viewed as governmental", but there need not be "any actual sovereign acts".<sup>22</sup> The Court of Appeal was satisfied

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<sup>17</sup> *Supra* note 3, para. 120. US\$250 million was to go to the State Treasury of the D.R.C. and the balance to *Gécamines*.

<sup>18</sup> *Supra* note 3, para. 109.

<sup>19</sup> *Supra* note 3, para. 141.

<sup>20</sup> *Supra* note 3, para. 195.

<sup>21</sup> With Fleming J. dissenting.

<sup>22</sup> See *F.G. Hemisphere Associates LLC v. The Democratic Republic of Congo and La Générale des Carrières et des Mines* [2011] JCA 141, paras. 71, 78.

that *Gécamines* had met this threshold and its assets could be equated with those of the D.R.C.

### 3.4. RULING BY THE PRIVY COUNCIL

This case then went up to the Privy Council, the highest court for British crown dependencies. In *La Générale des Carrières et des Mines v. F.G. Hemisphere Associates LLC* (hereinafter the *Gécamines* case),<sup>23</sup> the Privy Council overturned the decision of the Royal Court of Appeal. It held that *Gécamines* was not an organ of the state but a separate entity. As such, the assets of *Gécamines* could not be equated with those of the D.R.C. and it could not be held liable for the debts of the D.R.C.

The Privy Council considered that the Royal Court and the Royal Court of Appeal incorrectly formulated and applied the *Trendtex* test in determining whether a S.O.E. can be held liable for state debts.<sup>24</sup> The Board was of the view that if constitutional and/or factual control alone sufficed, almost any state trading corporation may then be liable for state debts.<sup>25</sup> The Board also pointed out that this situation would be inconsistent with the common law and the spirit of the United Kingdom's State Immunity Act 1978 (hereinafter the 1978 Act),<sup>26</sup> which took up the approach of the European Convention on State Immunity.<sup>27</sup> The Board quoted section 14 of the 1978 Act, section 14(1) of which provides that immunity does not apply "to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the State and capable of suing and being sued." Section 14(2) goes on to list the only situations in which such a separate entity could be immune in the courts of the United Kingdom. This, the Board stated, showed that the 1978 Act was "at pains to recognise the separateness and distinctness of state-owned corporations, notwithstanding they may have been entrusted

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<sup>23</sup> [2012] UKPC 27; Privy Council Appeal No 0061 of 2011, 17 July 2012.

<sup>24</sup> *Id.*, para. 51.

<sup>25</sup> *Id.*, para. 19.

<sup>26</sup> State Immunity Act, 1978, c. 33 (U.K.).

<sup>27</sup> Council of Europe, European Convention on State Immunity, May 16th, 1972, ETS No. 074, 1495 U.N.T.S. 182. The 1978 Act was extended to Jersey by the State Immunity (Jersey) Order 1985.

with public functions including activities involving the exercise of sovereign authority.”<sup>28</sup>

The Board considered the traditional Saloman principle<sup>29</sup> that a company has its own legal personality and the circumstances in which the corporate veil could be pierced.<sup>30</sup> However, the Board made it clear that a body could be regarded as an organ of the state despite its separate legal personality.<sup>31</sup> This meant that a separate legal personality was not conclusive as to whether an entity was to be regarded as an organ of the state.<sup>32</sup> Although relevant, nor were constitutional and factual control and the exercise of sovereign functions without more conclusive.<sup>33</sup> It follows from this statement that the Board regarded the *Trendtex* test as insufficient or too simple a test in determining whether *Gécamines* was an organ of the D.R.C. The Board went on to state:<sup>34</sup>

... . Where a separate juridical entity is formed by the State for what are on the face of its commercial or industrial purposes, with its own management and budget, the strong presumption is that its separate corporate status should be respected, and that it and the State forming it should not have to bear each other's liabilities.

The Board set a rather high threshold for the assets of a state-owned entity to be equated with those of the state. Extreme circumstances were required. To displace the presumption, the affairs of the entity and the State had to be “so closely intertwined and confused that the entity could not properly be regarded for any significant purpose as distinct from the State and vice versa.”<sup>35</sup> The Board then stated an exception: “circumstances in which the State has so interfered with or behaved towards a state-owned entity that it would be appropriate to look through or past the entity to the State, lifting the veil of incorporation.”<sup>36</sup> The Board added that merely because a state’s conduct makes

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<sup>28</sup> See *supra* note 22, para. 19.

<sup>29</sup> *Salomon v. A. Salomon & Co Ltd* [1897] AC 22.

<sup>30</sup> The Board accepted that a court is only justified to pierce the corporate veil if there is control by the wrongdoer and some impropriety linked to the use of the company structure to avoid or conceal liability see *Ben Hasham v. Ali Shayif* [2008] EWHC 2380 (Fam), paras. 159–163.

<sup>31</sup> See *supra* note 22, para. 25.

<sup>32</sup> See *supra* note 22, para. 29.

<sup>33</sup> See *supra* note 22, para. 29.

<sup>34</sup> See *supra* note 22, para. 29.

<sup>35</sup> See *supra* note 22, para. 29.

<sup>36</sup> See *supra* note 22, para. 30.



it appropriate to lift the corporate veil to enable a creditor of a S.O.E. to look to the state does not mean the creditor of a state could look to the S.O.E.<sup>37</sup> In respect of when the corporate veil could be lifted, the Board further considered that “the international element may raise different considerations . . . . from those that would arise under purely domestic circumstances.”<sup>38</sup> Ultimately, the Board decided, “an overall judgment is required as to whether “the required degree of separation” is present”<sup>39</sup> In other words, whether the entity was an organ of the state did not depend on a single factor, but on a consideration of all the relevant circumstances.<sup>40</sup>

The Board pointed out that the Royal Court and the Royal Court of Appeal did not consider as important whether or not *Gécamines* was fulfilling a sovereign function (*acta jure imperii*).<sup>41</sup> The Board further regarded the Royal Court of Appeal as having adopted a very broad concept of government.<sup>42</sup> By this, the Royal Court of Appeal was stated to have unjustifiably considered whether the functions, which could otherwise be viewed as ordinary trading activities, were ancillary to a principal function of the government or functions like carrying out government policies.<sup>43</sup> The Board was of the view that the Royal Court of Appeal diluted the approach to sovereign activity as indicated by Lord Wilberforce in *Il Congresso del Partido*: that mere governmental purpose or motive did not convert a commercial act into a sovereign act and that it was necessary to consider the whole context of the activity to see whether it was sovereign in nature.<sup>44</sup>

On an examination of the constitution and activities of *Gécamines*, the Board decided that *Gécamines* was not an organ of the D.R.C. and F.G. Hemisphere could not look to its assets for enforcement. There was also no justification to lift the corporate veil.<sup>45</sup> The fact that *Gécamines* was controlled by the D.R.C. was not surprising to the Board, because, after all, it was a

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<sup>37</sup> See *supra* note 22, para. 30.

<sup>38</sup> See *supra* note 22, para. 42.

<sup>39</sup> See *supra* note 22, para. 34.

<sup>40</sup> See ANDREW DICKINSON, RAE LINDSAY & JAMES P. LOONAM, *STATE IMMUNITY, SELECTED MATERIALS AND COMMENTARY* (2004).

<sup>41</sup> See *supra* note 22, paras. 44, 45.

<sup>42</sup> See *supra* note 22, para. 45.

<sup>43</sup> See *supra* note 28, paras. 45, 47.

<sup>44</sup> See *supra* note 22, paras. 46, 47.

<sup>45</sup> See *supra* note 22, para. 77.

S.O.E.<sup>46</sup> Nor was the fact that *Gécamines* assisted, promoted and advanced development, prosperity and economic welfare and carried out such government policies. The reasoning of the Board was that such features were “of the essence of many state-controlled corporations’ functions’ and did not make them part of the state.”<sup>47</sup> The Board also addressed the two principal areas relied on by the Royal Court as supporting F.G. Hemisphere’s case: (i) the mining review instigated by the D.R.C. and the treatment of the “entry fees” and (ii) the Sicominex transaction.

In relation to the review instigated by the D.R.C. of the mining contracts, the Board was of the view that *Gécamines*’ position was one of insisting on its right to set-off the “entry fees” paid to the D.R.C. against its tax and other liabilities.<sup>48</sup> This suggested that *Gécamines* considered itself an entity with interests separate from the D.R.C. It was:<sup>49</sup>

A real and functioning corporate entity, having substantial assets and a substantial business including interests in over thirty joint ventures with outside concerns. It had its own budget and accounting, its own borrowings, its own debts and tax and other liabilities and its own differences with government departments.

As for the Sicominex transaction, the Board disagreed with the Royal Court that *Gécamines* was “unceremoniously subjected to the controlling will of the state” because not only did the D.R.C. contribute to the transaction, *Gécamines* derived real commercial benefits from the transaction.<sup>50</sup> The Board concluded that neither of the two areas relied on by the Royal Court went to show that *Gécamines* was exercising sovereign functions.

#### 4. F.G. HEMISPHERE IN HONG KONG

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<sup>46</sup> See *supra* note 22, para. 43.

<sup>47</sup> See *supra* note 22, paras. 44, 48, 54.

<sup>48</sup> See *supra* note 22, paras. 61, 68.

<sup>49</sup> See *supra* note 22, para. 70.

<sup>50</sup> See *supra* note 22, para. 69. These commercial benefits are, as pointed out by the Board, the US\$50 million loan made to *Gécamines* by the Chinese consortium, the US\$100 million premium (part of the “entry fees” to be paid by the Chinese consortium), the US\$32 million loan made to *Gécamines* by the Chinese consortium to enable it to subscribe for shares in Sicominex and *Gécamines*’ 30% shareholding in Sicominex.

F.G. Hemisphere was also involved in a spate of litigation in Hong Kong. This time, the assets targeted for execution of the awards against the D.R.C. were the part of the “entry fees” to be paid by the Chinese consortium to the D.R.C. under the Sicomines transaction.<sup>51</sup> The case went up all the way to the Court of Final Appeal.<sup>52</sup> The two main issues before the Hong Kong courts in this case were whether (i) the doctrine of restrictive immunity or the doctrine of absolute immunity applied to Hong Kong post-handover and (ii) whether the D.R.C. had waived any immunity by virtue of agreeing to the application of the I.C.C. Rules.<sup>53</sup> This paper does not aim to go into a detailed discussion of the issues.<sup>54</sup> Instead, the focus is on how the courts viewed the “entry fees” under the Sicomines transaction for the purposes of execution of the awards.

The Court of Final Appeal, however, did not go to the issue of execution against the “entry fees” because it had already held that the D.R.C. was absolutely immune from proceedings. The majority opinion was that following the handover in 1997, Hong Kong followed the doctrine of absolute immunity, consistent with the People’s Republic of China (hereinafter P.R.C.).<sup>55</sup> It also held that there had been no waiver of immunity by the D.R.C. The judgment of the Court of Final Appeal was provisional as the majority was of the view that the Court was obliged to seek an interpretation from the Standing Committee of the National People’s Congress (hereinafter NN.P.C.S.C.) of the Basic Law provisions engaged pursuant to Article 158(3) of the Basic Law. Upon receiving the sought interpretation from the N.P.C.S.C., the Court of Final Appeal

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<sup>51</sup> Then believed to be US\$221 million (as opposed to the US\$250 million figure stated in the *Gécamines* case). See *F.G. Hemisphere Associates LLC v. Democratic Republic of Congo & Ors* [2009] 1 HKC 111, para 4 (Hong Kong Court of First Instance) (hereafter referred to as the ‘C.F.I. judgment’).

<sup>52</sup> See *Democratic Republic of Congo & Ors v. F.G. Hemisphere Associates LLC* FACV Nos. 5,6,7 of 2010, 8th June 2011 (Hong Kong Court of Final Appeal) (hereafter referred to as the ‘C.F.A. judgment’).

<sup>53</sup> See Int’l Chamber of Commerce [ICC], International Chamber of Commerce Arbitration Rules 1998 art. 28, para. 6, which governed the 2 ICC arbitrations, provides: ‘Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.’

<sup>54</sup> These have been discussed in detail see Rajesh Sharma, *Enforcement of Arbitral Awards and Defence of Sovereignty: The Crouching Tiger and the Hidden Dragon*, LAPLAND L. REV., no 1, 2011, at 252.

<sup>55</sup> Application of absolute immunity in Hong Kong by China has been seen negatively from the international arbitration perspective. See generally Ashley Bell, *Big Trouble in ‘Little China*, 28 J. INT’L ARB. 643-652 (2011). Nicholas A. Brown & James D.A. Lewis, *Game of Thrones: A Narrowing Immunity?*, 30 J. INT’L ARB. 689-700 (2013); Nicholas Pengelley, *Waiver of Sovereign Immunity from Execution: Arbitration is Not Enough*, 26 J. INT’L ARB. 859-872 (2009); TERESA CHEN & ADRIAN LAI, *Lesson Learned From the FG Hemisphere and Huatianlong Case*, ARBITRATION-ICCA.ORG, [http://www.arbitration-icca.org/media/4/13523372058325/media1132342764462706-lessons\\_learned\\_from\\_the\\_fg\\_hemisphere\\_vs\\_drc\\_and\\_huatianlong\\_case.pdf](http://www.arbitration-icca.org/media/4/13523372058325/media1132342764462706-lessons_learned_from_the_fg_hemisphere_vs_drc_and_huatianlong_case.pdf).

confirmed its provisional judgment as the interpretation was consistent with it.<sup>56</sup>

However, in the courts below, the issue of execution in relation to the “entry fees” was relevant as they had held that the doctrine of restrictive immunity applied.<sup>57</sup> It was then important for the courts to determine whether the Sicomines transaction was one of a commercial nature such that it fell within the exception to the doctrine of restrictive immunity.<sup>58</sup>

#### 4.1. HIGH COURT OF HONG KONG

In the High Court, Justice Reyes held the view that the Sicomines transaction was not of a commercial nature.<sup>59</sup> First, Justice Reyes considered that the transaction was executed under the umbrella cooperation agreements between the P.R.C. and the D.R.C.<sup>60</sup> The Sicomines transaction was an inter-state one between the P.R.C. and the D.R.C., notwithstanding the fact that the Chinese side entered into the transaction through corporations.<sup>61</sup> The corporations, he noted, were state owned.<sup>62</sup>

Second, His Justice derived from the fact that the Sicomines transaction was “massive and ambitious” that it was not a “routine trading operation” – it could only have been carried out with state backing.<sup>63</sup> His Justice further noted

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<sup>56</sup> *Democratic Republic of Congo & Ors v. F.G. Hemisphere Associates LLC* FACV Nos. 5,6,7 of 2010, 8 September 2011 (Hong Kong Court of Final Appeal).

<sup>57</sup> Justice Reyes, in the High Court did not express a definitive view of which doctrine applied. His provisional view was that the common law restrictive immunity approach applied to Hong Kong. It was not necessary for him to conclude on the applicable approach because he held that the Sicomines transaction was not of a commercial nature. Therefore, it fell within the exception to restrictive immunity which meant that whether Hong Kong followed restrictive or absolute immunity, the D.R.C. was immune in either case: *see supra* note 51, paras. 69, 70.

<sup>58</sup> As a general trend if a property of a State-owned enterprise which is kept and used specifically for the fulfillment of sovereign functions or used for sovereign purposes is immune from attachment or execution. See A.F.M. Maniruzzaman, *State Enterprises Arbitration and Sovereign Immunity Issues: A Look at Recent Trends*, DIS. RESOL. J., Aug.-Oct. 2005, at 1-8. *See also* the trend in the context of investment arbitration in Paul Blyschak, *State-Owned Enterprises and International Investment Treaties: When Are State-Owned Entities and Their Investments Protected*, 6 J. INT'L L. AND INT'L REL., no. 2, 2011, at 1-52.

<sup>59</sup> *See supra* note 51, para. 83.

<sup>60</sup> *See supra* note 51, para. 85.

<sup>61</sup> *See supra* note 51, para. 86.

<sup>62</sup> *See supra* note 51, para. 86.

<sup>63</sup> *See supra* note 51, paras. 87, 89.

that the infrastructure project involved was for “the development of the whole of the D.R.C. for the economic benefit and well-being of its citizens.”<sup>64</sup>

Third, Justice Reyes believed that the agreements were not conventional for a trading contract.<sup>65</sup> For instance, there were provisions dealing with tax and customs duties exemptions. Visas and work permits were also assured for expatriate staff in that contract. Justice Reyes opined that these terms could only be stipulated by a state in the exercise of its sovereign power.<sup>66</sup>

Lastly, His Justice was of the view that a state could exact the “entry fees” in consideration of the licence to exploit the D.R.C.’s mineral rights.<sup>67</sup> His Justice concluded that these features were the “hallmarks of the exercise by states of sovereign authority in the interests of their citizens.”<sup>68</sup> His Justice held that even if the “entry fees” were an asset of the D.R.C., the D.R.C. could raise immunity from execution because the transaction was not of a commercial nature, and the D.R.C. had not waived its immunity.<sup>69</sup>

#### 4.2. COURT OF APPEAL

Consistent with Justice Reyes’ provisional view, the majority in the Court of Appeal held that Hong Kong continued to follow the common law doctrine of restrictive community following the resumption of sovereignty by the P.R.C. in 1997.<sup>70</sup> The Court of Appeal was also of the view that submission to arbitration under the I.C.C. Rules did not amount to a waiver of immunity by the D.R.C.

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<sup>64</sup> See *supra* note 51, para. 88.

<sup>65</sup> See *supra* note 51, para. 90.

<sup>66</sup> See *supra* note 51, para. 90.

<sup>67</sup> See *supra* note 51, para. 91.

<sup>68</sup> See *supra* note 51, para 92.

<sup>69</sup> See *supra* note 51, paras 145, 110, 117, 121. For a critical view of the approach of Justice Reyes taken in regards to the relevant ICC Rules as simply a waiver of the right of challenging an enforcement by D.R.C. and not as waiving the right of immunity from execution see Nicholas Pengelley, *Waiver of Sovereign Immunity from Execution: Arbitration is Not Enough*, 26 J. INT’L ARB 859, 866. For a detailed survey of I.C.C. cases relating to liability of state for its instrumentalities see Eduardo Silva Romero, *Are State Liable for the Conduct of their Instrumentalities: ICC Case Law*, in 4 STATE ENTITIES IN INTERNATIONAL ARBITRATION, THE INTERNATIONAL ARBITRATION INSTITUTE 31-55 (Emmanuel Gillard & Jennifer Yunan eds., 2008).

<sup>70</sup> [2010] 2 HKC 487, para. 122 (Hong Kong Court of Appeal) (hereafter referred to as the ‘C.A. judgment’). With Hon Yeung JA dissenting, para 228.

However, the Court held that Justice Reyes had applied the wrong test in determining whether the “entry fees” were immune from execution.<sup>71</sup> Counsel for F.G. Hemisphere contended that the correct test was to look at the intended purpose of the assets sought to be attached. The Court of Appeal agreed that Justice Reyes had wrongly made reference to the nature of the Sicomines transaction, which gave rise to the “entry fees” liability.<sup>72</sup> The nature of the underlying acts was relevant to the first stage when immunity from suit is considered,<sup>73</sup> and not at the execution stage. At the execution stage, the correct test was to consider what the intended purpose of the “entry fees” was.<sup>74</sup> If the “entry fees” were to be used for a sovereign or public purpose, they could not be subjected to execution.<sup>75</sup> If they were for purely commercial purposes, the awards could be enforced against such an amount.<sup>76</sup>

The Court of Appeal found that there was evidence suggesting that “entry fees” going to the D.R.C. were to be used for its budget.<sup>77</sup> Subject to further findings of fact, the Court was of the view that this amount was immune from execution as it was for a public purpose.<sup>78</sup> What was interesting was the Court’s statement that “the plaintiff has shown a good arguable case for injunctions over the *Gécamines* tranche” because this part of the “entry fees” was intended for a commercial purpose.<sup>79</sup> This goes to show that the Court saw that there was a good arguable case that *Gécamines*’ assets could be assimilated with those of the D.R.C. On this issue, the court ordered an “inquiry to determine to what extent, if any, the entry fees . . . are intended by the D.R.C. for payment to *Gécamines* and, further, whether the amount thus

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<sup>71</sup> With Hon Yeung JA dissenting on this point, *Id*, paras. 242, 243.

<sup>72</sup> See *supra* note 70, para. 179.

<sup>73</sup> The relevant acts in this case were those in relation to the entry by the D.R.C. into credit agreements with Energoinvest. Hon Yuen JA therefore rightly stated that Justice Reyes had not considered whether such acts were commercial or sovereign in ‘nature’ for the purposes of determining whether the D.R.C. was immune from the jurisdiction of Hong Kong courts, under the doctrine of restrictive immunity. Hon Yuen JA was of the view that it was clear that the transactions were commercial in nature as they were financing arrangements. Accordingly, the D.R.C. was not immune from being impleaded in Hong Kong courts under the doctrine of restrictive immunity: *Supra* note 70, paras 268, 269.

<sup>74</sup> See *supra* note 70, para. 179.

<sup>75</sup> See *supra* note 70, paras. 179, 276.

<sup>76</sup> See *supra* note 70, paras. 179, 276.

<sup>77</sup> See *supra* note 70, para. 179.

<sup>78</sup> See *supra* note 70, paras. 179, 276.

<sup>79</sup> See *supra* note 70, paras. 179, 276.

payable is amenable to or immune from execution”.<sup>80</sup> Unfortunately, the Court on this issue did not go any further.

## 5. THE GÉCAMINES CASE – IS IT BASED ON PRINCIPLE?

It is submitted that the simple way of disposing of the case would have been to determine whether *Gécamines*' assets which were being sought to be attached were for commercial or sovereign purposes. If they were for commercial purposes, these assets would have been available to F.G. Hemisphere for execution of the awards because of the doctrine of restrictive immunity. If they were for sovereign purposes, these assets would have been immune from execution. It is likely that the courts would have arrived at the former conclusion given the extensive operation of *Gécamines* in the commercial arena. F.G. Hemisphere would accordingly have been able to execute the awards against *Gécamines*' assets. Yet the courts in Jersey went a step back to look at whether *Gécamines*' assets could be said to belong to the D.R.C. for the purposes of execution of the awards against the D.R.C. This was crucial to the case because F.G. Hemisphere could not pursue the assets of an entity which was not an organ of the D.R.C. The difficult question then arose as to the applicable principles to determine whether an entity could be held responsible for the state's liability.<sup>81</sup>

This *Trendtex* test was approved in the Kensington case by Cooke J, who stated that the relevant factors to determine whether a body was entitled to immunity from suit could apply to determine whether a particular body could be held liable for the state's debts.<sup>82</sup> Yet the Board considered the test of “governmental control and function” in the *Trendtex* case as inconclusive, albeit relevant. Accordingly, even upon an examination of a S.O.E.'s constitution, powers, duties and activities, a court would not be able to determine conclusively whether or not the S.O.E. is an organ of the state. Based

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<sup>80</sup> See *supra* note 70, para. 284.

<sup>81</sup> The debate of this issue is still alive and a survey of various jurisdictions has not shown any conclusive approach. For further discussion, see A.F.M Maniruzzaman, “State Enterprise Arbitration and Sovereign Immunity Issues: A Look at Recent Trends”, pp.1-8.

<sup>82</sup> See *Kensington International Limited v. Republic of Congo* [2005] EWHC 2684 (Comm.) paras. 52, 53.

on the Board's decision, the starting point for a court would be to presume that a S.O.E. is a separate legal entity, because of its separate legal personality. It would be extremely difficult for the court to justify that the S.O.E. is an organ of the state. This would only be possible in the rare circumstances where the affairs of the S.O.E. and the state are "so closely intertwined and confused" that the S.O.E. cannot be regarded for "any significant purpose" as distinct from the state.<sup>83</sup>

In holding that there was a strong presumption that an S.O.E. with its own management and budget was an entity distinct from the state, the Privy Council gave due respect to the tradition Salomon principle. However, the Board has by no means set out clear principles as to when an entity is to be regarded as "distinct" from the state. It is argued here that the *Trendtex* test provides a much more principled approach, or at least a starting point for the courts. In looking into whether an entity exercises governmental function, the purpose that it serves automatically comes into play. If the purpose of the S.O.E. "is to assist, promote and advance the industrial development, prosperity and economic welfare of the area in which it operates", it is carrying out government policy and assumes the position of an organ of the state.<sup>84</sup> This can by all means be through the carrying out of commercial activity, like *Gécamines* was.

However, the Board disapproved of this approach in relation to *Gécamines* and was of the view that it was the overall context that mattered.<sup>85</sup> The very thing that the Board went on to examine in deciding whether or not *Gécamines* was an organ of the state was its constitution and activities. Whether the "overall context" that the Board cited to reach its conclusion that *Gécamines* was not an organ of the state remains unclear. The Royal Court of Jersey and the Royal Court of Appeal had seemingly also considered the "overall context" when one looks to the matters that were raised and

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<sup>83</sup> See *supra* note 22, para. 29.

<sup>84</sup> See *supra* note 22, para 53 (Cooke J.).

<sup>85</sup> There has been an argument that sometimes, even where motive and purpose are judged irrelevant to determining the commercial character of an activity, reference has been made to the context in which the activity took place. See Yearbook of the International Law Commission 1999 para. 49, 2 Y.B. Int'l L. Comm'n, A/CN.4/SER.A/1999/Add.1 (Part 2), as quoted in A.F.M Maniruzzaman, "State Enterprise Arbitration and Sovereign Immunity Issues: A Look at Recent Trends", p. 3.



considered. It is difficult to understand why the Board did not value the overwhelming control by the D.R.C. over *Gécamines* and the fact that *Gécamines*' assets originated from the D.R.C.<sup>86</sup> It appears that the Board had simply imposed its own view on the facts, and justified intervention by holding that the lower courts had applied an incorrect test.<sup>87</sup>

## 6. GÉCAMINES' STATUS CONSIDERED IN HONG KONG

Although the status of *Gécamines* was not a central issue in the Hong Kong courts, F.G. Hemisphere did submit that *Gécamines* was merely an agent or front acting for the D.R.C.<sup>88</sup> such that the entire amount of "entry fees" belonged to D.R.C. However, further findings of fact were necessary for the Hong Kong Court of Appeal to come to a conclusion, so it proceeded on the assumption that the "entry fees" were due to the D.R.C. in deciding whether the D.R.C. was immune.<sup>89</sup>

Even so, it is interesting to note that the Court of Appeal considered there to be an arguable case for injunction over the *Gécamines* tranche of the "entry fees". The Court viewed that this part would have been used by *Gécamines* for commercial purposes and so immunity against execution was not available. His Honourable Justice of Appeal Yuen adopted the factors listed by Justice Reyes to support why he considered it arguable that the "entry fees" were the D.R.C.'s assets.<sup>90</sup> Remarkably, these factors are in line with the considerations that contributed to the Jersey courts' holding that *Gécamines* was an organ of the D.R.C., namely: the Sicomines transaction was made possible only because it was an inter-state one between the D.R.C. and the P.R.C.;<sup>91</sup> the Sicomines transaction was of national importance for the benefit of the public;<sup>92</sup> and the D.R.C. made free use of *Gécamines*' revenue.<sup>93</sup>

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<sup>86</sup> See *supra* note 22, para. 54.

<sup>87</sup> See *supra* note 22, para. 51.

<sup>88</sup> See *supra* note 51, para 28; *Supra* note 70, para. 275.

<sup>89</sup> See *supra* note 70, para. 172.

<sup>90</sup> See *supra* note 70, 275.

<sup>91</sup> See *supra* note 51, para. 85; *cf supra* note 3, para. 129.

<sup>92</sup> See *supra* note 51, para. 88; *cf supra* note 3, paras. 109, 132.

It may be said that the Court of Appeal found it arguable that *Gécamines*' assets could be equated with those of the D.R.C., for it was only then that the *Gécamines* tranche could be subjected to enforcement for D.R.C.'s liability. Of course, one might be stretching this argument too far — just because the Court found it arguable on the facts that the “entry fees” in the *Gécamines* tranche belonged to the D.R.C. does not mean *Gécamines*' entire asset pool can be equated with that of the D.R.C. Pursuing this line of argument would be too narrow approach as the sole consideration taken into account is the Sicomines transaction. Nevertheless, at the very least, the strong similarity in the reasoning of the Jersey courts and the Court of Appeal cannot be overlooked.

## 7. THE IMPACT OF THE GÉCAMINES CASE ON FUTURE CASES

This being a Privy Council case, it would only be binding on all courts in Commonwealth countries, the U.K.'s overseas territories and British Crown Dependencies. As for the U.K. and Hong Kong, it is likely to be highly persuasive if a question arises as to whether an S.O.E.'s assets can be pursued by the creditors of the state. The courts would have to decide whether the S.O.E.'s assets can be said to belong to the state, in other words, whether the S.O.E. is an organ of the state.<sup>94</sup>

### 7.1. WHERE THE LIABILITY IS INCURRED BY THE STATE

Creditors may want to go after the assets of an S.O.E. to execute an award made against the state, as in the *Gécamines* case. To justify execution against the assets of an S.O.E., the creditor would seek to argue that the S.O.E. is an organ of the state such that its assets can be equated with those of the state. If the *Gécamines* case is followed in future cases, there would be a strong presumption that an S.O.E. is a separate entity. Extreme circumstances would be required to displace such a presumption. When the S.O.E. is found as a

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<sup>93</sup> See *supra* note 51, para. 91; cf *supra* note 3, para. 109.

<sup>94</sup> This paper does not focus on the situation where state-owned enterprises might be a claimant. On this point see generally Mark Feldman, *State-Owned Enterprises as Claimant in International Investment Arbitration*, 31 ICSID REVIEW, no. 1, 2016, at 24-35.

separate entity and not a sham, its assets cannot be equated with those of the state for the purposes of execution of arbitral awards by creditors. If, considering the overall context, the S.O.E. is found to be an organ of the state, its assets can be equated with those of the state and creditors can go after them. It would then be up to the S.O.E. to raise the defence of immunity from execution. The assets of the S.O.E. may or may not be immune from execution depending on the intended purpose of the assets sought to be attached. If the assets are intended for commercial use, no immunity is available and the creditors can execute their awards against such assets under the doctrine of restrictive immunity. If the assets are for a sovereign or public purpose, they would be immune from execution.

In Hong Kong courts, in the absence of clear waiver of immunity from execution provisions or an unequivocal waiver by the state in the face of the courts, creditors are unable to implead a State in the execution of an award against the state because of the application of the doctrine of absolute immunity.<sup>95</sup> Even if an S.O.E. is found to be an organ of the state, its assets would be absolutely immune from execution. Whether the S.O.E. is a separate entity or an organ of state would produce the same result — one where the creditor cannot pursue the S.O.E.'s assets. It would therefore be unnecessary for a Hong Kong court to consider whether an S.O.E. is an organ of the state where the creditor is seeking to execute an award against a state. Going into an examination of the status of an S.O.E. would merely be academic. This leaves little room for the application of the *Gécamines* case in this context.

## **7.2. WHERE LIABILITY IS INCURRED BY THE S.O.E.**

The converse of the scenario in the *Gécamines* case is where the state's assets are being targeted by a creditor of its S.O.E. This may occur where the S.O.E. is considered insolvent, for example. It is likely that courts would apply the same reasoning to this scenario. The starting point would again be to consider whether there are extreme circumstances which displace the strong presumption that the S.O.E. is a separate entity, or whether the S.O.E. was

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<sup>95</sup> See *supra* note 51 and as confirmed in the interpretation of the Basic Law by the N.P.C.S.C.

simply a sham. If the S.O.E. is found to be a separate entity and not a sham, its assets cannot be equated with those of the state. This would mean that the creditors of the S.O.E. will not be able to look to the state's assets for execution. If, considering the overall context, the S.O.E. is found to be an organ of the state, its assets can be equated with those of the state. Then, creditors can go after state assets provided that they are intended for commercial purposes.

Again, the situation in Hong Kong would be different as it follows the doctrine of absolute immunity. Even if an S.O.E. is an organ of the state, both its assets and those of the state are absolutely immune from execution, in the absence of a clear waiver. This is regardless of what purpose the assets sought to be attached serve. If the S.O.E. is a separate entity, a creditor can certainly not seek execution against the assets of the state. The creditor can only seek to execute the award against the assets of the S.O.E., which would have no immunity from suit or execution if it is a separate entity. Again, it is argued that the relevance of the *Gécamines* case with respect to the execution stage is limited in Hong Kong courts. Whether or not a S.O.E. is an organ of the state goes only so far as to determine whether it has immunity from suit or execution against its own assets. Any examination by Hong Kong courts of the S.O.E.'s status for the purposes of execution against state assets would only serve an academic purpose.

## 8. CONCLUSION

Increasingly, states are using their S.O.Es to enter into transactions with others parties. With the precedent set by the *Gécamines* case, the separate legal personality of S.O.Es is to be respected and they are likely to be considered separate entities, unless there are exceptional circumstances to justify assimilating between them and the state. What this would mean on the one hand is that S.O.Es will be increasingly shielded from the creditors of the state, and on the other, S.O.Es would face a high hurdle in raising the defence of immunity. Conversely, if S.O.Es are presumed to be separate entities, states are less likely to be held responsible for the liabilities of S.O.Es. Overall, this

provides a holder of an arbitral award with fewer targets for enforcement. The impact of the *Gécamines* case on future similar Hong Kong cases remains to be seen — but it is suggested that it would be limited and would not go beyond determining whether an S.O.E. has immunity from suit.

One might naturally ask whether the Privy Council had underlying policy considerations due to the fact that a vulture fund was involved. After all, F.G. Hemisphere was a vulture fund that spanned several jurisdictions and was aggressively pursuing the full amount of a debt that it had bought at a huge discount.<sup>96</sup> Perhaps the Board had in mind wider equitable considerations, especially since it seemed to have adopted a wholly novel approach to the issue at hand. The interesting question is whether this case would have been decided in the same way were the enforcement proceedings between the original parties to the arbitral agreement.

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<sup>96</sup> F.G. Hemisphere also won a case the New South Wales, Australia where the court allowed US\$30 million to recover against D.R.C. See VANDA CARSON, *Vulture Fund Wins Case Against Cash-strapped Congo*, SMH.COM.AU (Dec. 22, 2010), <http://www.smh.com.au/business/vulture-fund-wins-case-against-cashstrapped-congo-20101221-194fj.html>. The decision of the court allowing this vulture fund against poor country like D.R.C. was heavily criticized. See James Bai, *Stop Them Circling: Addressing Vulture Fund in Australian Law*, 35 SYDNEY L. REV. 703-730 (2013).