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Quite Extreme Circumstances: Privy Council Determines the \$100m Question in La Générale des Carrières et des Mines ('Gécamines') v F.G. Hemisphere LLC ('Hemisphere')

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On 17 July 2012, the Privy Council (UKPC 27) passed a landmark judgment of relevance for creditors of States seeking to enforce against the assets of State-owned corporations. The Privy Council held that only in 'quite extreme circumstances' would a State-owned corporation (a separate juridical entity formed by the State for commercial or industrial purposes) be deemed as equivalent to the State itself, and so be liable for the State's liabilities (or the State for the entity's liabilities). By reference to a broad review of international case law, the Privy Council set out clear principles which are likely to be persuasive in a number of jurisdictions.

The facts

Hemisphere, a Delaware corporation, purchased the assignment of two International Chamber of Commerce arbitration awards against the Democratic Republic of Congo (the 'DRC') and attempted to enforce those awards against Gécamines, a DRC state owned corporation and its Jersey-based assets (to the value of approximately \$100m).

Hemisphere purchased the debt (assignment of the awards) from Energoinvest DD, a Yugoslavian hydroelectric company, which entered into supply and financing contracts with the DRC when Mobutu Sese Seko was in power 30 years ago. It has been reported that the debt was originally purchased by Hemisphere at approximately \$3.3m. The media often refer to companies such as Hemisphere as 'vulture funds', which buy distressed sovereign debt at a discount and then seek to enforce in a variety of jurisdictions. Hemisphere's efforts have included enforcement actions in the US, Hong Kong, South Africa, Australia and, in this case, Jersey. The most widely reported decision to date being the Hong Kong Court of Final Appeal's judgment (Democratic Republic of Congo v. FG Hemisphere (FACV Nos. 5, 6 & 7 of 2010) which addressed similar facts and held that States enjoy absolute immunity in Hong Kong as a result of the sovereign immunity policy of the People's Republic of China.

The lower courts' decision

Hemisphere brought proceedings against Gécamines in Jersey and on 27 October 2010 the Royal Court of Jersey upheld this claim (including injunctive relief) against Gécamines by concluding that:

‘the exceptional degree of power accorded to the state over the affairs of Gécamines, at all levels, was such that the company was no more, in truth, than an arm of the state with responsibility for operations in a sector of vital importance to the national economy’.

The lower courts decided Hemisphere’s case on the basis of the common law test set out in the English Court of Appeal case of *Trendtex Trading Corp v. Central Bank of Nigeria* [1977] 1 QB 529 (‘Trendex’) (a decision on whether the Central bank of Nigeria, a legal entity incorporated by a Nigerian statute, was a department or organ of the State of Nigeria) where Lord Denning held that he would ‘look to all the evidence to see whether the organisation was under government control and exercised governmental functions’. The Royal Court and the Court of Appeal looked to the company’s formal constitutional position and examined the control exercised by the State in practice over Gécamines and Gécamines’ functions, and ultimately concluded that Gécamines was an organ of the DRC.

On 14 July 2011, the Court of Appeal upheld this judgment. Gécamines appealed to the Judicial Committee of the Privy Council. Lord Hope, Lord Walker, Lord Mance, Lord Wilson and Lord Carnwath (the ‘Board’) heard the appeal.

The Privy Council’s decision - ‘the correct approach’

The Board held that the Court of Appeal had erred in concluding that Gécamines was an organ of the DRC. Lord Mance set the tone right from the outset of the judgment noting that ‘...Hemisphere has here, located, and obtained interim injunctive relief relating to, substantial assets of Gécamines in Jersey, in respect of the DRC *which has nothing to do with Gécamines’ activities* (emphasis added).’

Lord Mance noted that the Board looked beyond the Trendex decision and in particular to the UK State Immunity Act 1978 (the ‘Act’) (and the State Immunity (Jersey) Order, 1985 which extends the provision of the 1978 Act to Jersey) where a clear distinction in the context of immunity has emerged between the State and a ‘separate entity’. Section 14 of the Act essentially provides that references to a State include references to the government of that State and department of its government ‘but not to any entity [thereafter referred to as a ‘separate entity’] *which is distinct from the executive or organs of the government of the State and capable of suing or being sued* (emphasis added).’

Lord Mance continued to explain the correct approach to distinguishing between an organ of the State and a separate legal entity, a distinction which he notes is relevant not only to the question of immunity but also to substantive liability and enforcement, and the key point being that where:

‘a separate juridical entity is formed by the State for what are on the face of it 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. It will... take quite extreme circumstances to displace this presumption.’

The ‘quite extreme circumstances’ may include the situation where the entity has a juridical personality but in effect has no separate existence. To determine whether this is the case requires an examination of the constitutional arrangement as applied in practice as well as the State’s control over the entity’s activities and functions. In other cases, where the State can be said to have interfered with a State-owned entity it may be appropriate to lift the veil of incorporation. In this case, although the DRC may have interfered with its activities, the impact of lifting the corporate veil was not justified nor was Gécamines considered to be a sham company.

The Board undertook a detailed examination of the evidence and concluded that Gécamines was not an organ of the DRC, and therefore not liable, nor its assets answerable, for the DRC’s debts.

Conclusion

The reality faced by investors is that States regularly function through corporations. With the increase in investor-State treaties over the years, enforcing against the assets of a State-owner entity is often an attractive option for those investing into particular jurisdictions. This decision clarifies this area of law and effectively raises the bar. It will be persuasive in many jurisdictions and is likely to make it even more difficult for creditors of States to seek enforcement against the assets of State-owned corporations (and vice versa). Conversely, this is good news for State-owned corporations and should go some way in alleviating their fears of being sued for debts of the State from which they emanate. The Privy Council has set out clear principles in this decision, and emphasises the need for investors to evaluate the risk of entering into transactions with States right from the outset.

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