

## **PRIVY COUNCIL DECISION MAKES IT HARDER TO PURSUE STATE ENTITIES FOR STATE DEBTS**

*La Générale des Carrières et des Mines v F.G. Hemisphere Associates LLC* [2012] UKPC

### **Abstract**

In *La Générale des Carrières et des Mines v F.G. Hemisphere Associates LLC* [2012] UKPC 27, the Privy Council considered in what circumstances, if any, the assets of state-owned companies could be equated with the state and its assets; and whether these assets were available by way of enforcement to satisfy the liabilities of the state.

### **Facts**

In April 2003, F.G. Hemisphere Associates LLC (“**Hemisphere**”) purchased the assignment of two ICC arbitration awards made against the Democratic Republic of Congo (the “**DRC**”). Hemisphere sought to enforce these awards against a number of companies in courts in the US, Belgium, Hong Kong, the Bahamas, Australia and South Africa.<sup>[1]</sup> In the present case, Hemisphere attempted to enforce against the assets of La Générale des Carrières et des Mines (“**La Générale**”), a DRC state-owned corporation (specifically, its shareholding in a Jersey joint venture company and the income flow due from that joint venture company to La Générale). In earlier decisions, both the Royal Court and the Court of Appeal held that Hemisphere was entitled to enforce against La Générale.

La Générale appealed to the Privy Council (the final Appeal Court in this case).

### **Judgment**

The appeal was allowed.

The Privy Council examined the common law principles on State Immunity deriving from the case of *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 QB 529, before turning to the European Convention on State Immunity, and the UK’s State Immunity Act 1978 (along with the Jersey Legislative Order that extended the provisions of that Act to Jersey).

The Privy Council concluded that the correct approach for distinguishing between an organ of the State and a separate legal entity, both for questions of immunity and questions of substantive liability and enforcement, was a more nuanced approach than the previous “all or nothing” approach.

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<sup>[1]</sup> “Vulture funds, creditors and sovereign debtors : how to find a balance?”, Patrick Wautelet, Professor (University of Liège - Belgium).

A court should have regard to the separate juridical status of an entity, along with its constitution, control and functions. However, constitutional and factual control, and the exercise of sovereign functions, would not – without more – convert a separate entity into an organ of the State, especially where the entity was formed for (ostensibly) commercial or industrial purposes, and had its own management and budget. It would take extreme circumstances to displace the strong presumption of the entity's separate corporate status – essentially, it must have no effective separate existence. Examination of the relevant constitutional arrangements as well as of the State's control and the entity's activities and functions would have to justify the conclusion that the affairs of the state and the entity were 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.

### **Observation**

The decision will be welcomed by States, and will impact upon attempts to enforce arbitration awards and judgments in relation to debts owed against assets owned by a state and state controlled entities. Going forward, to enforce claims for sovereign debt against state-owned companies (or vice versa), creditors will need to show that the company is so much part of the state it has no meaningful independent existence.

This decision may be viewed by some observers against the global political and legal background. Similar claims by Hemisphere to enforce against the DRC have been rejected in other courts around the world. This latest ruling means that Hemisphere will no longer be able to enforce the awards against La Générale in the Jersey courts.

Following the earlier decisions in the Royal Court and the Court of Appeal, concerns were expressed as to whether so-called “vulture funds” (described as those that buy up the debt of poor nations cheaply when it is about to be written off and then sue countries for the full value of the debt plus interest which can be ten or 100 times what they paid for it <sup>[2]</sup>) should be allowed to pursue such actions against states like the DRC through the Jersey courts. In a report published by the IMF in 2011, it concluded there were 17 current lawsuits against 8 Heavily Indebted Poor Countries (HIPC) totaling over \$1.5 billion, with over 80% by value of the claims being directed towards the Republic of Congo and the DRC <sup>[3]</sup>. Jersey has now stated that legislation (similar to that already in existence in other countries, such as the UK) will be introduced to limit the amount that creditors can claim<sup>[4]</sup>.

20<sup>th</sup> July 2012

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<sup>[2]</sup> <http://www.bbc.co.uk/news/business-18894874>

<sup>[3]</sup> <http://www.imf.org/external/np/pp/eng/2011/110811.pdf>

<sup>[4]</sup> <http://www.bbc.co.uk/news/business-18894874>