HCMP 928/2008

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

MISCELLANEOUS PROCEEDINGS NO. 928 OF 2008

BETWEEN

FG HEMISPHERE ASSOCIATES LLC Plaintiff
and
DEMOCRATIC REPUBLIC OF THE CONGO 1st Defendant
CHINA RAILWAY GROUP (HONG KONG) LIMITED 2nd Defendant
CHINA RAILWAY RESOURCES DEVELOPMENT LIMITED 3rd Defendant
CHINA RAILWAY SINO-CONGO MINING LIMITED 4th Defendant
CHINA RAILWAY GROUP LIMITED 5th Defendant
and
SECRETARY FOR JUSTICE Intervener

Before: Hon Reyes J in Chambers

Date of Hearing: 18-19 November 2008 and 2 December 2008

Date of Judgment: 12 December 2008

J U D G M E N T

I. Introduction

1. FG, a Delaware company, is the assignee of the benefit of 2 ICC arbitral awards dated 30 April 2003 made in favour of Energoinvest against the Democratic Republic of Congo (DRC). Inclusive of interest accruing on the principal amounts payable under each award, the sum claimed by FG from the DRC is over US$100 million.

2. On 15 May 2008 FG obtained an ex parte Order from Saw J. That Order gave FG leave to enforce the 2 awards as a judgment of the Hong Kong Court.

3. Saw J's Order also enjoined the 2nd to 4th Defendants from paying US$104 million out of a sum of about US$221 million said to be payable by the 2nd to 4th Defendants (or some of them) to the DRC. The 5th Defendant was later added as a party by FG. The 2nd to 5th Defendants all belong to the China Railway Group.

4. It is FG's case that the US$221 million constitutes monies payable to the DRC as "Entry Fees" under a Cooperation Agreement (CA) and a Joint Venture Agreement (JVA) between the DRC and the 2nd to 4th Defendants (among others). By obtaining Saw J's Order, FG was seeking to enforce the 2 awards against the DRC by executing against part of the monies alleged to be due to the DRC as Entry Fees.

5. Saw J's Order additionally gave leave to FG to serve an Originating Summons in relation to these proceedings on the DRC at "Ministère de la Justice, Département de la Justice, Blvd du 30 Juin, Kinshasa ... or elsewhere in the [DRC]".

6. Saw J's Order was later amended by further Orders of this Court.

7. The DRC has since applied to set aside Saw J's Order (as amended) insofar as the same concerns it. The DRC's main bases for so doing (referred to as "upstream issues") are that the Hong Kong Court has no jurisdiction to adjudicate FG's claim against the DRC because:-

(1) the DRC, as a foreign state, enjoys sovereign immunity (especially immunity from execution); and

(2) the Hong Kong Court is not the appropriate forum for the determination of the issue of sovereign immunity.

8. The DRC has raised subsidiary objections (referred to as "downstream issues") for objecting to Saw J's Order. Without prejudice to its main contentions on sovereign immunity, the DRC maintains that Saw J's Order should be set aside in relation to the DRC because:-

(1) the Originating Summons was never properly served on it in Kinshasa or elsewhere;

(2) FG was guilty of material non-disclosure at the time when Saw J's Order was obtained; and

(3) the Entry Fees are not payable to the DRC and do not constitute an asset belonging to it within Hong Kong.

9. On 12 November 2008 the Secretary for Justice, invoking the pubic interest, applied to intervene in the substantive hearing of this matter on 18 November 2008. The Secretary said that he wished to advance submissions on the law relating to sovereign immunity.

10. I allowed the intervention, but on the stipulation (pressed upon me by Mr. Barrie Barlow SC (appearing for the DRC) and Mr. Russell Coleman SC (appearing for FG)) that there should be no adjournment of the substantive hearing.

11. The DRC's solicitors had informed the Secretary of these proceedings on 23 September 2008. No affidavit evidence was provided to explain why, given more than a month's advance notice, the Secretary was belatedly seeking an adjournment as part of his intervention.

12. Ms. Teresa Cheng SC made substantive oral submissions on the issue of sovereign immunity on behalf of the Secretary. In the course of such submissions, she applied for an adjournment. But such application was refused.

13. The hearing concluded in the morning of 19 November 2008 with judgment reserved. But that afternoon the Department of Justice informed me that the Secretary proposed to adduce further evidence which it was said had just become available.

14. That late evidence is a letter (the Letter) dated 20 November 2008 from the Office of the Commissioner of the Ministry of Foreign Affairs (MFA) of the People's Republic of China (PRC) in Hong Kong to the Constitutional and Mainland Affairs Bureau of the Hong Kong Government. The thrust of the Letter is a statement that the PRC has always taken the stance that sovereign states enjoy absolute (as opposed to merely restrictive) immunity before foreign courts.

15. At a hearing on 2 December 2008, I allowed the late evidence to be adduced and heard submissions on the weight to be attached to the Letter.

II. Background

16. The awards relate to financing in the amounts of about US$15 million and US$22 million which Energoinvest provided to the DRC (through the intermediary of the latter's Société Nationale d'Eletricité) in the 1980s. Energoinvest's interest in the awards was transferred to FG by an Assignment dated 16 November 2004.

17. By a Memorandum of Agreement dated 17 September 2007 between the DRC and a consortium of Chinese Enterprises (comprising the Export-Import Bank of China, China Railway and Sinohydro) the broad terms for the creation of a Joint Venture Company (JVC) were set out.

18. Under the Memorandum, the JVC was to be held as to 32% by a Congolese Party and 68% by a Chinese Party. The JVC was to develop the DRC's infrastructure in consideration of the right to exploit certain mineral resources of the DRC over the life of the JVC.

19. The Preamble to the Memorandum refers (among other things) to Cooperation Agreements signed on 3 April and 7 December 2001 between the DRC and PRC. It appears that the Memorandum was intended to provide the framework for implementing those Cooperation Agreements between the DRC and PRC.

20. On 22 April 2008 China Railway, Sinohydro and the DRC entered into the CA. The aim of the CA was to identify the cooperation projects to be implemented by the parties, the ways in which such projects were to be implemented, and the rights and obligations of each party.

21. Pursuant to the CA, a Chinese Consortium (comprising the 2nd to 4th Defendants and 2 Sinohydro subsidiaries) and certain Congolese Investors (comprising Gecamines (the DRC state mining company) and Mr. Gilbert Kalamba Banika) entered into the JVA. Under the JVA, the parties agreed to establish a DRC company in which the 2nd to 4th Defendants would hold 43%, Sinohydro-related companies 25%, Gecamines 20% and Mr. Banika 12% interests.

22. The Chinese Party to the JVA would be responsible for 100% of the JVC's obligations. Gecamines would in turn transfer certain mining rights to the JVC. Each of the parties would be responsible for specific capital contributions, with the 2nd to 4th Defendants making a loan to the Congolese Party in respect of the latter's contribution.

23. Subject to the satisfaction of certain conditions, the Chinese Party would also pay US$350 million of Entry Fees to the DRC and Gecamines for the right to exploit the DRC's mineral resources. Of this, it appears that US$221 million (representing 63.2% of the requisite Entry Fees) would be payable by the 2nd to 4th Defendants.

24. The JVA would only come into effect upon certain conditions having been met. These

conditions include approvals by the China National Development and Reform Committee, the PRC's Ministry of Commerce, and the China State Administration of Foreign Exchange.

25. Further, under the JVA, no Entry Fees are payable until a pre-feasibility report has been approved by the PRC authorities; a satisfactory due diligence has been conducted by the 2nd to 4th Defendants and Sinohydro; and mineral rights have been transferred to the JVC.

26. On 28 June 2008 the parties to the CA and JVA entered into a Supplemental Cooperation Agreement (SCA) and Supplemental Joint Venture Agreement (SJVA).

27. As a result of these supplemental agreements, the 4th Defendant was removed as a party to the joint venture. The 4th Defendant was replaced by the China Metallurgical Group Corporation (a PRC state-owned enterprise) which took up a 20% shareholding. The 2nd and 3rd Defendants' stake in the JVC became 28% and that of the Sinohydro companies 20%.

28. Under the supplemental agreements, Mr. Banika was removed as a member of the Congolese Party. His place was taken by Congo Simco (a DRC state company) which became a 12% shareholder in the JVC.

29. On one construction (by no means the only possible reading) of the SCA and SJVA, the Entry Fees due from the 2nd and 3rd Defendants (US$144 million by reference to their share in the JVC) became payable to Gecamines and Congo Simco, rather than to the DRC and Gecamines as before.

30. Upon FG's ex parte application, by Order dated 7 July 2008 I varied Saw J's Order to reflect the changes brought about by the SCA and SJVA. Although it is possible that the DRC ceased to be entitled to any part of the Entry Fees as a result of the SCA and SJVA, it is FG's case that Gecamines and Congo Simco are merely agents or fronts acting for the DRC. This means (according to FG) that the beneficial entitlement to the Entry Fees (or at least part of those fees) remains vested in the DRC. FG goes so far as to claim that the aim of the SCA and SJVA was to get around FG's present attempt to execute against that part of the Entry Fees payable by some Defendants.

31. The Letter is in the following terms (in translation from the Chinese):-

"Regarding the issue of state immunity involved in the case FG Hemisphere Associates LLC v. Democratic Republic of the Congo and Ors (HCMP 928/2008) before the Court of First Instance of the High Court of the Hong Kong Special Administrative Region, the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the Hong Kong Special Administrative Region, having been duly authorized, makes the following statement as regards the principled position of the Central People's Government.

The consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of 'restrictive immunity'. The courts in China have no jurisdiction over, nor in practice have they ever entertained, any case in which a foreign state or government is sued as a defendant or any claim involving the property of any foreign state or government, irrespective of the nature or purpose of the relevant act of the foreign state or government and also irrespective of the nature, purpose or use of the relevant property of the foreign state or government. At the same time, China has never accepted any foreign courts having jurisdiction over cases in which the State or Government of China is sued as a defendant, or over cases involving the property of the State or Government of China. This principled position held by the Government of China is unequivocal and consistent.

With compliments..."

III. Discussion

A. Issue 1: Sovereign immunity

A.1 Introduction

32. There are 2 schools of thought on the ambit of sovereign immunity in public international law.

33. The traditional thinking is that states being equal to one another, a state enjoys "absolute immunity" from suit in the courts of another state. Under this school, the domestic courts of one state would not normally have jurisdiction to adjudicate upon matters in which another state is named as a defendant. I say "normally" because the absolute immunity school of thinking allows for the possibility of a state waiving immunity before a given tribunal of another state.

34. More recently, from at least the 1950s, as states became more involved in commercial transactions either in their own name or in the form of state-owned corporations, a different line of thinking has established itself. This school of thought would confer only a "restrictive immunity" on states. Thus, under this school, states do not enjoy immunity from suit where they are engaged in transactions of a purely commercial nature. On this thinking, regardless of whether a state has waived immunity, it will be subject to the jurisdiction of a foreign court if in relation to suits arising out of ordinary commercial transactions.

35. The DRC contends that the Hong Kong Court should follow the absolute immunity school. Alternatively, the DRC contends that the transactions involved here are not commercial ones falling within the exception to sovereign immunity contemplated by the restrictive approach.

36. FG says that the Hong Kong Court should adopt a restrictive approach and the relevant transactions here are purely commercial deals. In the alternative, if the proper approach is absolute immunity or if the transactions here are not commercial, then on the facts (FG suggests) the DRC has waived its immunity.

A.2 Sovereign immunity in Hong Kong before 1 July 1997

37. It is plain that immediately prior to 1 July 1997 Hong Kong followed the restrictive approach.

38. At common law, in the first half of the 20th century, the absolute immunity school of thinking was dominant.

39. But a series of landmark decision (especially, The "PHILIPPINE ADMIRAL" [1977] AC 373 (PC), Trendtex Trading Corporation v. Central Bank of Nigeria [1977] 1 QB 529 (CA), and The "I CONGRESSO DEL PARTIDO" [1983] AC 245 (HL)[1]) heralded a shift to the restrictive immunity school of thinking, initially in respect of actions in rem and then in relation to all actions whether in rem or in personam.

40. By the time of Congresso, Lord Wilberforce[2] could state (at 261F):-

"The effect of The Philippine Admiral ... if accepted, as I would accept it, is that ... actions, whether commenced in rem or not, are to be decided according to the 'restrictive' theory."

41. In 1978 the UK enacted the State Immunity Act (SIA) which endorsed the restrictive

approach to state immunity. The SIA was extended to Hong Kong, with only minor revision, by the State Immunity (Overseas Territories) Order 1979.

A.3 The position after 1 July 1997

42. The difficulty lies in determining Hong Kong's position following its reversion to the Mainland on 1 July 1997. At that point, the SIA ceased to have effect in Hong Kong. Counsel have advanced competing theories as to the consequence of the SIA ceasing to operate here.

43. Theory 1 is supported by Mr. Coleman. This posits that, as a result of the SIA ceasing to have effect, the common law as it had developed prior to the extension of the SIA to Hong Kong was revived and continues to apply.

44. Mr. Coleman bolsters Theory 1 by reference to Articles 8 and 18 of the Basic Law. Those articles provide that, following the resumption by the Mainland of sovereignty over Hong Kong, the common law previously in force in Hong Kong shall apply. If that is right, Mr. Coleman says that Hong Kong must continue to follow the restrictive approach.

45. Theory 2 (supported by Mr. Barlow) refers to Articles 13 and 19 of the Basic Law. These provide that the Central People's Government shall be responsible for the foreign affairs relating to the HKSAR. Accordingly, the Hong Kong Court "shall have no jurisdiction over acts of state such as defence and foreign affairs".

46. That means (Mr. Barlow submits) that the Hong Kong Court cannot adjudicate on the question of sovereign immunity, since such issue concerns foreign affairs (namely, the status of a foreign state within the Hong Kong forum). If that is right, then whatever the common law position (whether absolute or restrictive) the Hong Kong Court simply lacks jurisdiction to determine the DRC's claim to sovereign immunity.

47. Theory 3 is a variant of Theory 1. It is advanced by Ms. Cheng on behalf of the DOJ and has the support of Mr. Barlow as an alternative to Theory 2.

48. Theory 3 accepts that the position in Hong Kong is governed by common law. But that is only taken as a starting point.

49. Ms. Cheng argues that the true common law position is not necessarily that reflected by (say) Lord Wilberforce's dictum cited above. Ms. Cheng suggests that previously, in concluding that customary international law had evolved beyond an absolute to a restrictive immunity position, the English Courts (including the Privy Council and the House of Lords) looked largely to the practice of Western states. That was too narrow an approach. The English Courts did not consider that many developing countries (such as the PRC) have consistently adhered to the absolute immunity school.

50. Ms. Cheng has drawn my attention to dicta in Trendtex where Lord Denning MR espouses the view that domestic common law automatically "incorporates" customary international law. This means (according to Ms. Cheng) that if numerous developing states still adhere to the absolute immunity school, customary international law cannot have evolved to a stage where restrictive immunity has become the prevailing orthodoxy.

51. The Hong Kong Court (Ms. Cheng contends) needs to embark upon a comprehensive survey of the general practice of states to determine what precisely customary international law on sovereign immunity is at present. It is only such customary international law, determined after extensive survey, which should now be held by me to constitute Hong Kong common law on sovereign immunity on the basis of Lord Denning's dicta on incorporation.

52. Ms. Cheng does not stop there.

53. She also refers to Articles 13 and 19 of the Basic Law and the Letter. She submits that, given that this Court has no jurisdiction on matters relating to foreign affairs, in any survey, I should attach significant weight to the Letter as indicative of the PRC's views on sovereign immunity.

54. The Letter states that the Central People's Government has consistently advocated absolute immunity in international forums. The PRC has also (the Letter states) persistently objected to any attempt to restrict the ambit of the absolutist doctrine.

55. Ms. Cheng acknowledges that ultimately the Letter is not binding on me. But she submits that, given Articles 13 and 19, whatever the outcome of the survey which the Court undertakes of other states' practice, I should attach significant weight to the matters certified in the Letter. Hong Kong forming part of the PRC, it would be odd (Ms. Cheng stresses) for the Hong Kong Court to adopt a restrictive approach, while the PRC Government has always taken an absolute immunity stance.

56. Theory 4 is based on an argument sketched out by Mr. Graeme Johnston in The Conflict of Laws in Hong Kong (2005).

57. Theory 4 was initially endorsed (albeit with radically differing conclusions) by Mr. Coleman and Mr. Barlow. Later, upon reflection, Mr. Coleman thought that Theory 4 was invalid and disavowed any further reliance on it.

58. Theory 4 relies on s. 6 of the International Organizations and Diplomatic Privileges Ordinance (Cap. 190) (IODPO). That provides:-

"Notwithstanding any provision to the contrary contained in any Ordinance, the international custom relating to the immunities and privileges as to person, property or servants of sovereigns, diplomatic agents, or the representatives of foreign powers for the time being recognized by the People's Republic of China shall, in so far as the same is applicable mutatis mutandis have effect in Hong Kong."

59. Mr. Johnston's book (at §4.043) notes that there is an ambiguity in the section. Does the expression "for the time being recognized by the [PRC]" refer to "sovereigns, diplomatic agents, or the representatives of foreign powers" or does the expression modify "international custom"? The book concedes that the former reading is "the more natural linguistic meaning". But the author suggests that the latter reading is "arguable".

60. If the latter reading is taken, the author suggests that, by IODPO s. 6, "the international custom relating to ... sovereigns" will have to be determined by reference to "international custom ... for the time being recognized by the [PRC]". Consequently, to determine Hong Kong law on sovereign immunity, I must (according to the author) hear expert evidence on the doctrine of sovereign immunity as applied under Mainland law.

61. Such exercise of considering expert evidence on Mainland law is no easier than that of deciding the scope of sovereign immunity under Hong Kong law by reference to a survey of prevailing state practice.

62. There is the evidence of the Letter which I have already mentioned. But, on the footing of Theory 4 being correct, both FG and the DRC have advanced expert affidavit evidence on sovereign immunity under PRC law. The gist of that evidence is that the law on sovereign immunity in the PRC may not be as clear-cut as the Letter states.

63. There is no doubt that until recently the Mainland took the absolute immunity position. Nonetheless, despite what is stated in the Letter, there are indications of a possible change in the position regarding sovereign immunity in the Mainland.

64. This is because on 14 September 2005 the PRC signed the United Nations Convention on Jurisdictional Immunities of States and Their Property. That Convention adopts a restrictive approach in relation to state immunity.

65. The Convention has not yet been signed by a sufficient number of states and so has not yet come into force. Some 30 signatories are required and to date only about half-a-dozen states have signed. Nor has the Convention been enacted by the PRC to form part of Mainland domestic law. But, having signed the Convention, the PRC Government must be taken to have at least indicated its acceptance of the wisdom of the provisions therein.

66. Mr. Coleman (when advocating Theory 4) relied heavily on the Convention as evidence that the PRC had moved (or was moving) from an absolute to a restrictive immunity position.

67. Mr. Barlow, on the other hand, argued that the fact that the Convention had not yet come into effect, whether in the PRC or elsewhere, must be construed as a strong pointer that the absolute immunity theory remained valid in the Mainland.

68. In contrast, Ms. Cheng submitted (and Mr. Coleman later agreed) that the IODPO has nothing to do with sovereign immunity. According to Ms. Cheng, the IODPO merely regulates the recognition of diplomatic immunity and diplomatic privileges enjoyed by representatives of sovereign states or international institutions (such as the United Nations) in Hong Kong.

69. I have summarised the 4 principal theories advocated by counsel in deference to the time spent in hearing submissions on them. But at the end of the day I think that it is unnecessary to express any settled view on the validity of the theories.

70. This is because I do not believe that, on the facts, the relevant transaction here is of a commercial nature. Thus, even if it were supposed on the basis of one theory or other that Hong Kong law adopts a restrictive approach, I do not believe that the transaction here falls within the exception to sovereign immunity recognised by the restrictive approach.

71. If I had to express a provisional view, it would be that Theory 1 seems the more correct and straightforward analysis. This is because I have difficulties with Theories 2, 3 and 4.

72. Insofar as Theory 2 is concerned, I doubt that Basic Law Arts. 13 and 19 have the effect that this Court has no jurisdiction to adjudicate on claims of sovereign immunity. A Court determining such a matter does not embark on an exercise involving "foreign affairs relating to the HKSAR". The Court is not conducting foreign affairs. Nor, to my mind, is the Court adjudicating upon any act of state.

73. All the Court is doing is deciding what customary international law is on a matter and whether the law so discerned forms part of Hong Kong domestic law. If the law is part of Hong Kong domestic law, the Court merely applies it much in the same way as it is bound to apply any other domestic law.

74. Theory 3, on the other hand, seems overwrought. By this I mean that the theory's components do not all sit comfortably together.

75. Brownlie, Principles of Public International Law (7th ed.) states of sovereign immunity (at p. 330):-

"It is far from easy to state the current legal position in terms of customary or general international law. Recent writers emphasize that there is a trend in the practice of states towards the restrictive doctrine of immunity but avoid firm and precise prescriptions as to the present state of the law. Moreover, the practice of states is far from consistent and, as the comments of governments relating to the draft articles produced by the International Law Commission indicate, there is a persistent divergence between adherents of the principle of absolute immunity and that of restrictive immunity...."

76. Given that is an accurate summary of the present position, I am sceptical that a survey of the general practice of states will lead to any meaningful result.

77. Further, if Ms. Cheng is right that it would be anomalous for Hong Kong to take one position (restrictive immunity) while the PRC Government took another (absolute immunity), what is the point of conducting a survey of other states? In reality, Ms. Cheng must be inviting me to treat the Letter as practically conclusive. However, in light of the signing of the Convention by the PRC, I have difficulty in doing just that.

78. The Convention must be some evidence of a trend in customary international law, even if only in relation towards "the law as it should be if it was to accord with good policy" (sometimes referred to as de lege ferenda).

79. In Trendtex (an authority which Ms. Cheng herself urged on me), Lord Denning MR, commenting on state practice relating to sovereign immunity in his time, said this (at 556D-557B):-

"Seeing this great cloud of witnesses, I would ask: is there not here sufficient evidence to show that the rule of international law has changed? What more is needed? Are we to wait until every other country save England recognises the change? Ought we not to act now? Whenever a change is made, someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood. '... We must take the current when it serves, or lose our ventures.': Julius Caesar, Act IV, sc.III.

I see no reason why we should wait for the House of Lords to make the change. After all, we are not considering the rules of English law on which the House has the final say. We are considering the rules of international law. We can and should state our view as to those rules and apply them as we think best, leaving it to the House to reverse us if we are wrong."

80. I understand this to mean that ascertaining customary international law does not mean taking a poll of states and assessing what is the practice of the majority. The Court can look to what the trend is. Consequently, if Lord Denning's dictum is right, in reaching any conclusion about customary international law, I cannot ignore the Convention and the trend which it signifies. The Convention is an important piece of evidence as to customary law.

81. But the Letter is silent on the Convention and the significance of the PRC's signing that document. I am therefore at a loss on how the stance stated in the Letter is to be reconciled (if at all) with the signing of the Convention.

82. On Theory 4, I agree with Ms. Cheng's stance. It seems to me that the IODPO s. 6 does not concern the doctrine of sovereign immunity, but merely the privileges and immunities of diplomats and other similar representatives.

A.4 The nature of the transaction

83. Let me now explain why I do not regard the transaction here as being of a commercial

nature.

84. Assume that under the CA, JVA, SCA and SJVA, the Entry Fees are ultimately payable to the DRC (as alleged by FG and contrary to the case advanced by the 2nd to 5th Defendants). This is the hypothesis most favourable to FG since obviously, if the DRC were not involved at all, there would be no basis for executing against the Entry Fees. Even then, I do not think that the payment of Entry Fees can constitute a commercial transaction of the nature excepted by the restrictive approach.

85. First, consider the context of the CA, JVA, SCA and SJVA. They appear to have been executed within the umbrella cooperation agreements between the PRC and DRC mentioned in the Memorandum.

86. That is not a normal attribute of a routine commercial transaction among businessmen or traders operating to make a profit for their own account. It is true that the Chinese side has entered into the CA, SCA, JVA and SJVA through corporate entities. But those entities are state enterprises. That the PRC has chosen to implement the umbrella understanding between itself and the DRC through state-owned companies cannot detract from the fact that, in reality, the transaction is the working out of a cooperative venture between 2 sovereign states.

87. Second, consider the nature and scale of the undertaking under the CA, JVA, SCA and SJVA. That undertaking is massive and ambitious.

88. In consideration for the transfer to the JVC of the right to exploit extensive copper and cobalt reserves in the DRC (amounting to some 10,616,070 tons), the Chinese Party will build extensive infrastructure in the DRC. That infrastructure comprises railroads, asphalted and non-asphalted roads, urban networks, airports, hospitals, hydroelectric and electric stations, buildings, houses, health centers and universities. The agreements provide for no more nor less than the development of the whole of the DRC for the economic benefit and well-being of its citizens.

89. Contrary to Mr. Coleman's submission, I am unable to characterise a development project of the scale envisaged as a routine trading operation. This is not, for example, a mere requisition of supplies for use in government offices or the engagement of a ship for cargo trading. Few (if any) commercial organisations would be able to carry out a massive undertaking of the sort envisaged without state backing. It seems to me that, in this particular instance, the project is possible (perhaps only possible) because it is being driven by 2 governments (the DRC and PRC) as opposed to private entities.

90. Third, consider the provisions of the CA, SCA, JVA and SJVA. They are not the terms which one would expect or find in a conventional trading contract. Thus, for example, the JVC is to enjoy special tax and customs advantages (including exemptions from import and export duties) in relation to its DRC operations. The flow of capital (free from the risk of expropriation) is stipulated by the JVA as is the promise of any preferential rights legislated by the DRC in the future. Relevant visas and work permits are also assured for expatriate staff of the JVC. These are terms which only states can stipulate in the exercise of their sovereign power.

91. Fourth, consider the Entry Fees. These seem to be in the nature of an up-front payment in consideration of the grant of a licence to exploit the DRC's mineral rights. Such payment strikes me as only one which a state or government can exact. Here the DRC is allowing its natural resources or heritage to be used for the direct benefit of its people.

92. None of the matters which I have just highlighted suggest a purely commercial transaction within the contemplation of the restrictive approach. On the contrary, the matters under

consideration are more the hallmarks of the exercise by states of sovereign authority in the interests of their citizens.

93. In the course of submission, Mr. Coleman pressed upon me the fact that, in various speeches in relation to the agreements here, representatives of the DRC government at the highest level have described the proposed undertaking as a "commercial" venture.

94. But it is important to look at context. Ultimately, whether a transaction is or is not a "commercial" venture within the terms of the restrictive approach is a question of law. The label given by different ministers to a transaction in their speeches cannot be conclusive.

95. In my view, in their speeches the DRC government ministers were saying no more than that, the proposed venture was a proper use of their country's resources. The DRC's heritage (its Government was in effect saying) was not being uselessly squandered or surrendered. The transaction was "commercial" in the sense of being "a good deal" from which everyone would benefit. In particular, the populace of the DRC would be obtaining much-needed and valuable infrastructure.

96. It follows that, even if Hong Kong adheres to the doctrine of restrictive immunity, the relevant transaction as a whole (including the payment of Entry Fees) does not fall within the commercial trade exemption. See, generally, the useful discussion (albeit ultimately inconclusive on the facts of that case) in Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania and another (No.2) [2007] 2 WLR 876 (CA), at §§131-133.

A.5 Waiver of immunity

97. That leaves the question whether the DRC waived the right to invoke state immunity.

98. Mr. Coleman contends that the DRC waived its immunity by submitting to the ICC arbitrations which produced the awards. In particular, Mr. Coleman submits that waiver may be inferred from one or more of the following matters:-

(1) Article 28(6) of the ICC Rules 1998 (which governed the 2 ICC arbitrations). This 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."

(2) The 1st and 2nd ICC awards were made in Switzerland (Zurich) and France (Paris) respectively.

(3) Swiss law adopts a restrictive approach on state immunity.

99. On Article 28(6), Mr. Coleman argues that the submission to ICC arbitrations amounted to an agreement to abide by the ICC Rules. Given the undertaking in Article 28(6) to "carry out any Award without delay," the DRC (Mr. Coleman submits) must be presumed to have waived any right to claim immunity from enforcement of the awards against it.

100. Mr. Coleman cites Creighton v. Qatar (2000) XXV Ybk Comm Arb 458 in support. There the French Cour de Cassation mentioned agreement to Article 24(2) of the ICC Rules 1975 as an example of a waiver of immunity from execution. Article 24(2) was in similar terms to Article 28(6).

101. On the seats of the 2 arbitrations, Mr. Coleman points out that (like Hong Kong) Switzerland and France are parties to the <<New York Convention. Implicit in the submission to arbitration in Switzerland and France (Mr. Coleman reasons) must have been an acceptance of the possibility of the awards being enforced in anyNew York Convention >> state (such as Hong Kong).

102. On this, Mr. Coleman notes Article III of the <<New York Convention>>. That states:-

"Each Contracting State shall recognise arbitration awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

103. As for Swiss law, Mr. Coleman stresses that it does not distinguish between waiver of immunity as to jurisdiction and waiver of immunity as to enforcement. A submission to arbitration in Switzerland is treated as both a waiver of immunity from jurisdiction and enforcement.

104. I am not persuaded that there has been waiver by the DRC of immunity in respect of the enforcement of the 2 ICC awards.

105. First, the issue is whether the DRC has waived the right to claim immunity from execution in Hong Kong.

106. The law distinguishes between waiver of immunity in relation to suit and waiver of immunity in relation to execution. The fact that a state has waived immunity in respect of a suit does not of itself imply that it has also waived immunity from execution in respect of any judgment or award arising from such suit. See, for example, Dicey, Morris & Collins on the Conflict of Laws (14th ed., 2006), p.280 (n. 52) (in the context of the State Immunity Act 1978) and In re Suarez [1917] 2 Ch 131 (involving diplomatic immunity against execution).

107. It follows that I cannot infer anything from the mere fact that the DRC submitted to 2 arbitrations.

108. Second, am I able to infer a waiver from the additional fact the 2 arbitrations were subject to the ICC rules? Let me assume for this purpose that the DRC's submission to ICC arbitrations constituted an agreement to abide by the ICC Rules 1998 (including Article 28(6)).

109. I should only find waiver if there has been clear and unambiguous conduct on the part of the DRC which can be characterised as inconsistent with an intention to invoke immunity from execution. Mr. Barlow (citing Dicey, Morris & Collins, p. 285 (at §10-028)) submits that no less than an express written statement of waiver or an express declaration of waiver before the Court would suffice. But, for the purposes of the present argument, I shall assume that it is enough to found waiver if there is clear conduct which is at variance with claiming immunity from execution.

110. I am not persuaded that Article 28(6) is any clear statement or evidence of waiver.

111. I read that Article as saying no more than that the DRC waives a right of recourse (that is, challenge) against the award to the extent that the DRC can validly waive such right. The article says nothing about (and does not deal with) waiving the right of immunity from execution in some other jurisdiction in relation to an adverse award.

112. It is true that under Article 28(6) the DRC undertakes to carry out an award. But that is far from saying that the DRC waives its right to plead immunity from the jurisdiction of a foreign court in relation to the enforcement of the award. An undertaking to carry out something is not the same thing as surrendering an immunity.

113. With respect, I do not think that Creighton can be right insofar as it was there suggested that submission to an ICC arbitration is without more tantamount to a waiver of immunity from execution. I do not think such conclusion logically follows from the premise.

114. Third, I cannot infer from the simple fact that the awards were obtained in <<New York Convention>> states that:-

(1) the DRC agreed that the awards could be enforced against it in other <<New York Convention>> states; and

(2) the DRC would not raise a plea of immunity against execution in the course of enforcement proceedings in some other <<New York Convention>> state.

115. Article III does not assist me. It is part of a binding agreement among contracting states to the <<New York Convention>>. The DRC is not such a party.

116. The DRC may have been aware of Article III when it submitted to arbitrations in Switzerland and France. The DRC may also have been aware that the latter states were parties to the <<New York Convention. But that does not logically signify a blanket waiver of immunity and a wholesale acceptance that the awards can be enforced against the DRC in anyNew York Convention >> state.

117. Consequently, I can see no explicit conduct on the part of the DRC which can be said to be inconsistent with the maintenance of a stance of immunity from execution.

118. Fourth, I do not think that recourse to Swiss law (whatever it might be) advances FG's argument. To begin with, enforcement being sought in Hong Kong, I do not see why Swiss law is relevant.

119. Further, that Swiss law adheres to a restrictive approach cannot get around the fundamental difficulty which I have already identified. That is the difficulty that, in my view, the transaction here does not fall within the commercial exception envisaged by the restrictive approach. It would still be necessary, presumably even under Swiss law, to point to conduct which is inconsistent with the maintenance of a stance of immunity.

A.6 Conclusion on immunity

120. I do not think that this Court has jurisdiction over the claim against the DRC. The DRC enjoys immunity from execution in connection with the enforcement here of the 2 awards.

121. I do not find that the DRC has waived such immunity.

122. It follows that FG's application to register the 2 ICC awards so as to enforce the same as judgments of this Court against the DRC should be set aside.

B. Forum non conveniens

123. In light of my conclusion, it is unnecessary to deal with this issue.

124. I only note that, had forum non conveniens been raised in isolation, I would have refused to stay this matter.

125. The suggestion is that the issue of sovereign immunity should be stayed to the Supreme People's Court of Beijing.

126. But it seems to me that the validity of the DRC's claim to sovereign immunity is squarely within the competence and jurisdiction of the Hong Kong Court. There is no good reason why I should stay such issue to the Beijing Court.

C. Downstream issues

127. There is no need for me to deal with the downstream issues. I shall only briefly set out my views on those matters.

C.1 Service of the Originating Summons

128. The Originating Summons was never served on the DRC in Kinshasa. Attempts were made to serve the Summons using the procedure set out in Order 11, Rule 7. That proved abortive. The Hong Kong Government passed the relevant documents to the MFA. But the MFA did not accede to the Hong Kong Government's request for the documents to be served on the DRC.

129. FG's solicitors also sent copies of the same by post to various DRC government offices abroad. These appear to have succeeded in drawing the DRC's attention to these proceedings. The result was that the DRC responded by filing an Acknowledgment of Service by its solicitors Huen Wong & Co. on 16 June 2008. That Acknowledgment of Service was expressly limited to the purpose of contesting jurisdiction.

130. FG thus found itself in the paradoxical situation of not having effected proper formal service, but having an Acknowledgment of Service.

131. FG's solicitors attempted to rectify the problem by obtaining an ex parte order for substituted service. They applied for the matter to come before a judge, but the Court listed the matter before Master Lung instead. On 31 October 2008 he ordered that substituted service be effected on the DRC by posting a copy of the Originating Summons to the offices of Huen Wong & Co.

132. Mr. Barlow criticises the procedure used to obtain Master Lung's Order. But I think that FG's solicitors took practical and sensible steps to rectify an unusual situation. I am unable to fault the procedure taken.

133. As Mr. Coleman stresses, plainly the DRC by acknowledging service signified that it was aware of these proceedings. As is self-evident from this Judgment, contrary to Mr. Barlow's suggestion, the procedure taken by FG to serve these proceedings on the DRC has not resulted in the DRC being barred from raising such jurisdictional objections as it sees fit.

C.2 Alleged material non-disclosure

134. I am unable to find any material non-disclosure.

135. In an earlier hearing, I raised the possibility of the enforcement of the awards being contrary to public policy in light of their assignment to FG. I was concerned that the assignment of the awards might constitute maintenance or champerty. I asked whether that possibility had been mentioned to Saw J at the ex parte stage. I was told that it had not.

136. Having now considered the authorities referred to me by Mr. Coleman, I remain of the view that the possibility of maintenance and champerty should have been mentioned at the ex parte stage as giving rise to a potential defence. But I can also see on the authorities that it is highly arguable that the assignments here do not constitute maintenance and champerty. Accordingly, I do not think that the non-disclosure can be regarded as material. Even if the matters had been mentioned to Saw J, he would likely have granted the Order which he made at the ex parte stage.

137. Mr. Barlow submits that FG presented a misleading case in the course of its ex parte application to the effect that:-

(1) FG had enforceable awards for about US$104 million;

(2) the DRC had assets in Hong Kong in the form of a contingent entitlement to Entry Fees; and

(3) the DRC had no defence of sovereign immunity.

138. Mr. Barlow also raised a number of miscellaneous minor criticisms relating to FG's financial position and the joinder of the 5th Defendant.

139. I do not think that the FG misled Saw J in any of the ways alleged. FG presented the facts as it understood them to be at the relevant time. It stated its case in respect of those facts. Merely because the DRC disagrees with such case does not mean that FG misled Saw J.

140. I have held that the DRC is entitled to rely on sovereign immunity. Before Saw J, FG mentioned that the DRC might claim immunity. FG submitted that, as far as it was concerned, it had an answer (based on the restrictive approach) to a claim for immunity. Simply because I have now held FG to be wrong on the matter does not mean that FG misled the judge.

141. Mr. Barlow suggested that FG did not make proper disclosure of a lack of assets to back its undertaking as to damages. I disagree. FG made it plain that its only assets were the awards.

142. Mr. Barlow suggests that there was something wrong about the late joinder of the 5th Defendant. I am unable to find anything wrong in such late joinder.

143. There is, accordingly, nothing in the allegations of material non-disclosure.

C.3 DRC has no assets in Hong Kong

144. On this I would simply make 2 points.

145. First, even if the Entry Fees are an asset of the DRC, I have held that the DRC can raise immunity from execution against the Entry Fees. There is accordingly no need to resolve the question whether under the CA, SCA, JVA or SJVA the Entry Fees (or part of them) are actually ultimately due to the DRC.

146. Second, Mr. Barlow notes that payment of the Entry Fees is subject to conditions. He submits that in consequence, even if the Entry Fees were ultimately owed to the DRC, there is no presently existing asset which can be attached.

147. I do not think that this submission is right. The existence of conditions would not render valueless a right to the Entry Fees. The contingent right to Entry Fees (or part of them) would be an existing asset (a chose in action) against which equitable execution (at the very least) could be levied.

IV. Conclusion

148. There will be the following Orders:-

(1) On the DRC's Summons dated 7 July 2008:-

(a) There will be a Declaration that this Court has no jurisdiction over the DRC in these proceedings.

(b) The injunction granted by Saw J against the DRC in Paragraph 2 of his Order dated 16 May 2008 will be discharged.

(c) The leave granted by Saw J's Order for the 2 ICC awards to be enforced against the DRC as a judgment of this Court will be set aside.

(d) The leave granted by Saw J's Order to serve the Originating Summons on the DRC outside the jurisdiction will be set aside.

(e) The leave granted by Master Lung to serve the DRC by way of substituted service will be set aside.

(2) As against the DRC, the Originating Summons dated 16 May 2008 and later amended on 28 August 2008 will be dismissed.

149. There will be liberty to apply.

150. I regard the Orders set out in §§148(1)(b)-(e) and 148(2) above as consequential upon the Declaration in §148(1)(a).

151. The liberty to apply given in §149 above extends to the 2nd to 5th Defendants. They took a neutral stance in the hearing before me. My decision may have consequences upon the claims made against them in the Originating Summons. They are at liberty to restore this matter before me for submissions on the further conduct of the Originating Summons in light of this Judgment.

152. The DRC asks for a Declaration that it has not been properly served with the Originating Summons. But, whether or not it had been served properly, the DRC chose to acknowledge service, even if only for the purpose of challenging jurisdiction. The particular Declaration sought therefore seems to me to be pointless. The Declaration is refused.

153. The DRC has substantially prevailed on its Summons and (insofar as the DRC is concerned) on the Originating Summons. Accordingly, there will be an Order Nisi as follows:-

(1) As against FG, the DRC is to have the costs of its Summons and of the Originating Summons. Those costs will include the DRC's costs in relation to the Secretary for Justice's applications to be joined as a party and to adduce late evidence.

(2) Costs will be on a party-and-party basis, to be taxed if not agreed. I do not presently see a ground for granting costs on an indemnity basis as sought by the DRC's Summons.

154. There will be the following additional Orders Nisi:-

(1) As against FG, the 2nd to 5th Defendants are to have their costs of DRC's Summons. Such costs are to include their costs incurred in relation to the Secretary for Justice's applications to be joined as a party and to adduce late evidence.

(2) The Secretary for Justice will bear his own costs of his various applications.

155. Finally, Mr. Coleman indicated at the hearing that, in the event I held against FG, his clients were likely to take the matter on appeal. He asked for interim measures to preserve the position pending an application for a stay pending appeal.

156. Accordingly, there will be a direction that the Orders made in §148 above will be stayed for 7 days from the date of this Judgment. If within those 7 days, FG applies for a stay of execution pending appeal, the Orders in §148 will be stayed until the disposal of such application or further Order.

(A.T. Reyes)
Judge of the Court of First Instance
High Court

Mr. Russell Coleman, SC and Ms. Zabrina Lau instructed by Messrs Sidley Austin, for the Plaintiff

Mr. Barrie Barlow, SC instructed by Messrs Huen Wong & Co., for the 1stDefendant

Mr. Ivan Ng (18-19.11.2008) of Messrs DLA Piper Hong Kong, for the 2nd to 5thDefendants

Mr. Richard Zimmern (2.12.2008) instructed by Messrs DLA Piper Hong Kong, for the 2nd to 5thDefendants

Mr. Teresa Cheng, SC and Mr. Adrian Lai (2.12.2008) instructed by the Department of Justice, for the Intervener