FG Hemisphere Associates

Jurisdiction:	Jersey
Judge:	H. W. B. Page, Jurats Tibbo, Kerley
Judgment Date:	27 October 2010
Neutral Citation:	[2010] JRC 195
Reported In:	[2010] JRC 195
Court:	Royal Court
Date:	27 October 2010

Text

[2010] JRC 195

ROYAL COURT

(Samedi Division)

Before:

H. W. B. Page, **Q.C., Commissioner, and** Jurats Tibbo **and** Kerley.

Between
FG Hemisphere Associates LLC
Representor
and
(1) The Democratic Republic of Congo
(2) La Generale des Carrieres et des Mines
Respondents

and

Groupement pour le Traitemant du Terril de Lubumbashi Limited
Party Cited

Advocate K. J. Lawrence **for the Representor.**

Advocate J. Harvey-Hills **for the Second Respondent.**

Advocate A. D. Robinson **for the Party Cited.**

The First Respondent did not appear and was not represented.

Authorities

Trendtex Trading Corp v Central Bank of Nigeria [1977] 1 QB 529, CA at 559, 560.

Kensington International Limited v Republic of Congo [2005] EWHC 2684 (Comm).

Walker International Holdings v Congo [2005] EWHC 2813 (Comm.). la Loi No. 78-002 du 8 janvier 1978 portant dispositions généralés applicables aux enterprises publiques.

Compensation (Defence) Act 1939.

Pothier, in his Traités de la Procédure Civile et Criminelle.

Société Eram Ltd v Cie Internationale [2004] 1 AC 260 HL.

Dicey, Morris and Collins on The Conflict of Laws, 14 th Ed. (2006), Vol.2 at p.1116.

New York Life Insurance Company v Public Trustee [1924] CA 2 Ch 101.

Kwok v Estate Duty Commissioner [1988] Privy Council 1 WLR 1035.

In re Russo-Asiatic Bank [1934] Ch. 720, 738.

F & K Jabbour v Custodian of Israeli Absentee Property [1954] 1 WLR 139, 146.

Cambridge Credit Corporation v Lissenden (1978) NSWLR, 411.

In re Helbert Wegg & Co [1956] Ch 323.

Richardson v Richardson [1927] P228.

Deutsche Shcachtbau-und Tiefbohrgesellschaft mbH v Shell International Petroleum Co Ltd [1990] 1 AC 295.

In re Kaplan [2009] JLR 88.

Proceeds of Crime (Jersey) Law 1999.

King v Serious Fraud Office [2009] 1 WLR, 718, [2009] UKHL 17.

Bankruptcy (Désastre) Jersey Law 1990.

In re Rosedale Investments [1995] JLR 123.

This judgment was supplied to the parties in draft in accordance with Practice Direction RC 10/01 on 10 th September, 2010. The Royal Court subsequently declined to accede to an application by the Representor, Second Respondent and Party Cited to suspend formal handing down pending the outcome of settlement discussions then in progress but, on the application of the Second Respondents and the Party Cited granted leave to appeal that ruling. On 27 th October, 2010, settlement discussions having failed, the Second Respondents and Party Cited gave notice of withdrawal of their appeals. Judgment is, accordingly, handed down as of 27 th October, 2010.

THE COMMISSIONER:

CONTENTS

I INTRODUCTION

1 The issues with which this judgment is concerned arise in proceedings launched by the Representor ("Hemisphere") on 12 th March, 2009, against the First Respondent ("the DRC"), the Second Respondent ("Gécamines") and the Party Cited ("GTL"). Although the trial of those issues is technically the inter partes hearing in respect of certain orders

granted by this Court ex parte on 19 th March last year (Clyde-Smith, Commissioner, and Jurats Le Breton and Newcombe), in practice it represents by agreement of the parties the definitive determination of the substantive issues raised by Hemisphere's Representation.

2 Hemisphere is the assignee of the benefit of two ICC arbitration awards made against the DRC and a Congolese company called Société National D'Electricité in April 2003 (“the Awards”). The identity of the original claimants in the arbitrations and the circumstances of the disputes that resulted in the Awards are of no relevance to the present trial. The validity of the assignment in November 2004 is not in issue. Since then Hemisphere's efforts world-wide to recover on the Awards have, it is said, met with little success, with the result that there is now in excess of US$ 100,000,000 still outstanding, together with daily-accruing interest.

3 Gécamines is a substantial mining company incorporated in the DRC, the largest of several. Hemisphere contends that it is, on a true analysis, an organ of the state of the DRC. The contention is vigorously denied by Gécamines.

4 GTL is a Jersey-incorporated company with its registered office in St. Helier in which Gécamines owns shares and with which Gécamines has a long-running contractual relationship which generates considerable income for Gécamines.

5 Hemisphere's purpose in starting proceedings in this court is to endeavour to recover at least a large part of the amount still unpaid by the defendants to its original claims by obtaining leave to enforce the Awards (as New York Convention awards) as a judgment of this Court against the DRC and Gécamines and to execute that judgment against certain assets of Gécamines (and thus assets of the DRC) which, Hemisphere contends, are situate in Jersey and amenable to execution.

6 The assets in question are said to be 23,600 shares in GTL of which Gécamines is the registered owner (“the Shares”), and the right of Gécamines to receive certain payments due to Gécamines by GTL in respect of the supply of cobalt and copper-bearing slag under a contract known as “the Slag Sales Agreement” (“the Slag Sales Payments”). Hemisphere believes that payments accruing due under this agreement are likely to be of the order of US$30–45 million per annum for the next eight years or so.

7 The principal issues of substance are whether the relationship between Gécamines and the DRC is such that the former should properly be regarded as an organ of state, and if so whether execution against the Shares and Slag Sales Payments is permissible. The first of these is essentially an issue between Hemisphere and Gécamines; the second an issue which is also contested by GTL. The DRC itself has played no part in the proceedings.

8 The original order made by this Court, ex parte, on 19 th March last year:-

The Court also granted Hemisphere interim conservatory relief against GTL, the DRC and Gécamines designed to freeze the target assets together with extensive disclosure orders.

> (i) granted interim conservatory relief in the form of an immediate *arrêt entre mains* of the Shares and the Slag Sales Payments held or under the control of GTL;
>
> (ii) granted leave to Hemisphere to enforce the Awards in the same manner as a judgment against the DRC and Gécamines in Jersey subject to either of these parties having leave to apply to set aside or vary that part of the order within a period of two months and fourteen days from service on them of the order ("the Relevant Period"); and
>
> (iii) granted leave to Hemisphere to effect execution of the Awards by way of distraint upon the Shares and the Slag Sales Payments by means of *arrêt entre mains confirmée* and otherwise in the manner stated in the order, subject again to the two Respondents – and in this case also GTL as Party Cited – being at liberty to apply to set aside or vary this part of the order and provided that no such execution should take place before expiry of the Relevant Period and that in the event of any such application this part of the order should not take effect until the application had been determined.

9 Following the issue by both Gécamines and GTL of summonses challenging the freezing order, the active parties (that is all those other than the DRC) agreed, by consent order embodied in an Act of Court dated 29 th September, 2009, certain variations to the earlier order, notably that the disclosure provisions should be stayed and that the issues raised should be decided

> *"by way of an inter partes hearing to review the ex parte applications as to whether assets are available to satisfy the arbitration awards against [the DRC] in particular but not limited to the issues (1) as to whether [Gécamines] is an organ of [the DRC] and (2) if so, whether the Respondents have sovereign immunity to [Hemisphere's] claims";*

There was also to be a timetable for service of evidence and skeleton arguments with a view to a hearing with an estimated duration of five days. In the event, sovereign immunity as a potential defence subsequently dropped out of the picture.

10 Hemisphere's case that Gécamines is to be regarded as an organ of state of the DRC ("the personality issue", to borrow a phrase coined in the *Trendtex* case to which we refer below) rests in part on Gécamines' historic constitution and related legislation concerning Congolese public enterprises, in part on recent but as yet incomplete legislative reforms, and in part on the relationship in practice between successive governments of the DRC and Gécamines. Gécamines, for its part, insists that both as a matter of legal formality and practice it is and has always been a duly constituted entity in its own right, wholly independent of the state, a position that has now been re-enforced by legislative reforms that began in April 2008 and are expected to be complete in the course of 2010.

11 Success for Hemisphere on this central issue would not, however, be the end of the matter. It is not disputed that, in those circumstances, the Shares could in principle be taken by Hemisphere in execution of its judgment. But, in the case of the Slag Sales Payments, issues arise (i) as to whether the situs of the debt represented by those payments is Jersey (in which case it would be attachable here) or somewhere else (in which case there would be no jurisdiction to attach it); (ii) as to whether relief should be refused on the ground that there is a risk that Gécamines could be required to pay twice; and (iii) as to whether there would in reality be any scope for the Viscount to collect the Payments – and, if not, whether the Court should refuse, as a matter of discretion, to confirm the interim attachment orders. In any event, questions arise as to the extent to which it is appropriate to make the disclosure orders sought by Hemisphere.

II Law-on the Personality Issue

12 There was substantial agreement between Advocate Kerry Lawrence who appeared for Hemisphere and Advocate Justin Harvey-Hills representing Gécamines that, in addressing the question whether Gécamines is to be regarded as an organ of state so as to render its assets liable to execution by creditors of the DRC, the test may be taken as whether, at the relevant point in time (a matter addressed a little later on), it was under the control of the government and exercised governmental functions – those being the criteria propounded by Lord Denning MR in *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 QB 529, CA at 559, 560:-

> ***"If we are still bound to apply the doctrine of absolute immunity, there is, even so, an important question arising upon it.*** The doctrine grants immunity to a foreign government or its department of state, or any body which can be regarded as an "alter ego or organ" of the government. But how are we to discover whether a body is an "alter ego or organ" of the government?…….I confess I can think of no satisfactory test except that of looking to the functions and control of the organisation. I do not think that it should depend on the foreign law alone. I would look to all the evidence to see whether the organisation was under government control and exercised governmental functions."

13 *Trendtex* concerned a claim of state immunity made by the Nigerian Central Bank and required the Court to address, among other things, the question whether, as a matter of international law, the former widely-espoused rule of absolute immunity had been supplanted by a practice among nations of according immunity only in respect of acts of a governmental nature and not in respect of acts of a commercial nature – the so-called restrictive theory: hence the introductory words in the passage cited above. But in accepting that passage as the most frequently quoted formulation of the relevant test it is important to bear in mind that the phrase "alter ego or organ" (the latter of which has been widely used in submissions of both counsel in the present proceedings) was and is no more than convenient shorthand for the concept with which the court had to wrestle and was only one

of several formulations used in the judgments in *Trendtex*:- others included ***"government department", "emanation, arm, alter ego or department", "part and parcel of the State"*** (Stephenson LJ); ***"a mere instrument of that government", "a mere government bureau", "a department of the government", "an organ or department of government", "so related to the Government of Nigeria as to form part of it"*** (Shaw LJ). It is also to be noted that the judgments of both Shaw and Stephenson LJJ shied away from explicitly adopting anything quite as simple as Lord Denning's formulation of the relevant test and preferred to approach the problem in more discursive terms, placing emphasis on legislative intent and the Bank's constitution powers and duties, ***"the functions that it performs"*** and ***"the activities it pursues".***

14 We were also referred to two more recent English case the contexts of which are rather closer to home: the decision of Cooke J in *Kensington International Limited v Republic of Congo* [2005] EWHC 2684 (Comm.) and that of Morison J in *Walker International Holdings v Congo* [2005] EWHC 2813 (Comm.). Both involved attempts by judgment creditors of the other 'Congo' state, The Republic of Congo (formerly the Peoples' Republic of the Congo and sometimes referred to as "Congo-Brazzaville"), to enforce judgments against property nominally in the hands of other entities: proceeds of the sale of oil in *Kensington* and shares in a house in Sackville Street, London in *Walker*. Central to both cases was the role and status of the state owned oil company Société Nationale des Petroles du Congo ("SNPC"), the claimants in each case alleging that the true state of affairs – that SNPC and related entities were part and parcel of the state — had been deliberately concealed by means of sham structures and transactions designed to defeat creditors of the state. In each case, therefore, much of the trial was concerned with the substance or otherwise of those structures and transactions. And in each case the court found that SNPC and related entities had no real existence separate and distinct from the state, conclusions which, Mr Harvey-Hills argued, turned on the peculiar nature of SNPC which, he contended, was very different from that of Gécamines. We return to this matter at a later stage, but it is right to make clear straight away that there is no suggestion in the present case that Gécamines is in any sense a sham or has been devised as a smoke-screen for the Government's activities.

15 In reaching this conclusion, Cooke J in *Kensington* expressly adopted both Lord Denning MR's ***"government control and governmental functions"*** test in *Trendtex* and Shaw LJ's formulation that ***"whether or not a particular organisation is to be accorded the status of a department of government or not must depend upon its constitution, its powers and duties and its activities",*** observing that the issues with which he, Cooke J, was concerned were not the same as those in *Trendtex*, but ***"the answers will turn on the self same factors."*** And in *Walker* Morison J held that the appropriate test was ***"more akin to the test of whether a State owned company is, for immunity reasons, to be regarded as a department of State or as a separate entity"***. On that basis, he said, the decisions in *Trendtex* and later cases in that area were relevant, although he did not reiterate the terms of the test.

16 Other principles suggested by Mr Harvey-Hills as flowing from these cases and of

particular relevance to the present litigation were that there can be ***"no intermediate or hybrid status"*** for an entity for present purposes (per Shaw LJ in Trendtex); that the burden is on Hemisphere to prove its case; and that the requirements of control by the Government and performance of governmental functions by Gécamines are cumulative and not alternative. None of these was seriously challenged by Miss Lawrence. For our own part, however, while it is easy to understand why performance of governmental functions should be a necessary element of enjoying the privilege in international law of immunity from suit or execution, it is less obvious why (hypothetically) property held in the name of an entity which is engaged in activities that would not by any stretch of imagination normally be described as "governmental" but which is wholly owned and controlled by the state (and, by any other standard one cares to think of, is nothing more than an instrument of the state), should not be available to creditors of the state to the same extent as any other state property. It may be that the matter will need to be explored on some future occasion: for the present we are content to proceed on the basis that both limbs of the test need to be satisfied if Hemisphere is to succeed, noting in passing that the exploitation of the nation's oil reserves by SNPC was clearly regarded by both Cooke J and Morison J as a governmental function.

17 Finally, Miss Lawrence emphasised the observation of Lord Denning MR that in applying the test that he regarded as the appropriate one, regard must be had not just to the "foreign law" (by which we take him to have meant the constitutional formalities of the organisation in question) but to "all the evidence to see whether the organisation was under governmental control and exercised governmental functions": what Miss Lawrence called "the reality" of things. Mr Harvey-Hills did not suggest otherwise.

III <u>The form of the trial and the nature of the evidence</u>

18 By common consent of the parties there were no formal pleadings apart from Hemisphere's Representation and the trial took the form of a hearing on the basis of documentary and affidavit evidence, without discovery and without any witness appearing in person. The issues were defined by the terms of the Court's order of 29 th September, 2009. setting out the question to be tried, by the exchange of affidavits, by summary Statements of Case directed by the Court and by the parties' respective skeleton arguments.

19 The trial took place over a period of five days in June this year, with Advocate Anthony Robinson representing GTL only appearing (with the consent of the Court) on the final two days.

20 It is in the nature of things that the bulk of documentation likely to throw light on the relationship between Gécamines and the State and Government of the DRC is in the hands of those parties and that, in the absence of discovery Hemisphere has been constrained to rely on legislation and other publicly available governmental material, on a small number of items of correspondence and other documents exhibited by Gécamines itself, and on published reports by international bodies with a close interest in the DRC. Apart from

documents put in evidence by Gécamines, most of these materials were introduced as exhibits to affidavits by Mr Peter Grossman, a Managing Director of Hemisphere, or to reports by Maître Mukadi Bonyi of Mukadi Bonyi & Associes, Cabinet d'Avocats, Bruxelles, a distinguished Congolese advocate and academic. Mr Grossman himself has no first hand knowledge of the matters with which we are currently concerned, although his evidence was highly material at the stage of the ex parte hearing as regards the circumstances in which Hemisphere came to be making its claim, attempts to enforce the Awards in other jurisdictions and the basis for Hemisphere's belief that there are assets in Jersey against which it could enforce a judgment.

21 Me Bonyi was, similarly, not in a position to give direct evidence of the relationship between Gécamines and the Government and there were only limited areas in which points of law arose on which he was able to supply true expert opinion. But his qualifications and experience *(among other things:- Avocat à la Cour Suprême de Justice et la Cour d'Appel de Kinshasa; Chef du Département de Droit Privé et Judiciaire de Droit de l'Université de Kinshasa; Conseiller Juridique au Ministére de l'Information et de la Presse, Kinshasa (1986); Conseiller Juridique au Cabinet du Président de la République (1986–1990); Consultant a la Banque Mondiale, la Banque Commerciale du Congo, Le Bureau International du Travail/STEP (Kinshasa), le Fédération des Enterprises du Congo, et l'Union Nationale des Travailleurs du Congo)* equipped him well to draw together the disparate strands of the history of the DRC, its mining sector and Gécamines and to present them in a coherent way. Mr Harvey-Hills submitted that this was all worthless and invited the Court, in advance of the trial, to rule out his reports as inadmissible and also on the ground that there had been no order for exchange of expert reports in the case. This the Court declined to do, not least because of the late stage at which the application was made – six months after the directions for trial made by consent in September last year – but also because it was by no means clear, at the stage of that application, to what extent the contents of his reports would or would not prove to be relevant and admissible and it appeared wrong to take too strict a line in relation to material of this kind: it is evident from the reported decisions in *Trendtex*, *Kensington*and *Walker*, that courts have traditionally taken a liberal approach to the admission of background evidence and opinion from experts such as Me Bonyi in relation to subjects of the kind with which we are concerned. In the event, Me Bonyi's reports in the present case do, if nothing else, serve a useful purpose, as we have said, in helping to put matters in a coherent context. But when it comes to making definitive findings of fact on contested issues we have been careful to base our findings on documentary material or the evidence of Gécamines' own witness, Mr Mukasa, and not on assertions of fact or opinion by Me Bonyi.

22 As regards reports by international bodies and other groups, we regard it as entirely legitimate and useful to take cognisance of reports by the World Bank on the basis of its standing and its close direct involvement over a number of years in helping to promote the economic and political development and stability of the DRC, something that Gécamines itself was keen to emphasise repeatedly in its own evidence and submissions. It may be that they are not reliable in every detail; but where they deal with constantly recurring themes or corroborate facts evidenced elsewhere or record concerns, recommendations or proposed programmes, there is every reason to accord them due weight (as Morison J did

with certain IMF reports in *Walker*). Except in very limited respects, where indicated, we have, however, taken no account of the several reports by groups of NGOs (Non Governmental Organisations) adduced on behalf of Hemisphere, given the difficulty of assessing their reliability and the well known propensity of some NGOs to have campaigning agendas of their own. Nor have we attached any weight to press reports of interviews with Mr Paul Fortin, the managing Director of Gécamines until September last year, which Miss Lawrence invited us to note.

23 For its part, Gécamines' evidence consisted of two affidavits by Mr Caliste Mukasa Kalembwe (“Mr Mukasa”) and documents exhibited by him. He explained that he has worked for Gécamines since 1978, except for a period between 2002 and 2005. He began his career as a mining engineer and thereafter progressed through a series of positions on the technical and operations side ending up as *sous directeur technique* in July 2001. Between 2002 and 2005 he worked for another mining company (though his own CV appears to indicate that he continued to hold a position described as *grand directeur hiérarchiqueà la Gécamines mais sans fonction précise*). In December 2005 he applied for and was appointed to the position of *administrateur délégué adjoint* (to which we shall refer as “deputy managing director”), a post that he held until the then *directeur général* (“managing director”), Mr Paul Fortin, left in September 2009 and Mr Mukasa was appointed *directeur général ad intérim* (“interim managing director”).

24 With this background we should naturally be slow to question Mr Mukasa's evidence, particularly in circumstances where there is no other witness of fact to gainsay him and there has been no cross-examination. We would certainly have expected him to be well qualified to testify to much of Gécamines' history over the past twenty years or so and, in particular, to speak authoritatively and in detail about events since his appointment as interim managing director with a seat on the board of directors in December 2005. As it is, he seems to us to have fallen short of expectations in two troubling respects which have left us with significant reservations about the weight that we might otherwise have given to his evidence. The first concerns the construction that he seeks to put on certain events that occurred between 2007 and 2009 – notably those covered in sections VII and VIII below – a gloss that is difficult to square with contemporaneous documents and statements by ministers, coupled with a number of stark inconsistencies between what he says and what the documents record. The second arises from what appears to be a distinct reluctance to offer more information and documents than he does in relation to certain aspects of those same events and, importantly, the latest state of play as regards the reform of Gécamines to which he and Mr Harvey-Hills attach such importance. Details of these concerns appear in the appropriate sections of this judgment. We do not, however, accept as established certain suggestions of political bias or corrupt conduct made or hinted at by Hemisphere.

25 A notable feature of the case is that the DRC itself has done nothing to support Gécamines' case, having played no part in the trial. Nor was evidence from any witness representing the government of the DRC adduced by Gécamines (cf Morrison J's observations in *Walker* on the failure of Fininco to call any witnesses from the government or SNPC.)

26 As between GTL and Hemisphere, disputed issues of fact were of limited scope and GTL's evidence was confined to a short affidavit by Mr Sami Kallioinen, Group Controller of OMG Kokkola Chemicals Holding B V (“OMG”), the majority shareholder in GTL, and a director of GTL.

27 Apart from the World Bank reports, the originals of most of the exhibits were in French, as were Mr Mukasa's affidavits. However, the trial was largely conducted by reference to English language translations produced by the parties (sometimes a little stilted) and we have for the most part adopted the same practice in this judgment (with occasional adjustment), using French only where it appears particularly appropriate or convenient to do so.

28 Before turning to the parties' respective contentions on “the personality issue”, it is necessary to understand something of the historical, political and economic context in which the material events with which we are concerned occurred.

IV The Democratic Republic of Congo

29 The state of Congo, formerly a Belgian colony, gained its independence in 1960 but was almost immediately beset by political unrest. In 1965 Joseph-Desire Mobutu (otherwise Mobutu Sese Seko), an army officer, seized power in a coup. In 1971 he was elected President, the country's name was changed to Zaire, and an intensive period of ‘Zairisation’, designed to promote the influence of African culture and influence in the nation's affairs, began. Mobutu was to remain President for the next 26 years.

30 In the course of 1994–95, a huge influx of refugees in the eastern part of the country fleeing war in neighbouring Rwanda began to destabilise the region. In 1997 war broke out. Rebel forces under Laurent-Desire Kabila, supported by troops from Rwanda and Angola, invaded Congo, ousted Mobutu and re-adopted the title “Democratic Republic of Congo”. Prospects of peace were, however, short-lived. In 1998, a rebellion against Laurent Kabila led to renewed civil war and to internal armed conflict between different factions which continued to engulf the country for the next two or three years. The government managed to negotiate a cease-fire with some of the rebel factions in August 1999 (“the Lusaka Accord”) and an “inter-Congolese dialogue” designed to bring about peace and re-unification was started. But the Accord was widely violated by all parties. In January 2001, Laurent Kabila was assassinated and his son, Joseph Kabila, was declared President.

31 By February 2002 UN-sponsored peace talks had begun in South Africa, a process which eventually resulted in what became known as the Sun City Accord of April 2003, a draft new constitution, and the formation, pursuant to that Accord, of a transitional government under the presidency of Joseph Kabila for a two-year period pending elections.

32 The impact of these events was summarised in a World Bank report dated 26 th January, 2004, entitled “Transitional Support Strategy for the Democratic Republic of Congo” in the following terms:-

> *“After about eighty years of colonial rule, several conflicts in the immediate post-independence period, and a long period of corruption and mismanagement under President Mobutu Sese Seko, DRC, which is the second largest country in Sub-Saharan Africa……entered the 1990s in a state of quasi-collapse.* That decade was marked by successive episodes of increasing violence: looting by the armed forces in 1991 and again in 1993, a first conflict in 1997 (which caused the fall of President Mobutu and his replacement by President Laurent-Desire Kabila) and a second conflict between 1998 and 2003……during which a reported 3.1 million people died, and many more had their lives dislocated. The level of devastation caused by these conflicts is extreme, as illustrated by the collapse of per capita income, which, at $96 (29 cents per day) in 2002, is only a fraction of its 1960 level ….” (p.2).

Mr. Mukasa put it this way:-

> *“It is believed that these wars claimed over five million lives, which makes them the deadliest since the Second World War.* After 2002, the political situation in Congo began to stabilize. Nevertheless, the economy had been virtually destroyed by the wars. In 2002, The Gross Domestic Product per resident had fallen to US$96. 75% of the population lived on less than a dollar a day. Life expectancy had fallen to 45 years and the infant mortality rate was in the order of 128 per 1,000 births” (figures derived from the same World Bank report).

33 The report referred to above was the first of a series produced by the World Bank from July 2001 onwards designed to support the government in its endeavours to establish a lasting peace, to restore the economy and to re-establish normal relations with the international community including the Bank itself and the IMF (Bank lending having been discontinued in August 1991):-

> *“The Democratic Republic of Congo (DRC) is emerging from a terrible war that has seen the military involvement on Congolese soil of seven other African countries and at least eight militias.* Since January 2001, Congolese authorities have taken a number of important steps to help implementation of the Lusaka Peace Accord and the inter-Congolese dialogue called for under the Accord, liberalize political life and address key economic issues. They have also engaged in a constructive dialogue with the Bank and the IMF”: 9th July 2001 Transitional Support Strategy (“TSS”).

By the time of its 26 January 2004 report, the Bank felt able to report significant progress:-

> *“Since April 2001, the Government has implemented a solid and ambitious program of economic reforms, supported by the Bretton Woods Institutions (p.6) ……DRC has moved from the first of three overlapping phases identified in*

> *the 2001 TSS to the second one……The first phase, political and economic stabilization, corresponded roughly to the 2001 TSS period and is now largely completed.* The second phase, recovery, during which the basis (infrastructure, institutions, and policy) for poverty reduction in DRC would be rebuilt, is expected to roughly correspond to the new TSS. The third phases, development, will start once the country has normalized" (p.12).

34 Following the period of transition established by the Lusaka Accord, a new government, headed by President Joseph Kabila, was elected at the end of 2006.

V <u>Reform of Public Enterprises</u>

35 A number of fundamental objectives feature repeatedly in successive World Bank reports: the need for political stability, restoration of the rule of law, transparency in governance and the creation of circumstances conducive to renewed investment in the country. Specific areas needing far-reaching "structural reform" included, it was said, public enterprises (sometimes described as "parastatals") and the mining sector.

36 The first of these two was the subject of a separate 45-page World Bank report dated 10 th March, 2004, entitled "Economic and Sector Work – Reforming the Public Enterprises Through Improved Governance"., According to that report, state enterprises of one kind and another, of which there were said to be over one hundred (fifty-eight of which, including Gécamines, were wholly owned by the state) had come to dominate the country's economy to the increasing exclusion of the private sector and in many cases had extended their activities well beyond their original core businesses. At the same time there had been a marked, and in some cases dramatic, decline in productivity.

> *"In other words, DRC economy is in the hands of PEs.* PEs have over time expanded their activities outside the scope of their statutes to include other commercial activities in addition to health and education. The crowding out of the private sector by the PEs combined with the new roles in health and education normally reserved for the state has impacted the economy with a decline in GDP of more than 50 percent."

A massive programme of restructuring was called for:-

> *"Over a hundred enterprises need to be unbundled into essential public service enterprises or restructured around their core economic mandates, including through public-private partnerships".*

37 A start along this path had begun in 2001 with audits of most of the public enterprises, followed by the establishment in October 2002 of the *Comité de Pilotage de la Réforme des Entreprises du Portefeuille de l'Etat* ("COPIREP"), a state agency funded by the World Bank charged with responsibility for steering the process of reform. But progress was slow: as at

the date of the March 2004 World Bank report, the principal legislative enactment governing public enterprises remained a 1978 law, la Loi No 78-002 du 8 janvier 1978 portant dispositions générales applicables aux entreprises publiques – as indeed it continued to remain until July 2008 (of which more later).

A The mining sector: regeneration and reform

38 The DRC occupies some 2.3 million square kilometres in the heart of equatorial central Africa and is potentially one of the continent's richest states, endowed as it is, among other things, with vast mineral resources, including copper, cobalt, zinc and uranium. The estimated copper reserves of the province of Katanga alone, estimated at 70 million metric tonnes, make it the second richest copper region of the world, just behind Chile. At one time mining was the main engine of the economy, but years of political unrest, war, corruption, illegal exploitation and breakdown of the rule of law took an appalling toll on the industry: see, for example, the "Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of Congo", compiled in response to a request from the Security Council of the UN in 2000 and successive World Bank reports, the most recent of which (in evidence) was that dated 20 th April, 2008, on *"Growth with Governance In the Mining Sector".*

39 The post-conflict state of affairs was summarised in a report dated 7 th August, 2003, on progress of the World Bank's *"Private Sector Development and Competitiveness Project"* as follows:-

> *"The Democratic Republic of Congo was previously an important world producer of copper, cobalt, diamonds, gold and other base metals.* Historically, mining accounted for 25 percent of the country's gross domestic product, 25 percent of total budgetary revenues and about three-quarters of total export revenues. It provides 7 percent of employment. Government maintains at least part ownership, and generally majority ownership, of all mining operations in the country. The rapid recovery of mining production to the levels seen in the early 1980s (about US$2 billion) requires the rapid restructuring and privatisation of mining state-owned enterprises, namely [sic] La Générale des Carrières et des Mines (Gécamines), formerly the country's first provider of foreign exchange with more than US$1 billion in revenues. Copper production from Gécamines has declined from a peak of 475,000 tonnes in 1986 to about 15,000 in 2002, while cobalt production has decreased from 14,000 tonnes to less than 4,000 in the same period."

40 One of the first steps taken by the Joseph Kabila government towards restoring and reforming the mining sector was the promulgation in 2002 of a new *Mining Code* and related regulations designed to establish clear, transparent procedures for the industry and to attract investment from the private sector in the same way that had been so successful in Zambia following de-regulation of the industry there. An important principle of the code

was, as Mr. Mukasa explained, that of accessibility: putting an end to the historic system of large concessions which could be held practically indefinitely without being developed and the providing instead for smaller lots for which any mining company could acquire time-limited rights of research and exploitation. Prior to 2002, Gécamines, for example, held exclusive mining concessions over some 60,000 square kilometres, including some 32,000 square kilometres in the province of Katanga, the most easterly and remote part of the country. The process of reform was to be driven by COPIREP with backing from the World Bank.

41 By 2008 progress was being made but major problems persisted:-

> *"The Democratic Republic of Congo (DRC) is endowed with exceptional mineral resources, and exploitation of these resources holds great promise for jump-starting economic development as has happened in other countries.* For instance, DRC's mining sector could, within ten years, contribute 20–25 percent of GDP and one-third of total tax receipts. However, in the past the DRC has been unable to harness its mineral wealth for economic development, due largely to corrupt management and political interference in the parastatal mining companies, and to the inappropriate policies that limited private sector investment. Following the fall of the Mobutu government and the period of civil war, the transitional Government has taken some important steps to stimulate development of the sector, including restructuring the parastatals and allowing private sector investment. The most significant step in this direction was the passage in 2002 of a new Mine Law and regulations. This action, together with high commodity prices, has resulted in a renewal of investment in exploration and exploitation activities. This will not result in positive economic outcome or improved well-being of Congolese, however, because administration of the sector is dysfunctional – handicapped by insufficient capacity, continuing political instability, corruption, and fundamental deficiencies in governance. The Government, with the assistance of donors, private sector companies, and civil society, must undertake a coherent and systematic series of actions to address these issues." (World Bank report of 20th April, 2008, "Growth with Governance In the Mining Sector").

42 Among the requisite actions envisaged by the report was improving governance of the mining sector by, among other things, "adjusting the provisions of certain partnership contracts and improving their supervision". From about 1994 onwards, faced with falling production, governments had begun to allow state mining companies to enter into partnerships with private companies. But with the advent of peace, there was widespread concern that some, at least, of these arrangements had been entered into under opaque and questionable circumstances and on terms unduly favourable to the private sector partners. This was to lead in due course to the adoption in February 2007 of a new Governance Contract and the establishment later that year of a commission to re-examine a large number of such contracts – an exercise on which Hemisphere relies and to which we return later.

43 Another major development affecting the sector was the signing in 2007 and 2008 of agreements between the Government of the DRC and a group of Chinese enterprises providing for a massive programme of investment in the country's infrastructure in return for access to mineral deposits. This, too, is a matter to which we return later.

B Gécamines

44 Of the five or six state-owned mining companies active in recent years, Gécamines is by far the largest: indeed, as recently as 2006 was said to be the largest public company in the DRC.

45 Its origins lie in Union Minière du Haut Katanga ("UMHK"), a company originally established in 1906 under Belgian colonial law, owned as to fifty percent by La Société Générale de Belgique and as to fifty percent by Tanganyika Concessions Limited. By the mid-1960s it was one of the largest mining companies in the world. On 1 st January, 1967, however, the government of President Mobutu caused UMHK to be liquidated and its assets transferred to a new state-owned company called La Générale Congolaise des Minerais ("Gécomin"): in other words, UMKH was nationalised. In or about 1972, the company was renamed "Gécamines".

46 Gécamines has continued, ever since, to be wholly owned by the DRC.

47 In the mid-1970s, Gécamines entered a period of drastically declining fortunes. Revenue streams necessary for the financing of ambitious expansion plans dried up, and funding from the World Bank and other external institutions was, in effect, lost. By 1993 production of copper had fallen from approximately 470,000 tonnes per year in the late 1970s and early 1980s to a mere 46,000 tonnes. To what extent this was the result of the factors listed by Mr Mukasa (the Israel/ Arab war and the ensuing oil crisis, world-wide economic recession and fall in the demand for copper, coupled with the outbreak of civil war in Congo itself) and to what extent also a consequence of factors of the kind mentioned in the April 2008 World Bank report (corrupt management, political interference, inappropriate policies and what was described there as "the kleptocracy of the Mobutu years") is not necessary for us to try to assess. On any view civil war and political unrest plainly contributed to the situation. It also seems clear that by one route or another Gécamines found itself in a situation where, by the mid-1990s, it had vastly extensive mining concessions but lacked the capital to exploit them. It was this that led to the company signing its first joint venture deals in the mid 1990s.

48 A consequence of the adoption of the new Mining Code in 2002 and its policy of opening up access to mineral deposits coupled with Gécamines' lack of funds was that the company had little alternative but to relinquish much of its 32,000 square kilometres of historic concessions in Katanga province ("most" according to Mr. Mukasa). At the same time it embarked on a considerable programme of joint ventures with other mining companies:

there are now twenty-six.

49 In 2003, the first step in an effort to restructure Gécamines took place. By that time its annual production of copper had fallen to an all time low of 7,700 tonnes but it still had a pay-roll of some 33,000 employees: with COPIREP's help this was reduced to 10,000. The second step consisted of the introduction in September 2005 of external management to work alongside the existing team under the terms of a contract with a French company, SOFRECO SA ("SOFRECO") for a period of eighteen months. This development was followed shortly afterwards by the reconstitution of Gécamines' board of directors by Decree No 05/185 of 30 th December, 2005, (Décret No 05/185 du 30 Déc 2005 Portant Nomination des Membres du Conseil D'Administation [de Gécamines]). The latter provided for a board of eleven members, of whom six were appointed by name. Of those, three had been recommended by SOFRECO, namely Mr Paul Fortin, a Canadian, who was appointed managing director; Mr Michel Antoine, of French nationality, finance director; and Mr Pascal Renardet, another Frenchman, assistant technical director. In addition, Mr Assumani Sekimonyo was appointed the new chairman, Mr Mukasa the deputy managing director and Mr Mwema Mutamba the technical director. The remaining five seats were to be filled by representatives of the cabinet of the President of the Republic, the vice-president of the Commission of the Economy and Finance, the Ministry of Finance, the Ministry of Mines and Treasury.

50 By late 2007, the contract with SOFRECO had come to an end and the finance and assistant technical directors appointed in December 2005 had moved on. However, Mr Fortin remained as managing director, and Mr Mukasa as deputy managing director until September 2009 when Mr Fortin left and Mr Mukasa took his place.

51 The next step in the attempt to restructure Gécamines involved – and, as will become apparent, continues to involve – major legislative reforms affecting Gécamines at two levels: first, the process of reforming all public enterprises, of which Gécamines is one (as touched on earlier in this judgment), and secondly the proposed conversion or transformation of Gécamines' into a commercial company. Mr Mukasa, in his first affidavit, described the process as follows:-

> *"The World Bank, through COPIREP, continued its activities concerning the public sector enterprises in general and concerning Gécamines.* Consequently, Congolese Government, encouraged by the World Bank, pursued an ambitious legislative program. This program aims to make public enterprises more efficient by transforming them either into commercial companies if they operate in a competitive *market and their purpose is to generate profits, or into a public service or public establishment if they provide public services.*
>
> *Gécamines is in the process of being transformed from a public enterprise into a commercial company.* I understand that the ultimate objective of Congolese Government and the World Bank is to privatize Gécamines."

52 Two caveats need to be entered at this point. First, the impression that could be obtained from some passages of Mr Mukasa's evidence that the World Bank is directing the process of reform and/or that COPIREP is, in effect, one of its agencies would not be accurate. The World Bank has long been involved in helping to fund projects likely to contribute to the improved stability of the country, the development of its economy and the welfare of it people. It is also plain that it has been active and influential in encouraging successive governments to undertake necessary reforms of one kind or another. But responsibility for implementing reforms lies, as it always has done, with the government of the day. COPIREP may have received funding from the World Bank but it remains an agency of the DRC.

53 Secondly, the track-record of attempts to reform Gécamines in the past is not good. And, as appears from section VII below, the current process of reform appears to be proving more difficult and protracted than expected and its current status is unclear.

54 We turn now to the specific issues which fall to be considered against this background.

VI The point in time at which the status of Gécamines has to be determined

55 Hemisphere's case is that Gécamines has always been and remains today an organ of state. By contrast, Gécamines' case, as originally expressed in its Statement of Case filed on 19 March, 2010, and in Mr Mukasa's first affidavit, was essentially two-fold. First, that it is not and never has been an organ of the state of the DRC. But secondly, and more importantly, even if Gécamines could in the past have been regarded as a state entity, as a result of changes in the law this ceased to be the position on 24 April, 2009, or certainly would cease to be so by 30 April, 2010, at which point Gécamines would have been transformed into a private commercial company. Accordingly, it was argued, if Gecamines was no longer an organ of state by the time of the trial that was all that mattered: the Court was required to determine whether assets of Gécamines were available to satisfy the Awards against the DRC by reference to the nature of Gécamines at the time of the trial, and should ignore its previous character, even if the Court were to conclude that it had been an organ of state at the time of the ex parte orders.

56 Hemisphere's response to this was as follows. On any view Gécamines was an organ of state at the time of the ex-parte application; it has remained an organ of the state of DRC throughout the supposed transitional period that commenced on 24 April, 2009; the conduct of the DRC towards Gécamines has been and continues to be such that the latter will in reality remain an organ of the state for the foreseeable future even after completion of any supposed transformation. In the alternative, if the Court were to conclude that Gécamines was an organ of the state of DRC at the time of the ex-parte Order, but were to hold that at some point in time since that date it had ceased to be so, the Court should order (i) that the Shares (that is the shares in GTL owned by Gécamines) or the proceeds of sale thereof and the attendant dividends be transferred to Hemisphere, given that they were assets of the DRC at the date of seizure on 19 th March, 2009; and (ii) the monies otherwise payable to

Gécamines pursuant to the Slag Sales Agreement but trapped by the conservatory measures during the period of time between the ex-parte Order and the date when the Court concludes that Gécamines ceased to be an organ of the state of DRC (the "Trapped Monies"), be transferred to Hemisphere.

57 Until shortly before the trial it looked, therefore, as if a key point of dispute might be whether the date at which the identity issue needed to be addressed was 19 th March, 2009, when the ex parte orders were made and served on GTL, or the date of the trial (though whether this would have been the start or finish of the hearing or the date of judgment was never entirely clear)., In the event, it became evident shortly before the start of the of the trial that whenever the process of reform of Gécamines was going to be consummated it was not going to be before the end of the proceedings. But Mr Harvey-Hills, undaunted, argued on behalf of Gécamines that what matters is that the process of transformation is under way, that Gécamines's previous articles of association have been abolished and that a new interim constitutional regime is in place which, by the end of the current year, will see Gécamines fully transformed and fledged as a *société commerciale* with the impeccable credentials of a fully independent entity. Miss Lawrence submitted that the fact that the process has started has done nothing other than vindicate and re-enforce Hemisphere's case and that, even when the process of reform is complete, it is unlikely to change the reality of Gécamines' relationship to the state.

58 For reasons that we give more fully later on, it is clear as a matter of authority as well as principle that the point at which the identity of Gécamines has to be determined for present purposes must be 19 th March, 2009. The effect of service of the ex parte orders on GTL was not simply to restrain GTL in personam from dealing with the assets in question but, because those orders included an *arrêt entre mains*, to arrest or seize them and to give Hemisphere an immediate proprietary interest in them, subject only to a condition subsequent providing for the seizure to be discharged – or not declared *confirmée* — should it be shown that it was unwarranted. Whether those assets were or were not, on a true analysis, the property of the DRC at that point is therefore what matters. The alternative proposed by Mr Harvey Hills would, in any event, result in something of a lottery.

59 As we shall see when we come to look at the reform process in more detail, the changes that had actually come into force by 19 th March, 2009, were of relatively limited impact.

VII Gécamines' constitution

60 Hemisphere's starting point is that the legal regime under which Gécamines was until recently constituted and under which it operated for most of its life is one that is fundamentally incompatible with the concept of an entity with an identity genuinely independent of the state and that nothing in the recent attempts at reform has altered that position.

61 It is common ground that the principal elements of that regime were, first, Law No.78-002 of 1978 referred to earlier (at section V above), governing all public enterprises; and secondly, Prime Ministerial Decree No. 0049 of 7 th November, 1995, which laid down Gécamines's *"statuts",* what we might call "articles of association" (*"Décret No.0049 du 7 Novembre 1995 portant Création et Statuts d'une Entreprise Publique dénommée La Générale des Carrières et des Mines, en abrégé, "Gécamines"*). There had been earlier versions of these, but the debate at trial was conducted on both sides by reference to the 1995 articles, which were the ones current on 19 th March, 2009.

62 Other, later, laws bearing on Gécamines include the Mining Code of 2002; Presidential Decree 18 th March, 2003, creating a Permanent Committee for the Restructuring of Gécamines; and Decree No. 05–185 of 30 th December, 2005, regarding the appointment of members of the board of directors of Gécamines already mentioned.

63 At their simplest, the main planks of Hemisphere's argument are, first, that Gécamines is and always has been wholly-owned by the state. And, secondly, that from 1995 onwards at least its articles, coupled with the impact of the 1978 Law, conferred on the state a degree of power and potential control over Gécamines that went beyond anything that could be regarded as merely inherent in the fact of 100% ownership — a degree of power that was intrusive and incompatible with the concept of independence in any real sense.

64 The main features of the 1978 Law of significance for present purposes are that it applied to all public enterprises and that it provided that such bodies were endowed with legal personality; that their "structures" would consist of a board of directors (*le conseil d'administration*), management committee (*le comité de gestion*), and college of commissioners of account (*le collège des commissaires aux comptes*); that the board of directors would have the broadest powers with respect to any and all administrative and management duties reflecting the company's mission and objectives; that responsibility for day-to-day matters would be delegated to the management committee; that the President of the Republic would have the power to appoint and remove members of the board of directors, the chairman of the management committee and the commissioners of accounts; and – importantly — that all such enterprises were subject to supervision/regulation (*la tutelle*) by one or other state authority (*l'organe de tutelle*) as designated in the articles (*les statuts*) of that enterprise.

65 The scope of this supervisory regime was potentially far-reaching. Its effect was that, without the authority of the state, a public enterprise such as Gécamines was not free, among other things, to dispose of its capital, to contract loans or increase or decrease its assets, to acquire or dispose of immovable property, to enter into contracts for services or goods in an amount equal to or greater than 1 million Congolese Francs (c.US$20,000), or to purchase or dispose of shares. Moreover, deliberations and decisions of an enterprise's board of directors and, where appropriate, its management committee had to be copied to the supervising authority and only took effect five days after such notification and provided that there had been no objection from the supervising authority. Grounds of objection could

be either that the decision was contrary to law or that it was not in the enterprise's interests.

66 As regards Gécamines' 1995 articles, these only served to underline the subservience of the company, providing as they did,

> (i) that the composition of the board, the appointment and removal of its members, and of the management of Gécamines were to be determined by the President of the DRC;
>
> (ii) that Gécamines' budget had to be submitted to the Minister for Mines for approval;
>
> (iii) that the company's net profits were to be used to constitute reserves and/or to be remitted to the state Treasury at the discretion of the government;
>
> (iv) that Gécamines was for the most part subject to the authority of the Minister for Mines as regards the making of contracts for the supply of goods and services, the annual report, the organization of departments, the hierarchical structure, conditions of employment and salary scales, the establishment of agencies and offices, the acquisition and disposition of immovable property, borrowing and loans, the acquisition and disposition of investments, the specific accounting plan, the budget or forecast of revenues and expenditure, the end of year accounts and the balance sheet;
>
> (v) that Gécamines' assets (*“le patrimoine”*) derive entirely from the state and may not be increased or decreased without acknowledgement by decree from the Prime Minister (Article 4 and 6);

67 Mr Harvey-Hills' main response to these features was to suggest that they are no more than is to be expected where a company is the wholly-owned subsidiary of another. Up to a point that may be right – but only so far. Looking at the legislative regime as a whole, while there are, to some extent, conventional elements of structure and management, there is no escaping the fact that there is also a striking overlay of state-control mechanisms external to the company itself. The board of directors may nominally be endowed with “the broadest powers” (*les pouvoirs les plus étendus*) but closer examination of related provisions reveals that these powers are not as extensive as might appear at first sight and are circumscribed and qualified in a number of ways.

68 It is true, as Mr Harvey-Hills also points out, that the financial statements of Gécamines appear to have been the subject of annual audits (though some of them were significantly qualified) and that Gécamines appears to have been treated in many respects as a separate entity by the tax authorities.

69 Overall, however, we find it impossible to avoid the conclusion that, as matter of constitutional provision prior to recent attempts at reform, 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.

70 The next question is whether, even if this historical analysis is right, the recent legislative steps towards the reform of Gécamines have in any event rendered this earlier state of affairs irrelevant — as Mr Harvey-Hills argues first and foremost is the case. Indeed, reading between the lines, the way in which Gécamines' argument and Mr Mukasa's evidence was presented strongly suggested a desire to fight the battle by reference to the "reformed" Gécamines rather than the old one.

A Recent reform of Gécamines

71 The first major legislative step in the process of reform was the enactment in July 2008 of two laws: Law No 08/007 which made provision for the transformation of public enterprises into either commercial companies with the state as sole shareholder or into public services *(Loi No. 08/007 du 07 juillet 2008 portant dispositions générales relatives à la transformation des entreprises publiques),* and Law No 08/010 which established rules governing the organisation and management of the state's portfolio (*Loi No. 08/010 du 07 juillet 2008 fixant les règles relatives a l'organisation et à la gestion du portefeuille de l'état).*

72 Law No.08/007 of 7 th July, 2008, recognised that there would, inevitably, be a period of transition between its enactment and the conclusion of formalities requisite for the establishment of the new entities. It accordingly envisaged that within the following three months a definitive list of public enterprises to be transformed would be published and the articles of each new enterprise would be determined by Prime Ministerial Decree; that there would also be prime Ministerial Decree setting out transitional measures by which enterprises would be governed until such time as their amended articles had been adopted; and that pending the issue of this transitional-measures decree, such enterprises would continue to be regulated by their respective (old) articles (Articles 13 and 16). Law No 78-002 of 1978 as amended and supplemented from time to time was repealed but subject to the provisions of Chapter V of the new law which, among other things, established the transitional regime described above.

73 In the event, the timetable originally envisaged became extended. In the first place it was not until nine months later, on 24 th April, 2009, that the Prime Ministerial Decrees contemplated by Law No 08/007 concerning transitional measures and the definitive list of enterprises to be transformed were promulgated (*Décret No. 09/11 du 24 avril 2009 portant mesures transitoires relative à la transformation des entreprises publiques; Décret No. 09/12 du 24 avril 2009 établissant la liste des entreprises publiques transformées en sociétés commerciales, établissements publics et services publics).* The latter listed Gécamines as one of the entities transformed into a commercial company (*société commerciale*); but neither decree laid down any new set of articles for the company.

74 The consequences of this delay for present purposes are three-fold. First, at the time when the 19 th March, 2009, orders were made, Gécamines was, on any view still governed by its old articles: according to the terms of Article 2 of Decree No.09/11 these were not repealed until that decree was signed on 24 th April, 2009. Secondly, although the matter may not be entirely beyond debate, it seems unlikely that the intention of the legislature, when enacting Law No. 08/007 in July 2008, was that the provisions of the 1978 Law regarding supervisory/regulatory authorities (*les organes de tutelle*) should cease to have effect until the anticipated transitional arrangements had been put in place, which means that these too were still in effect at the time of the 19 th March, 2009, orders. And thirdly, even as at 24 th April, 2009, Gécamines still had no new articles.

75 The main provisions of Decree No. 09/11 relevant to the present proceedings (in addition to those already mentioned) were stipulations that, in the period between the signing of that decree and the actual conversion of enterprises into commercial companies, only the terms of the Decree would apply (Article 3); that conversion would take effect when an entity's new articles were adopted (Article 4); and that in the intervening, transitional period an entity's General Assembly would consist of the delegates of six specified ministers *(*"Pendant la période transitoire telle que fixée à l'article 3, l'Assemblée générale de l'actionnaarie Etat de l'entreprise publique transformée en société commerciale est constituée d'un Comité comprenant outré le Délégué du Ministre du Portefeuille, un Délégué du Cabinet du Président de la République, un Délégué du Cabinet du Premier Ministre, un Délégué du Ministre des Finances, un Délégué du Ministre du Budget et un Délégué du Ministre du secteur d'activités concerné".), endowed with authority to take all decisions recognised by legislation relating to commercial companies as exercisable by the General Assembly, particularly as regards the adoption of a company's articles (Article 5); and that management of the company would rest with the Management Committee, with responsibility for day-to-day matters delegated to the Director and General Manager (Article 10). On the adoption of new articles the General Assembly Committee and the Management Committee would be dissolved (Article 5). In the meantime, a detailed statement of assets and liabilities of each enterprise was to be prepared, based on an inventory certified by both internal and external auditors (Article 13), and draft new articles were to be submitted to the Ministre du Portefeuille and approved by the General Assembly Committee (Article 14). In no circumstances, it was decreed, was the period of transition to exceed twelve months from the signing of the decree (Article 17).

76 Mr Harvey-Hills relies in particular on the fact that, while other elements of the transformation process may still be in train, the old system of supervision/regulation (*tutelle*) of Gécamines by the Ministry of Mines is no more, having ceased to operate with the issue of Decree 09/11 on 24 th April, 2009. But, as Miss Lawrence points out, all that has happened is that, in practice, one particular mechanism of control has been superseded by another equally potent one in the shape of the Committee of the General Assembly.

77 Moreover, of the eleven members that the Board of Directors is supposed to have as a matter of law, five are representatives of executive organs of state; and of the six remaining

positions, only three had (at the time of the trial) been filled, thus leaving the government with a controlling majority. As yet, directors continue to be appointed by the President and those representing the State are still classified by Act No. 08/010 of 7 th July, 2008, as state agents and are required to sign a contract of mandate with the State (Articles 3,9 and 17). As regards vacancies, Mr Mukasa responded that when the deputy technical director left in August 2007, he was not replaced, thus reducing the board in practice to ten members. In all other cases the duties of the outgoing member were, he said, assumed by one of the other executive directors whilst a replacement was awaited, as for example, when the duties of financial director were taken on first by Mr Mukasa following the departure of the previous director in September 2007 and subsequently by the technical director after Mr Fortin left the company in September 2009 (at which point Mr Mukasa took over Mr Fortin's position and relinquished the duties of finance director). But, as Miss Lawrence pointed out, Article 15 of Act No 08/007 of 7 th July, 2008, expressly forbids the simultaneous holding of more than one director's mandate in companies in the State's portfolio.

78 Shortly after the issue of the two decrees in May 2009, COPIREP published a “road map” (*“Mesures transitoire de transformation des entreprises publiques: feuille de route”*) setting out the various steps that needed to be taken for the conversion of the listed public enterprises into commercial companies together with related timetables. The document itself showed the date for completion of the final stage of the process as February 2010. At about the same time, the Minister of Finance addressed a letter to the chairmen and managing directors of the board of directors of all public enterprises in the process of transformation drawing attention to a number of particular features of the process, including the fact that it was part of the government's collective programme being piloted by the Ministry of Finance; and that former management committees of enterprises concerned had been dissolved, leaving their day-to-day management in the hands of the managing directors and their deputies.

79 The next step so far as Gécamines was concerned was an Extraordinary General Meeting of its sole shareholder, the DRC, on 3 rd July, 2009, under the chairmanship of the Minister of Finance and attended by a representative of COPIREP as observer, at which approval was given to preparation of new articles of incorporation by reference to precedents supplied by COPIREP; to initiation of the process of transformation of Gécamines into a commercial company by identifying the requisite financial, accounting and legal measures; and to re-evaluation of all assets and liabilities and calculation of the new capital of the company.

80 At the time of swearing his first affidavit in February this year, Mr Mukasa indicated that the deadline for completion of the transformation of Gécamines into a commercial enterprise remained 30 th April, 2010. But if it was not by then already apparent that this was unrealistic, it soon became so. On 15 th March COPIREP wrote to the chairman of the board of Gécamines confirming the urgent need for Gécamines to submit its own ‘road map’, with the caution that this should not extend beyond 2010; and on 24 th March Gécamines responded with a timetable showing completion of the process by 30 th

October, 2010. On 28 th April the Prime Minister, by Decree No 12/19 formally announced extension of the transitional period for transformation of public enterprises to 31 st December, 2010.

81 It is evident from a close reading of these relatively recent documents, together with a summary entitled “Situation des Travaux de Réévaluation du Patrimoine de Gécamines” dated 7 th May, 2010, exhibited by Mr Mukasa to his second affidavit (the most recent documentary evidence made available to the Court) that, at that point, there were still a number of substantial tasks to be completed – not least various due diligence exercises, the definitive determination and revaluation of Gécamines' assets and liabilities, and the fixing of its share capital — much of which, according to COPIREP's original road map, had been due for completion by the end of October 2009. In particular, major problems remained to be resolved relating to the re-structuring of Gécamines's debt and differences of view between Gécamines and COPIREP as to whether the revaluation of Gécamines's assets should or should not include a valuation of its mining rights.

82 Nor was it clear what stage the drafting and adoption of new articles had reached. According to Mr Mukasa, Gécamines sent the (then) latest draft to the relevant ministry under cover of a letter dated 17 th February, 2010, (the letter itself was not in evidence) but there was no evidence of subsequent developments. It may fairly be assumed that at the close of the trial, at least, new articles had yet to be adopted.

83 Given the importance attached by Gécamines to the process of transformation, and given that, following Mr Fortin's departure last year, Mr Mukasa has been Gécamines' senior executive officer, we would have to say that we find Mr Mukasa's own evidence unsatisfactorily minimalist on the subject, particularly as regards the precise course of events, the reasons for lack of progress in the past and the extent to which the latest predictions for completion of the process are realistic. All other considerations apart, the fact that the government had formally decreed the postponement of the final deadline to 31 st December, 2010, was, on any view, a development that warranted specific mention by Mr Mukasa in his second affidavit, sworn as it was on 21 st May, 2010, and should not have been left to Hemisphere to have to discover for itself and put in evidence (as an appendix to Advocate Lawrence's skeleton argument, also dated 21 st May, 2010).

84 In summary, the position at the end of the trial in mid-June this year was, therefore, that Gécamines' former articles had ceased to be operative but the company had yet to acquire new ones; in the meantime, it was operating under the transitional regime established by Decree No 09/11 of 24 th April, 2009; the transformation process was running well behind time; there were still important hoops to be negotiated before the process would be complete and there was no certainty that the new deadline of the end of 2010 would be met. In short, the process was far from maturity and the terms of any new constitution that might eventually be conferred on Gécamines remained unknown: certainly not, in our judgment, a state of affairs that amounted to any real transformation in the nature of

Gécamines within the timescale of events with which we are concerned.

B Immunity from execution

85 It is convenient at this point to deal with another contention prayed in aid by Hemisphere: that, Gécamines' assets are by law immune from execution – a status, it is suggested, that is indicative of it being an organ of state. Mr Harvey-Hills argues that the question is irrelevant to the issue with which we are concerned. We accept that a distinction has to be drawn between immunity from suit or execution at the local level (i.e. in the courts of an entities home state) and immunity in international law from proceedings in a foreign court and that the former will usually throw no light on the latter. But it does not follow that local immunity is necessarily irrelevant to the question whether an entity is or is not part and parcel of the state for present purposes. An entity to whose assets the local law accords immunity from execution is plainly one that enjoys a privileged position of some kind; and, absent some other explanation, the obvious conclusion to draw is that this reflects a governmental or quasi-governmental position of some kind. To that extent, immunity from execution at the local level, if proved, might well be indicative – though not determinative – of it being part of the apparatus of state. Whether Gécamines does indeed currently enjoy such immunity is, however, far from clear.

86 Me. Bonyi's evidence is that property held by Gécamines cannot be the subject of execution under the law of the DRC, just as with any property owned by the State. He accepts that there is no legislative provision to this effect but says that the inability to seize assets of state owned companies such as Gécamines is based on general principles of Congolese law and cites statements confirming this to be the position made by the Minister of Justice, the President of the Supreme Court, the Attorney General, and various professors of law, though none of the materials in question was before the Court. And it appears that Gécamines itself certainly did specifically assert immunity from execution in a case in Belgium in 1998/99, and was upheld on the point by the Court of Appeal of Bruxelles. As appears below, a waiver clause in at least one 1997 contract is also consistent with a view on Gécamines' own part, at that time at least, that without such a waiver it would have been entitled to immunity.

87 By contrast Mr Mukasa insists that, whatever the position may have been in 1999 at the time of the Belgian case (of which, he says he knows nothing), Gécamines does not enjoy such immunity today. He himself, he says, has no recollection of the company ever invoking immunity in judicial proceedings. According to him, Gécamines is constantly involved in litigation and Congolese courts have been willing where appropriate to order seizure of its assets. In illustration of this he cites three specific judgments against Gécamines in the Courts of Lubumbahsi and says that in all three cases seizure of property of Gécamines was effected or authorised. Hemisphere suggests that each of these cases is attended by murky circumstances which explain why Gécamines was content to allow matters to proceed that far; but it is quite impossible on the evidence before us to form any clear view of the facts concerning those cases and, accordingly, we derive no help from

these particular examples.

88 On the other hand, Mr Mukasa's citing of a note dated 3rd July, 2007, addressed by Gécamines to the Government concerning its position as a debtor of three South African Banks does little to inspire confidence in his evidence. The passage relied on was as follows:-

> *"In its present financial situation Gécamines is not in a position to satisfy the formal demands of the South African banks or demands issued by its other creditors.* On the other hand, it could be given a respite if the government agreed to speed up the adoption and promulgation of a temporary immunity law for public companies, inspired by Law n° 022/2002 of 30/10/2002 on Special Arrangements for the Restructuring of Credit Institutions".

Why, comments Mr Mukasa, would Gécamines be looking to the Government for legislative protection of this kind if it already had immunity from execution? But the point loses much of its force when, turning to the terms of the contract made with the South African Banks in October 1997, one finds that they contained an express waiver of immunity. We accept, of course, that it cannot be taken for granted that similar waivers exist in all other creditors contracts, but reference to this note without pointing out the exceptional position of the South African Banks – if indeed it was exceptional – creates uncertainty as to the weight that the point really deserves.

89 All in all, the evidence on this topic is too fragmentary and otherwise unsatisfactory to permit any clear conclusion one way or the other. We accordingly discount it entirely in reaching our ultimate conclusions.

VIII Relations between Gécamines and the State

90 The second main limb of Hemisphere's case is that irrespective of the constitutional formalities, Gécamines has in practice always been under the dominion of the government of the day, its internal management overridden, bypassed or subject to interference, and its property taken or otherwise used for state purposes as and when the government deems appropriate. Four areas in particular are relied on to illustrate this: (A) the use of Gécamines's property for military or other governmental purposes in times of war; (B) the "revisitation" of mining contracts that has been going on since 2007 and the treatment of related "entry fees"; (C) the Sicomines project, and, here too, the related entry fees; and (D) Gécamines' role in the provision of social services to the populace.

A. In time of war

91 There seems little doubt that Hemisphere' claim that there has been a history of successive governments making use of Gécamines' assets to fund military operations, not just of the

DRC but also of neighbouring allies, is well founded. There was little for us to go on by way of chapter and verse, but a United Nations report to which attention was drawn by Hemisphere suggests that during the conflict in the Great Lakes region, and in the years 1999–2000, the state took at least a third of the profits of Gécamines to finance the war effort and created joint ventures between Gécamines and Zimbawean companies to serve the same purpose for its ally. Mr Mukasa did not dispute the generality of the claim or the scale of the exercise suggested by the UN report.

92 His answer was that such things happen in times of war and always have done; that what happened in Gécamines' case was no different, for example, from what the government of the United Kingdom did during the Second World War or the Falklands war. But, as Hemisphere rightly points out, the comparison is not a valid one. The requisitioning of property by the UK Government was effected pursuant to legislation which provided for compensation for the property owner: the Compensation (Defence) Act 1939. And in the event of a dispute between the government and property owner as to the value of the requisitioned property, the owners could pursue claims in tribunals established for that purpose. Mr Mukasa made no attempt to dispute this or to take issue with Hemisphere's assertion that in the case of Gécamines it received no compensation for assets commandeered in this way. Taken in isolation the subject might, perhaps, be regarded as one to which not too much weight should be accorded for present purposes; but as one piece in a larger jig-saw it appears to us to be of substantial significance.

B. The 2007 Mining Commission

93 We made mention earlier of the appointment in 2007 of a commission with the task of reviewing mining contracts entered into by Gécamines. Earlier attempts to tackle this subject had included the appointment by the National Assembly in 2003 of a commission, known as the Lutundula Commission, which had reported in June 2005, and the retention by the COPIREP, in February 2005, of Duncan & Allen, an American law firm with the task, among other things, of conducting a legal audit of existing contracts and recommending templates for future ones (funded by the Competitiveness and Private Sector Development Project of the World Bank). Neither of these appears to have had much effect in practice. The Lutundula Commission was highly critical of the circumstances in which many of the contracts in question had been entered into during earlier wars, placing much of the blame on government officials and politicians. In its June 2005 report, it also urged the National Assembly to extend its terms of reference to cover the period of the subsequent transitional government (a reference to the transitional government which was in power between April 2003 and the election of President Kabila in October 2006):-

> *"There is an urgent need for the National Assembly to conduct a systematic review of economic and financial agreements and acts signed by the Transitional Government.* Indeed, from information gathered by the Special Commission during its investigations, it appears that the Transitional Government has not done better than those who exercised state power during the wars of 1996–1997 and 1998. Quite the contrary, the drain of natural

> resources and other wealth of the country has intensified under the cover of the impunity guaranteed by the Constitution to government managers. It is therefore necessary to extend the mandate of the Special Commission to the transition period" (p 269).

It is unclear what, in the end, this commission achieved. To some extent, its work appears to have been overtaken by that of Duncan & Allen (appointed some five months before the Lutundula Commission delivered its report). The latter, however, found a major element of their work to have been compromised by the actions of Gécamines and the Government in negotiating, and in some cases concluding, new joint venture agreements while Duncan & Allen's work was going on but without reference to them (Duncan & Allen's report of 6 th April, 2006, paragraph 1.1, and the World Bank report of 20 th April, 2008, cited earlier at page 54 note 53).

94 Be that as it may, shortly after President Joseph Kabila was elected President in late 2006, the government decided to "revisit" all mining contracts to which public enterprises were party – not just those contracted during the wars. The exercise on this occasion made comparatively swift progress. The process started in April 2007 with the appointment by the Minister of Mines of a new commission (*Commission de Revisitation des Contrats Miniers*) and by November the same year the Commission had delivered a substantial two volume report, the second of which was devoted exclusively to some thirty joint venture contracts to which Gécamines was a party. The Commission's task was to examine the contracts and to make recommendations, where appropriate, for their revision. Following delivery of the report, a process of renegotiating or in some cases cancelling contracts that were deemed unsatisfactory began. We were informed that the process is a continuing one.

95 The first thing to note is that many of the joint venture contracts under scrutiny were themselves agreements that Gécamines had entered into at the instigation of governmental authorities. The Lutundula report implies as much and the Duncan & Allen report is explicit on the point: "With the exception of the TFM partnership (and maybe also the KMT partnership), almost all of GCM's [Gécamines'] partnership agreements were concluded privately, and most often upon the recommendation or instruction of the political and administrative authorities (the Office of the President of the Republic and the Ministry of Mines)". Mr Mukasa did not challenge this.

96 Hemisphere contends that the Commission itself was anything but "independent" and that the process of re-negotiation of individual contracts that followed its report was for the most part managed by the Government rather than by Gécamines itself and is illustrative of its attitude towards Gécamines. Mr Mukasa denied this, but the case made by Hemisphere is a strong one.

97 For a start, the members of the Commission – thirty or so in number – were all Governmental officials from one or other interested department: the President's office; the Prime Minister's office; the ministries of Mines, Finance, Budget, Justice, Portfolio, and

Industry; and other agencies such as the Mining Cadastre. (Hemisphere also draws attention to expressions of concern that appear to have been voiced in some quarters about a lack of transparency in the Commission's work and lack of co-operation with various international bodies; but there is insufficient evidence for us to form any view as to whether this suggestion was well-founded.)

98 The documentary record is also telling. On 11 th February, 2008, the Minister of Mines wrote to each of Gécamines' contractual partners notifying them of the results of the review of their contract., The letters — which were copied to Congolese President, Prime Minister, Portfolio Minister and Vice-Minister of Mines but not to Gécamines – enclosed, in each case, a schedule of what was described as "the elements on which negotiations will soon be centred that will attempt to achieve equality in the partnership". Addressees were requested to send their reactions to the Government, via the Minister's office, by 20 th February, 2008. The accompanying schedule was in two parts: the first a lists of criticisms of the current contracts, the second a list of items couched, in some cases, in mandatory terms under the heading "Requirements of the Government" (*Exigences du Gouvernement*) and, in other cases though it seems less frequently, in terms of a more advisory tone, under the heading "Position of the Government" (*Position du Gouvernement*).

99 Among interested agencies observing the progress of the Commission's work, there appears, by this stage, to have been widespread concern at the lack of transparency at what exactly was happening, given that the Commission's report had not been published, but leaks to the press had suggested that none of the reviewed contracts had been judged to be satisfactory. A speech by the Deputy Minister of Mines in Cape Town on 5 th February, 2008, which had made reference to the Government's intention to establish a panel to hear appeals in connection with the review process prompted the issue on 18 th February of a press release by fourteen Congolese and international NGOs urging the Government to be more forthcoming about the extent to which it had accepted the Commission's recommendations, the composition of the appeal panel and how it would work. The Commission's report was eventually published in March 2008 but a further press release by sixteen NGOs in early August suggests that public concern was still being expressed about progress with the re-negotiation of contracts.

100 Eventually, on 30 th August, 2008, the Minster of Mines issued letters to all parties concerned in mining contracts the subject of review requesting them to renegotiate them with their contractual partners in accordance with the accompanying Terms of Reference, adding "The report on these re-negotiations, which will take place in the presence of experts of the Government of the Republic, is expected in my office on 25th September 2008 at the latest." The preface to the Terms of Reference themselves read as follows:-

> *"The Government of the Republic, having received the conclusions of the Mining Contracts Revisitation Committee, has informed each partner of the criticisms and requirements (les reproches et les exigences) concerning him and, having published the Committee's final report, has set up a Panel charged with supervising the renegotiation and, if applicable, termination of the mining*

contracts, according to the observations and recommendations in it.

In order to meet the State's expectations (les attentes de l'Etat), the Government is setting negotiating parties to the contacts the objectives cited below as Terms of Reference, without prejudice to the requirements (exigences) expressed in letters of notification sent to the partnerships."

The ensuing details, arranged under sixteen heads, were on this occasion expressed in part in terms of recommendation (" *le Gouvernement recommande au negociators*") rather than command.

101 Mr Mukasa's evidence was that the ensuing negotiations between Gécamines and its various contractual partners were conducted by Gécamines itself, without interference from the Government, and that all but two of its contracts were successfully re-negotiated. This, in itself, may be right. But it is plain that the tone of the Terms of Reference, read as a whole against a background of repeated indications of governmental oversight and the terms of the earlier February 2008 letters, would have left Gécamines with little scope for departure very far from the recommendations of the Terms of Reference.

102 By the end of 2008 the process was largely complete. On 19 th December, 2008, the Council of Ministers (*le Conseil des Ministres*) met for the purpose, among other things, of receiving a report by the Minister of Mines on the results of the re-visitation process. In the case of Gécamines, the Council is recorded as having approved twenty revised contracts and having noted the termination of three others. But in two cases, where negotiations had evidently not been successful, the Council approved the setting up of an ad hoc governmental commission to take over and finalise negotiations, "having regard to the various benefits that Congolese State could derive from them" – one more indication of the limits within which parties were permitted to operate freely and the extent to which the whole process of re-visitation of mining contracts was controlled by the Government from beginning to end.

103 Nor is that, by any means, the end of the matter so far as consequences of the re-visitation of Gécamines' contracts are concerned. When it came to the fruits of that process, the Government appears to have had no compunction about treating a major component of them as state revenue rather than Gécamines' property. One of the principal features of renegotiated contracts was that the private sector partners became liable to pay substantial, or substantially increased, premiums for, in effect, the privilege of being allowed to enter into a joint venture with Gécamines (variously referred to as "entry fees", "key money", "signature bonuses", or " *pas de porte*"). The sums involved were considerable. Mr Mukasa insist that such payments were properly due and payable to Gécamines; but whatever the theoretical position might be, the documentary record leaves little doubt about the Government's stance.

104 It seems that on 3 rd October, 2008, the Minister of Mines wrote to the Minister of the Portfolio, with a copy to Gécamines among others, informing him that instructions had been

given to the President and Chief Executives of portfolio companies that all payments, without exception, arising out of re-visitation of mining contracts were to be remitted to the state treasury. The letter itself was not in evidence but the gist of it is evident from the Minister for Portfolio's reply on 4 th November, 2008, welcoming the instruction and emphasising certain procedural requirements.

105 On 14 th November, 2008, Mr Paul Fortin (at that time still managing director of Gécamines) and Mr. Zongewe Kiluba, another director, wrote at length to the Minister of the Portfolio and the Minister of Mines in response to these letters with a plea for reconsideration of the Government's directive. Having recited their understanding that Gécamines' ownership of the entry fees arising from the revisitation process was not contested and their belief that such payments were not taxable as such but only as part of the normal scheme of taxation of corporate profits, they continued – in a somewhat telling passage:-

> *"In the circumstances, it would appear that the payment of Gécamines key money and key money supplements into DGRAD [Treasury] accounts arises from a government measure which is no doubt motivated by the superior interests of the State, and Gécamines has no option but to be happy to contribute, once again, to the solution of national problems.* Nevertheless, in proper consideration of the logistics of managing a commercial company, and in our capacity as agents of the state in relation to a public enterprise which is prey to difficulties which threaten its survival, we should, on the one hand, ensure that the most pressing operational needs of Gécamines are met and, on the other hand, guarantee that the transfer of its key monies, which constitute part of its assets, to the State are balanced, "compensated", *if not by means of an income, then at the very least by the extinguishment of our company's debts to the transferor."* (Emphasis added.)

They asked, accordingly, that part of the entry fees be transferred back to Gécamines and, as regards the portion taken by the State, that this be offset against certain tax and other liabilities of Gécamines.

106 It would appear that Government was not entirely unresponsive to this appeal. At the meeting of the Council of Ministers on 19 th December, 2008, referred to earlier, it was decided (according to the minutes) that entry fees should be divided equally between the State and the mining company concerned. But that was as far as the concession went at that time; and, as far as the evidence available to this court goes, that is how the position remained at the time of the trial. So far as the documentary record goes:-

(i) It appears from Note 29.1 to the audited financial statements of Gécamines as at 31 st December, 2008, and 2007 (under the heading "Events after the Closing of Accounts") that by letters dated 24 th January, 2009, the Prime Minister accordingly notified Gécamines' various mining partners of the conclusions of the revisitation process and the renegotiated amounts of key money and royalties payable, indicating

that these were to be divided 50:50 between the Public Treasury and Gécamines.,,

(ii) Gécamines' own web-site as at 29 th December, 2009, reporting the outcome of the re-visitation process, included a passage reading as follows:-

> *"Gécamines' contribution to its partnerships consists mainly in the assignment of mining rights.* In other partnerships, Gécamines has also made contributions in the form of leased equipment and facilities. Gécamines' compensation is in the form of dividends (between 12.5% and 40% of distributable profits), royalties (between 2% and 2.5% of gross revenues or net revenues after deduction of selling costs, as the case may be) and lease payments on the equipment and facilities contributed. Gécamines also collects an entry fee (half of which is reserved for Congolese State), which is considered to be consideration for the right granted by Gécamines to its partner to access the business set up by the partnership".

(iii) The State's budget for 2010 included an item "Pas de porte Minier" in an amount of CF 130,456 million (c. US$ 260,000 million).

107 In his first affidavit, Mr Mukasa touched only fleetingly on the Government's stance in relation to these entry fees, accepting that it had taken the view that they belonged by right to the state, noting Gécamines' disagreement and concluding "Gécamines pursues its claim to this day with the help of the workers' union in order to keep the entire [entry fees payable in respect of] lease renewals for its own benefit". In his second affidavit he explained that the approach taken in Gécamines' letter of 14 th November, 2008, was dictated by the fact that the company was in an awkward position because it was heavily indebted to the State and to other public enterprises, that legal action against the Government was therefore likely to be counter-productive, and that Gécamines also feared that such action might also provoke a claim to US$ 100 million entry fees payable under the Sicomines project (to which we come next) which the Government had not so far made. But of events in the subsequent eighteen months he says no more than that Gécamines is *"actively endeavouring"* to obtain the aforementioned set-off; that its management have *"already approached"* the Ministers of Finance, Portfolio and Mines to plead its case; that every time its bank accounts are seized by government departments in satisfaction of outstanding tax or similar liabilities (which according to him was a frequent occurrence) and Gécamines suggests that there should be a set-off against entry fees, "The officials of these financial authorities, whilst understanding the position of Gécamines, have always advised obtaining government approval for such a set-off"; and, finally, *"Gécamines' general management has again asked the Ministers for a set-off and is hoping to achieve this through negotiation".*

108 Given the elapse of time since November 2008 and the importance of the topic (not least to making progress with the transformation of Gécamines to its proposed new status) we would have expected Mr Mukasa to have been able to substantiate these statements with documentary evidence. As it is, we have seen nothing subsequent to the minutes of the Council of Minister's meeting of 19 th December, 2008, to suggest that Mr Mukasa's hopes

of persuading the Government to change the decision that it made on that occasion are anything other than fanciful. Nor does Mr Mukasa offer any comment on the difficulty of reconciling the Government's stance with the supposed reform of Gécamines, given that appropriation of entry fees by the Government occurred at the very time that the reform process was supposedly under way following the enactment of Law No. 08/007 in July 2008.

C. The Sicomines project: China, the DRC and Gécamines

109 The matter of entry fees also arose in relation to another, exceptional joint venture to which Gécamines became a partner in 2008 and which was not therefore subject to the revisitation process. Here again the Government commandeered part of the entry fees for the public treasury: in this case over 70%. But, while Hemisphere points to this as yet another instance of the Government making free with Gécamines' revenue, it also submits that, on a broader canvass, the story here is the clearest possible illustration of the Government's view of its relationship with Gécamines and of the role of Gécamines as an instrument for the implementation of policies and projects of national importance.

110 "Sicomines" (La Sino-Congolaise Des Mines SARL) was – and is, as far as we are aware – a Congolese company formed in 2008 as joint venture between, on the one hand, two major Chinese groups, China Railway Group Limited and Sinohydro Corporation ("the Chinese Enterprise Group") and, on the other, Gécamines. It was formed pursuant to two major agreements signed on 22 nd April, 2008: a "Cooperation Agreement" between the DRC and the Chinese Enterprise Group "For the Development of a Mining Project and Infrastructure Project in the Democratic Republic of Congo"; and a "Joint Venture Agreement" between Gécamines and the two Chinese groups together with certain designated affiliates of those groups.

111 These agreements were the culmination of an extended period of negotiations between the DRC and China with the aim, on the one hand, of giving China access to a substantial stake in the DRC's mineral wealth and, on the other, the generation of funding for a massive national programme of infrastructure development in the DRC. Put shortly, the main elements of the plan were that the Chinese consortium would raise and put in place the loan finance necessary for the infrastructure project; that a joint venture company, (Sicomines, owned as to 68% by the Chinese consortium and as to 32% by Gécamines) would be formed to exploit extensive mineral deposits over which Gécamines had, at that time, the rights but not the financial resources to develop; that the Chinese would lend Gécamines US$32 million to finance its contribution towards the capital of Sicomines; that revenue from the mining operations would be used, first, to repay the interest on and principal of the infra-structure loans, next to repay the investment in phase one of the infrastructure project, and thereafter would be available for distribution between the shareholders to the extent that operations showed a profit; and that the Chinese consortium would also raise finance for the development of the mineral deposits in question.

112 Security for the funding of the project was to be granted to the Chinese consortium first by the DRC procuring the transfer by Gécamines to Sicomines of Mining Rights, Licenses and Permits held by Gécamines to extensive mineral reserves in Katanga Province (so that Sicomines would be able to use these as collateral for bank borrowings) and secondly by the guarantee of the DRC itself.

113 On the other hand, on transfer of Gécamines' designated mining rights and fulfilment of certain other conditions, the Chinese consortium undertook to pay the “Congolese Party” a substantial entry fee. The Chinese consortium also undertook to procure financial assistance in the form of a loan in order to help Gécamines with the rehabilitation of some of its facilities.

114 The scale of the projected infrastructure project was, by any standards, massive. Among other things, it involved the construction or modernisation of over 3,000 kilometres of railways; the construction of some 3,600 kilometres of new roads and rehabilitation of several thousand kilometres of other roads; the construction of a bridge over the river Lualaba; the rehabilitation of complete road systems in Kinshasa and a number of other cities; the rehabilitation of two airports; the construction and fitting out of 21 provincial hospitals of 150 beds each and the rehabilitation and completion of a 450-bed hospital in Kinshasa; the construction of 2 hydroelectric dams and the rehabilitation of the power systems of two cities; the construction of 5,000 low cost public housing units, 145 health centres of 50 beds each, and 2 new universities.

115 Other elements of the project were also impressive in scale. Funding for the infrastructure project was expected to be of the order of US$6 billion, and for the mining project US$3.25 billion; the mineral reserves transferred to Sicomines were estimated to hold some 10.6 million metric tons of copper and in excess of 600,000 metric tons of cobalt; the entry fee payable by the Chinese consortium was to be US$350 million, and the loan to Gécamines for rehabilitation of its plant was to be US$ 50 million.

116 Announcing the successful signing of the 22 nd April, 2008, Cooperation Agreements to the National Assembly on 9 th May, 2008, the Minister of Infrastructures, Public Works and Reconstruction spoke of the Agreement as the vision of President Kabila, as representing *“a vast “Marshall Plan”* for the reconstruction of our country's basic infrastructure”; as bringing about *“the political, economic and cultural reunification of our country”* and as *“putting an end to the constant cycle of despair, wretchedness and misery which Congolese people have suffered for decades.”*

117 On 22 nd May, 2008, the Minister addressed the Assembly again, responding it seems to various reactions to his earlier speech in the intervening period. The Minister opened his address by emphasising the underlying concept and structure of *“this Sino-Congolese Program”:*

> *“The first thing that must be recognised is that a project of such size and*

importance can only be achieved if the Government of the Peoples' Republic of China and the Government of the DRC clearly want it to happen. This is very important.

Their desire was manifested by numerous meetings and the work sessions that we had with the Chinese governmental authorities, in this case the Minister and the Vice Minister of Foreign Trade and the Minister of Foreign Affairs, in Kinshasa and in Beijing. The entire technical, financial, judicial and institutional structure has benefited from the support of both governments."

Addressing the question why the Cooperation Agreement had not been signed by the two governments, he explained that in order to avoid increasing the DRC's foreign debt, "both parties specifically agreed to work on the basis of a model that avoids state-to-state lending. This was the basis of our decision to cooperate through large state-owned enterprises."

118 Later on, on the subject of granting the Chinese consortium access to an important part of the country's mineral resources, he had this to say:-

"In this context [obstacles impeding access to traditional sources of finance] how to rebuild a country without resorting to alternative modes of financing that fit our situation? This is why your government has opted for a model that uses our national resources, particularly those related to mining, in exchange for the development of basic infrastructures in partnership with Chinese companies".

And a little later still,

"This is a good time to point out that state-owned companies are instruments of the Government's economic and social policies, and as such the Government is free to use them as it sees fit, in the best interests of the Republic. In this case, Gécamines was intimately involved in these initiatives through its corporate bodies, with the understanding that the issue of the revival of this state-owned company was also taken care of". (Emphasis added.)

119 Mr Harvey-Hills invited us to disregard this last passage – which was particularly relied on by Miss Lawrence – as no more than the impromptu observation of one particular Minister in response to a question the precise terms of which are unknown. But, while we readily accept that one should be cautious about the weight to be given to oral remarks in a forum where, no doubt, party politics plays a significant part, this particular comment was all of a piece with the Minister's earlier exposition of the ambitious national strategy on which the Government was embarked. A similar sentiment is also reflected in a report dated 15 th November, 2009, by the Economic and Financial Commission of the National Assembly in a section dealing with monies payable by the Chinese consortium and concerns that a proportion of US$ 50 million destined for Gécamines might have been misappropriated by private interests (as to which we express no view):-

"Recommendation:……One needs to re-proportion Gécamines and give it an

expert and technical and advisory role with the Government rather than continuing to allocate to it enormous financial resources which should rather form part of the public treasury given that the mining concession are not the property of Gécamines but rather belong to the State of Congo."

120 In the course of his speech to the National Assembly on 9 th May, 2008, the Minister of Infrastructures, Public Works and Reconstruction also spoke of the entry fee payable by the Chinese consortium, explaining that of the US$ 350 million, US$ 250 million would be by way of a budgetary contribution for the fiscal year 2008 and the balance for Gécamines. In his further address to the Assembly on 22 nd May, 2008, he explained that the allocation between the Public Treasury and Gécamines had been *"decided by the Government"* on the basis that it should permit the State to finance a portion of its spending and Gécamines to improve its cash position. As far as it is possible to tell, this split was determined by the Government purely as a matter of discretion on its part.

121 All the indications are that this decision was followed through. The first 50% tranche of entry fees appears to have been paid by the Chinese consortium in late 2009 in an amount of US$175 million (representing 50% of US$350,000). Of this, US$ 125 million has been allocated to the State Treasury and only US$50 million to Gécamines. As Miss Lawrence demonstrated, the Treasury's share appeared as a specifically identifiable item in budgetary reports by the Central Bank of Congo for September/October 2009 and also received specific mention by the Prime Minister on the occasion of his presentation of the State's 2010 budget to the National Assembly in October 2009. Whether the Government's "take" is more correctly characterised as diversion of part of monies to which Gécamines was contractually entitled or simply as a fee demanded by the Government direct from the Chinese consortium (a matter on which there was some discussion) is neither here nor there: the end result is the same.

122 As with the entry fees payable by pre-existing joint venture partners of Gécamines following the Mining Commission's report and the ensuing re-negotiation of contracts, there was an unsatisfactory reticence on the part of Mr Mukasa on the subject. In his first affidavit in February this year, having drawn attention to the US$350 million fee payable as one of the principal benefits of the Sicomines project for Gécamines — describing it as an important source of revenue for the company – he added, without elaboration,

"To avoid any confusion, I would like to be clear that contrary to what the Vulture Fund [Mr Mukasa's pejorative term for Hemisphere] seems to contend, this amount is due to Gécamines and not to DRC".

And in his second affidavit, sworn shortly before the start of the trial, Mr Mukasa's only specific mention of the Sicomines entry fees was with reference to Gécamines' letter of 14 th November, 2008, in which gratitude had been expressed that the Government's directive concerning payment of key money into DGRAD accounts:-

"did not concern the 100 million American Dollars owed to Gécamines as key

money from the 350 million American Dollars payable by the Consortium of Chinese companies who are partners of this company in Sicomines."

123 No attempt was made to acknowledge or respond to Hemisphere's observation that the Government had made it plain from the outset that the greater part of the US$350 million entry fee would accrue to the Public Treasury; or to the fact that, in accordance with that decision, US$125 million of the first tranche of US175 million had in fact been so treated. Nor was any explanation offered for Gécamines' apparent acceptance in its letter of 14 th November, 2008, that this was what was going to happen (suggesting that this came as no surprise) or how and why it is that he now comes, in his first affidavit, to assert that the full US$350 million *"is due to Gécamines and not to DRC"*. Mr Mukasa was also notably unforthcoming in his second affidavit as to how these fees, to which — he insists — Gécamines is entitled, are being treated in the inventory of assets and definitive balance sheet without which the transformation process cannot make progress.

124 As to the wider issue of how Gécamines came to be involved in the project, Mr Mukasa insisted that Gécamines had acted throughout as an entirely independent entity, without pressure from the government, and purely on the basis of what the Board of Directors judged to be in the best interests of the company as evidenced by the minutes of a meeting of the Board on 22 nd December, 2007. In his first affidavit he also sought, very clearly, to give the impression that the project had its origins in Gécamines' own prior discussions in the autumn of 2007 with Chinese companies about a possible partnership for the development of part of Gécamines' untapped mineral reserves; that the infrastructure aspects of the project were a Government initiative that was, in origin, separate from and incidental to the Gécamines/Chinese mining project; and that, in the final contractual package, represented by the two agreements of 22 nd April, 2008, the Government was simply following Gécamines' lead (see paragraphs 145 to 151 of Mr Mukasa's first affidavit).

125 But this view of things is hardly a realistic one. For a start Mr Mukasa made no mention in his first affidavit of the fact that, seven months earlier than the April 2008 agreements, on 17 th September, 2007, the DRC had signed a *Protocole d'Accord* (sometimes translated as Memorandum of Understanding, sometimes as Memorandum of Agreement) with a consortium of Chinese enterprises comprising the Export-Import Bank of China, China Railway Engineering Corporation and Sino-Hydro Corporation, the Preamble and Articles 1 and 11 of which were as follows:-

"I. PREAMBLE:- Considering the cooperation agreements signed on 3rd April and December 7, 2001, between the DRC and the People's Republic of China; Considering the memoranda of understanding and agreements relating to the financing of the infrastructure development of the Democratic Republic of Congo through the exploitation of its mineral resources which memoranda and agreements the Government signed, respectively, on August 9, 2007, with [China Railway Engineering Corporation], as well as the agreements entered into by them relating to the reconstruction of DRC, all of which memoranda and agreements are referred to hereinafter as the Prior Agreement; Considering the

consultations of the Parties and in accordance with the Memorandum of Understanding on Resource Financing for Infrastructure Development; IT IS AGREED AND DECIDED AS FOLLOWS:-

PURPOSE Article 1: This memorandum relates to the establishment of the terms and conditions of cooperation for the first tranche of financing for infrastructure development, in consideration of the exploitation of the natural resources of the Democratic Republic of Congo…….

EFFECT Article 11: This memorandum of Agreement, together with the Prior Agreement, is considered the principle and basis for every separate agreement of contract relating to the subject matter hereof and will come into effect on the date it is signed by the Parties and following approval of the mining and infrastructure development projects by the competent Chinese authority."

126 Although the earlier agreement did not include details of the extent of financing involved, the essential elements of the later April 2008 Agreements can almost all be traced back to this September 2007 *Protocole*. Section 2, for example, provided:-

> *"The Parties agree to create a joint venture company (JVC), for the purpose of engaging in mining activities, in the form of a semi-public company incorporated under Congolese law, being a joint venture between the Chinese enterprises comprising the Consortium and certain Congolese companies designated by the Government.* The financing for infrastructure development to take place pursuant to this Agreement will be secured by the mining concessions made available to the JVC by the DRC".

Article 3 specified the 32/68 % division of capital in the projected joint venture company between Congolese and Chinese interests. Schedule 1 tabled the estimated tonnage of mineral resources covered by the *Protocole* (valued at US$3 billion) and Schedule 2 listed the railways, roads and buildings of the infrastructure project under the heading "National Reconstruction Programme".

127 Hemisphere having drawn attention to the September 2007 *Protocole* and its significance – including the fact that Gécamines had not been a party to it — Mr Mukasa responded dismissively in his second affidavit, describing it as "only outlin[ing] the structure of an operation which the Congolese government wished to carry out in connection with an operation which Gécamines was already discussing with the Chinese Consortium"; as dealing with only two main subjects – participation in the capital of the joint venture company and infrastructure loans – *"in very general terms";* as being no more then a *"road map",* based, as regards finance and company capital, on joint venture agreements negotiated by Gécamines with several members of the Chinese Consortium in 2005 and 2006 in relation to other projects.

128 There is no reason to doubt Mr Mukasa's evidence that there had been previous contacts and joint venture agreements between Gécamines and Chinese companies; or that, when it

came to the combined mining/infrastructure venture, representatives of Gécamines' management were substantially involved in much of the detailed negotiations with their prospective counter-parties; or that the management and board of Gécamines took note of the respects in which the project was likely to be of benefit to Gécamines. But the nature and scale of the new venture, the terms of the September 2007 *Protocole* and subsequent April 2008 Agreements, and the grandiose description of the venture by the Minister of Infrastructures, Public Works and Reconstruction to the National Assembly in May 2008 leave little room for doubt on three fundamental points.

129 First, at the strategic level, the project was essentially an inter-state one between the DRC and the People's Republic of China and could not have come about, on the Congolese side, without the overall direction and control of the Government. Apart from the factors already mentioned, specific indicators of this appear in references at various points in the 22 nd April, 2008, Cooperation Agreement to the need for the approval of the Chinese government and the setting up of a “Steering and Coordination Committee” with the job, among others of “interfacing between the Chinese Government, the DRC, and the Mining JV” (Article 16).

130 Secondly, Gécamines' mining rights and the mortgaging of them as security for loan finance was every bit as critical to the infrastructure aspects of the project as to the mining operations side of things – the two being inextricably linked.

131 Thirdly, in the greater scheme of things, Gécamines' own particular interests, though important, were plainly subordinated to those of Congolese State and it is wholly improbable in reality that the Board of Gécamines had much option but to fulfil the role allotted to it by the Government. Apart from the wider considerations already mentioned, specific pointers to this also include the following:-

(i) Gécamines may have had various joint venture agreements of its own with Chinese entities as early as 2005 and 2006, but the Preamble to the September 2007 *Protocole* shows that the DRC had cooperation agreements with the Peoples' Republic of China dating back to 2001.

(ii) Gécamines was evidently not a party to the August 2007 agreements referred to in the Preamble between the Congolese Government and the several Chinese enterprises mentioned there (there is no mention there of Gécamines being a party and Mr Mukasa would almost certainly have mentioned the matter had that been the case).

(iii) Gécamines was not a party to the September 2007 *Protocole*. Nor was it even mentioned as such: the partners in the proposed Joint Venture Company were to be “the Chinese enterprises comprising the Consortium and certain Congolese companies designated by the Government” (Article 2).

(iv) In the event, as the 22 nd April, 2008, Cooperation Agreement makes clear, the

DRC "designated" Gécamines to be the Congolese partner in the Joint Venture Company (Article 1.4).

(v) By that same agreement the DRC undertook to cooperate in forming a Mining Joint Venture and "to transfer [to that company], through and with the participation of its state-owned company GECAMINES, the specified rights and licences" (Article 3.1); and (somewhat repetitiously) "that its state-owned company GECAMINES" would transfer the mining rights specified in the Agreement (Article 4).

132 These considerations, coupled with the way in which entry fees payable by the participating Chinese companies were allocated by the Government and have, as to the greater part been paid to or ear-marked for the Public Treasury, appear to us to fully vindicate Hemisphere's contention that the Sicomines saga is a striking example of the Government actively using Gécamines as an instrument of state economic and social policy and doing so on a grand scale: and all the more so given that the events took place in the run-up to the enactment in July 2008 of the Law (No. 08/007) which was designed to be the first stage in the process of the transformation of Gécamines into a commercial company.

D. Public/Social Services

133 Hemisphere claims that another function that Gécamines has, historically, performed on behalf of the Government, outside the scope of the objects laid down in its articles, has been the provision of local populations with healthcare, education, electricity and public utilities. It cites in particular a passage from the World Bank April 2008 Report referred to earlier:-

> *"DRC's mining sector has been dominated for years by several large enterprises owned by the government.* The enterprises have operated not as commercial enterprises but virtually as governments within a government – running schools, farms to produce food for employees, hospitals, social centres, transport, energy, and water infrastructure for the province."

Earlier World Bank reports also make reference to this historical aspect of Gécamines' activities, as for example its 10 th March, 2004, report:-

> *"While the labor code calls for the provision of some basic health and education services, PEs [Public Enterprises], under Government recommendation [emphasised thus in the original] and to compensate for state deficiencies in that area, have developed a large network of services including basic health centers but also large hospitals and schools.* In the Katanga region, almost all facilities including large hospitals were built and managed by Gécamines" (Section II, paragraph 43).

134 Mr Mukasa accepts that Gécamines has indeed provided services of this kind in the

regions in which it operates. But he asserts that this is quite normal: that it is no indication of Gécamines' status as an organ of state but simply reflects the need to build an infrastructure for a skilled workforce brought into an otherwise sparsely populated area. It is also, he asserts, a legal requirement of the Mining Code 2002.

135 In any event, he adds, provision of such benefits has been progressively reduced since the 1980 oil crisis. That may be so, but according to a recent posting on Gécamines' own web-site activity in this area remains substantial:-

> *"In the area of development and in the environment in which Gécamines operates, the company is very active in the areas of health, education and recreation.* For example, Gécamines has an extensive medical network comprising 12 hospitals and clinics, 27 dispensaries and health centres, and 17 occupational health offices. With 100 schools comprising 900 classes for some 40,000 students and 1,400 teachers, its educational institutions form one of the most extensive private networks in the province of Katanga. In terms of social and community development both in *Katanga and in the Democratic Republic of the Congo, Gécamines' accomplishments are unrivalled by any other company to date.* It has helped build the national railroad; through its subsidiaries, it has developed infrastructure for the production of electric power, and it has implemented better infrastructures for general, technical and vocational education and medical training……"

136 As regards Mr Mukasa's contention that, to the extent Gécamines does provide social services, it is merely complying with the 2002 Mining Code, he suggests that this is the effect of paragraphs f) and g) of Article 69 according to which applicants for a mining permit must supply the Mining Registry with, among other things, a report on the consultations with the authorities of the local administrative entities and with the representatives of the surrounding communities, and a plan as to how the project will contribute to the development of the surrounding communities. As is evident from the terms of these stipulations, neither imposes any specific obligation on mining companies to provide social services: it is more a matter of implied expectation that this will happen. Mr Harvey-Hills sought to establish that this is indeed what does happen, across the board, by inviting the Court to look at the example of the Mining Commission's report on the case of Boss Mining. But closer examination by Miss Lawrence of the other cases covered by that report showed this suggestion to be ill-founded: for the most part few of the mining contracts reviewed by the commission appeared to have produced any significant level of local benefits and certainly nothing remotely on the scale of services and projects listed by Gécamines on its web-site.

137 The difficulty that we have found, on the somewhat generalised, piece-meal evidence with which we were presented, is to discern with confidence the extent to which the provision of such services by Gécamines has, in truth, been the consequence of governmental directive as opposed to mere "recommendation" (per the passage from the World Bank report of March 2004 cited above) or the practical exigencies of conducting

mining operations in remote areas. In the case of Gécamines, the bulk of its operations appear to have been in a huge and relatively remote area in the province of Katanga in the East of the country and it is not difficult to imagine that the establishment and maintenance of at least some form of roads, schools, hospitals and the like was and is an unavoidable, practical pre-requisite of the attraction and retention of the necessary labour. We are not, therefore, persuaded that this particular subject is one from which we can draw any compelling conclusion of the kind suggested by Hemisphere – until, of course, we come to the Sicomines project with its extensive programme of, among other things road, hospitals and health care centres, a programme for which Gécamines, according to its web-site, has been happy to claim much of the credit:

> *"Gecamines' contribution to major Government works:-*
>
> *At the level of the Democratic Republic of Congo, the involvement of Gécamines in infrastructure development continues to be very noteworthy.* Indeed, it is la Sino-Congolaise des Mines, SICOMINES for short, one of the partnerships that Gecamines has created with a consortium of Chinese businesses, which will largely provide the repayment of the financing of major Government works."

IX Discussion and Conclusions: the Personality issue

138 A recurring theme in Mr Harvey-Hills' submissions was that there is no comparison between the position of Gécamines and that of SNPC, the state owned oil company that Cooke J and Morison J had occasion to consider in *Kensington* and *Walker* respectively, and held in each case to be part of the state of the Republic of Congo (formerly the Peoples' Republic of Congo). And it is true that there are differences, notably, certain terms in SNPC's bye-laws relating to functions that it was to perform "on behalf of the Congo" in relation to the country's oil and gas, coupled with a "convention" between the company and the state providing that the company was to carry out the policy of the government in these areas, and the key role of the man who was simultaneously President and Director General of SNPC and a special adviser to the President of the Republic – features particularly emphasised by Mr Harvey-Hills. But, in other respects, there are also striking similarities between the articles of SNPC and Gécamines particularly as regards external supervision by the relevant government ministry (Petroleum Affairs in the case of SNPC, Mines in the case of Gécamines) and composition of the board of directors.

139 Another feature to which Mr Harvey-Hills attached particular significance was the existence, high-lighted in one section of Morison J's judgment, of a *compte courant* to which SNPC was party but for which there is no counterpart in the current case. But the relevance of that account was to the relationship between SNPC and an ostensible subsidiary, Fininco, not to the relationship between SNPC and the State: the evidence revealed that huge sums of money were advanced on that account without any expectation that they would be repaid or that interest on them would accrue to SNPC and that Finico was nothing more than window-dressing for the expenditure by SNPC of its own money.

140 But the main point is that there is no reason in principle to view the circumstances of SNPC as establishing a bench-mark set of conditions which have to be satisfied or matched before it can be said that an entity is in truth an organ of state. The circumstances will vary from case to case. It must in the end be a matter of fact and degree. And here, in the present case, we are satisfied that Hemisphere has amply demonstrated that both elements of the *Trendtex* test are satisfied. As regards the first limb, "governmental control", the evidence speaks for itself. And, as regards the second limb, the performance of "governmental function", we concur with the words of Cooke J in *Kensington*: ***"An entity which is constituted in such a way that its purpose is to assist, promote and advance the industrial development, prosperity and economic welfare of the area in which it operates, can be seen as effectively carrying out government policy in the way that a government department does and therefore to assume the position of an organ of government"*** (at paragraph 53). It is only necessary to add that, in our view, the same necessarily applies, irrespective of its formal constitution, where an entity or its property is in practice made the instrument of the state for such purposes.

141 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. It might be suggested that the evidence shows no more than a truly independent entity which from time to time has been the victim of unprincipled requisition, expropriation and bullying by successive governments, or, as it was put in Gécamines' skeleton argument,

> *"It cannot, it is submitted, properly be relevant to the Court's determination of whether, after it has given judgment, Gécamines' assets are to be vulnerable to claims by FGH [Hemisphere] that in the dark days of the DRC's history, whether suffering under the colonial despoliation of Leopold II, under the Mobutu regime or during its terrible civil war with its c. 6m war dead, the country had either been oppressed or had collapsed so far that the rule of law had ceased at times to operate in places in a manner intelligible to a western court and Gécamines' rights had been disregarded in such periods."*

Whatever, attraction that argument might have had were we concerned only with old history, the events of the past eight years or so make the "much put-upon independent entity" thesis untenable and compel one to a very different conclusion.

142 It is not just *what* happened in the case of the Mining Review and the Sicomines project that are compelling but *when* it happened: the fact that the events in question occurred as recently as they did and at a time when Gécamines was supposed to be being transformed, with the encouragement of the World Bank, into an indisputably independent commercial company. (Although the main legislative enactments did not occur until 2008, the process was evidently already under way in December 2005 when the new Board of Directors was appointed by Decree No. 05/185, a step described by Mr Mukasa as "an important element

of the restructuring and transformation process".) Reading between the lines, Gécamines recognises that the pre-2008 *tutelle* regime was fatal to its case; and eliminating this bond has, no doubt, been a pre-requisite of further World Bank funding. How successful the government will prove to be in relinquishing control is another matter. It is impossible to suppose that resolution of the self-evident tensions and contradictions between the proclaimed intent of this reform process on the one hand and the way in which Gécamines has been treated in relation to the Mining Review and, above all, the Sicomines project on the other have not been the subject of discussion at the highest level in a way that found no expression in Mr Mukasa's evidence. But it is not unreasonable to suppose that this may well be one of the reasons why the reform process is taking as long as it is. Unless and until Gécamines can be seen to have been finally and convincingly reconstituted so as to be genuinely free from governmental control and interference, it can hardly complain if it is viewed as no more than an organ of state.

X *Arrêt entre mains: nature and effect*

143 The order of 19 th March, 2009, provided "Service of this Order upon the Party Cited shall operate both as an immediate injunction, and an immediate arrêt entre mains …." (paragraph 1) and *"The Representor do have leave to effect the execution of the Awards by way of distraint upon the assets of the First and/or Second Respondent in Jersey as follows: (a) this paragraph of this Order shall operate as an acte d' arrêt entre mains confirmée in respect of the Shares and the [Slag Sales] Payments which are controlled by and/or are in the hands of the Party Cited"* (in paragraph 15). However, the effect of this latter provision was, as one would expect, suspended until the Defendants and the Party Cited had had an opportunity to challenge it, as has happened. As yet, therefore, the interim order alone remains effective: the question is whether it should now be declared *confirmée.*

144 It is Hemisphere's case that the interim order was well founded and correctly made; that its effect was to create an immediate attachment of, and proprietary interest in, the Shares and Slag Sales Payments, subject only to being discharged following the trial; and that, in the case of the Slag Sales Payments the effect of the order was to attach not only Payments owing at the date of the order but also future Payments accruing due, at least up until such time, if ever, as Gécamines might cease to be an organ of state and be reconstructed as an entity genuinely independent of the DRC.

145 Mr Harvey-Hills' first objection, unheralded by his skeleton argument or Gécamines' Statement of Case, amounted to a root and branch attack on the validity of the *arrêt entre mains* elements of the ex parte 19 th March, 2009, orders and culminated in a submission that they should be immediately discharged. There were several strands to the argument, but essentially they were to the effect that there was no jurisdiction to make such an order at a stage when there had been no determination, on an inter partes hearing, that Gécamines was in fact an organ of state and/or that the circumstances of Hemisphere's claim were not within the very limited categories of debt where (supposedly) the *arrêt entre mains* form of execution is available. Coming at the late stage that it did, over twelve months after the

making of the orders in question and over eight months after the directions hearing in September last year, this was, to say the least, a little surprising. In the event, the contention was subsequently abandoned, rightly as far as we could see, and it is unnecessary for us to deal with it.

146 Mr Harvey-Hills' second submission was that, even if the *arrêt entre mains* was properly granted, it would only be effective to attach Slag Sales Payments that had become due at the time of the trial and not from the date of the ex parte order. It is plain that this argument was originally advanced in Gécamines' Statement of Case in the hope that, by the time of the trial, the reformation process described earlier would have been completed or at least have reached a sufficiently advanced stage for it to be claimed that Gécamines was now wholly independent of the state, whatever may have been the previous position. As we have seen, in reality the reformation process still has a long way to go. But the contention is in any event unsustainable.

147 Pothier, in his Traités de la Procédure Civile et Criminelle describes ***la saisie arrêt des choses incorporelles mobiliaires***, the precursor to ***arrêt entre mains*** in the following terms:-

> ***III. De la procédure de la saisie-arrêt***
>
> ***Le sergent, à la requête du créancier arrêtant, déclare au débiteur arrêté, par un acte qui lui est signifié à sa personne, ou à domicile, qu'il saisit, arrête, et met sous la main de justice, tout ce qu'il peut devoir et devra par la suite à celui pour le fait duquel l'arrêt se fait; pour sûreté de cette somme due à l'arrêtant, l'huissier lui fait défenses de payer à d'autres, l'assigne devant le juge du débiteur pour le fait duquel l'arrêt est fait, pour faire la déclaration de ce qu'il doit, et pour en faire paiement à l'arrêtant, jusqu'à concurrence de ce qui lui est du***
> ***……..***
>
> ***IV. De l'effet de la saisie-arrêt***
>
> ***L'effet de la saisie-arrêt est que, des qu'elle est fait, la créance arrêtée étant mise sous la main de justice, celui à qui elle appartient, et pour le fait duquel elle est arrêtée, n'en peut plus disposer; il ne peut donc pas la transporter au préjudice du droit de l'arrêtant, il ne peut la recevoir; et l'arrêté qui, au préjudice de l'arrêt, paieroit à son créancier, seroit à la vérité bien libéré envers son créancier, mais il ne seroit envers l'arrêtant, qui peut le faire condamner à lui faire délivrance de la somme qu'il devoit lors de l'arrêt, sans avoir égard au paiement qu'il a fait depuis, sauf son recours en répétition contre son créancier, à qui il a mal-à-propos payé depuis l'arrêt."***
>
> ***[III. On the procedure for the distraint- arrest***
>
> ***At the request of the arresting creditor, the Officer declares to the arrested***

debtor [i.e. third party], by an act which is notified to him in person, or at his home, that he is distraining, arresting and putting into the hands of justice, all that he can owe and will owe in the course of time, to the one for whose act the arrest is being made [i.e. the primary debtor]; as security for the sum owed to the arrestor, the officer forbids him to pay others, summons him in front of the judge of the debtor by whose act the arrest is made, to make the declaration of what he owes and to make payment to the arrestor up to the limit of what is owed to him.

……..

IV. On the effect of distraint-arrest

The effect of the distraint-arrest is that, as soon as it is made, the arrested letter of credit/debt being put into the hands of justice, the one to whom it belongs, and for whose act it is arrested [ie the primary debtor], can no longer dispose of it; therefore he cannot transfer it to the prejudice of the right of the arrestor, he cannot receive it; and the arrestee who, to the prejudice of the arrest, would pay his creditor, would be, in truth, really released from his creditor, but he would not be so with regard to the arrestor, who can have him sentenced to deliver to him the sum that he owed <u>at the time of the arrest</u>, without regard to the payment he has since made, except his repeated pleas against his creditor, to whom he has paid at the wrong time since the arrest……"] (emphasis added).

148 Miss Lawrence submits that the principal features of the *arret entre mains* so far as relevant to the present case, and the key questions that arise here, can accordingly be summarised as follows (as expressed, with minor textual adaptations, in her skeleton argument):-

(i) The effect of an interim *arrêt entre mains* is to arrest or seize the named assets in the hands of the third party. This is more than just a bar from dealing. It is an appropriation of the asset by the court giving the judgment creditor immediate security in relation to the debt owed.

(ii) It is clear that the extent of what is seized and owed is determined "at the time of the arrest". The purpose of bringing the third party before the court is, simply and naturally (when considering the plain and obvious meaning of the language used) to "confirm" whether the interim order was properly made. Whether the interim order was properly made can *only* be assessed by reference to the facts and position existing at the time of the interim arrest. In this case, the material question is was Gécamines an organ of the state of DRC at the time of the seizure? If it was and the order was therefore properly made, the interim order is simply made *confirmée*. The arrest itself is in fact made at the time of the first order. Its effect is simply suspended pending the third party being summonsed to Court to have it considered, and where appropriate, confirmed.

(iii) That this is the correct approach is leant further weight by the fact that steps taken

by the judgment debtor *after* the imposition of the interim order which seek to change the landscape as between himself and his third party debtor are to be ignored. Pothier states:-

> ***"Par la même raison, le créancier pour le fait duquel l'arrèt est fait ne peut pas, au préjudice des arrêtants, décharger son débiteur arrêté de son obligation; d'où il suit que, si un créancier a arrêté les loyers échus et à échoir, sur les locataires de son débiteur, ce débiteur ne peut pas, au préjudice de l'arrêtant, annuler le bail pour avenir, par une convention entre lui et son débiteur; car se seroit décharger les locataires de leurs obligations pour les annees à echoir, et ces années étant arrêtées, il ne peut, au préjudice de l'arrêtant, en disposer."***
>
> ***[For the same reason, the creditor [of the third party] for whose act the arrest is made, cannot, to the prejudice of the arrestors, discharge his arrested debtor from his obligation; from where it ensues that, if a creditor has arrested rents outstanding or to fall due, on the tenants of his debtors, this debtor cannot, to the prejudice of the arrestor, annul the lease for the future, by an agreement between him and his debtor; for that would be to discharge the tenants from their obligations for the years to expire, and these years being arrested, he cannot, to the prejudice of the arrestor, dispose of them].***

(iv) GTL is, by closest analogy to the English legal position, a garnishee, and whilst not identical, there is clearly much similarity between the order of an interim *arrêt entre mains* and a garnishee order nisi (now called an interim third party debt order) albeit that an *arrêt entre mains* appears wider and more flexible in its ambit (applying for example to all movable property of the debtor in the hands of the third party not just sums of money, and to future as well as present debts). Reference to English law regarding garnishees is therefore helpful and persuasive in light of this degree of similarity.

149 These propositions appear to us to be soundly based. It is unnecessary to review the English authorities on garnishee proceedings (now known as 'third party debt orders'). The following passages from the speech of Lord Millett in *Société Eram Ltd v Cie Internationale* [2004] 1 AC 260 HL, in which he spoke of the true nature and effect of such an order, will suffice:-

> ***"It is a process of execution which enables a judgment creditor to obtain satisfaction of his judgment debt out of money owed to the judgment debtor.*** The court does not order the third party to pay the judgment creditor out of its own money, but to discharge the debt which it owes to the judgment debtor by payment of that debt to the judgment creditor. The subject matter of execution is a chose in action, which like land cannot be seized; but the procedure is modelled on the process of obtaining execution against land with such modifications as are necessary to reflect the difference in the nature of the asset.

As in the case of land execution is effected in two stages. The first stage takes the form of an order nisi (or interim order) which creates a charge on the asset to be executed against and gives the judgment creditor priority over other claimants to the asset; and the second stage takes the form of an order absolute (or final order) which brings about the realisation of the asset and the payment of the proceeds to the judgment creditor" (paragraph 82).

"Two things follow. First, a third party debt order is not an in personam order against the third party; it has proprietary consequences and takes effect as an order in rem against the debt owed by the third party to the judgment debtor. Secondly, the discharge of the debt is an integral part of the scheme of the order, which creates and then realises a proprietary interest in the debt and makes the proceeds available to the judgment creditor" (paragraph 88).

XII GTL's case

150 Advocate Robinson, on behalf of GTL, confined himself to issues of immediate relevance to his client. He submitted that even if the court were to conclude that Gécamines is indeed part of the DRC, the ex parte orders obtained by Hemisphere were unfounded and should for the most part be set aside. There were four main strings to his argument. First, that the situs of the debt represented by the Slag Sales Payments was and is not Jersey and there was, therefore, no jurisdiction to make the interim order (the Shares, he accepted, were a different matter as they were clearly sited in the Island). Because an *arrêt entre mains* has the effect as discussed earlier of creating a proprietary charge over the property in question, it is necessary for Hemisphere to show, not just that GTL satisfies the jurisdictional rules for this Court which allow it to be sued here, but also that the thing itself is located here – that the debt sought to be seized has its situs here (to use the traditional legal term). Secondly, Mr Robinson contended that, even if he were wrong on his first point, the Court should refuse the relief sought by Hemisphere, as to confirm it would expose GTL to the risk of being ordered to make payment twice, once in Jersey and again in another jurisdiction (the "double jeopardy" argument). Thirdly, he submitted that, as a matter of discretion, the Court should in any event refuse the relief sought as there was no realistic prospect of the Viscount being able to take any effective action to recover money – there being none in Jersey itself. Fourthly, he attacked the breadth and terms of the disclosure orders obtained by Hemisphere as in any event unjustifiable, all the more so if GTL were right in its submissions concerning the Slag Sales Payments and only the Shares were susceptible to execution in this jurisdiction.

151 These submissions were preceded by introductory comments by Mr Robinson in which he sought to emphasise that GTL was an innocent bystander that had been dragged into the proceedings without any good reason. GTL, he said, was not itself a debtor of Hemisphere; its relationship with Gécamines is a genuine business one; it is a stranger to the dispute between Hemisphere and Gécamines. GTL had no wish to be obstructive, but, he submitted, it had serious concerns about the propriety of what Hemisphere had done and was entitled to voice them. GTL had no assets in Jersey and, indeed, no real

connection with the Island other than that it was incorporated here and has its registered office here; the relief obtained by Hemisphere was based on no more than a legal fiction that there was a debt with situs in Jersey; there would be nothing that the Viscount could do to recover any money; the real, and illegitimate, purpose of the proceedings as regards GTL was to obtain disclosure of information that would assist Hemisphere in enforcing its Awards elsewhere.

A The situs of the debt

152 Whether a tangible asset is or is not within a court's territorial jurisdiction and available to be seized is usually easy enough to determine. But intangible assets (*choses in action*), such as a contractual debt, can and frequently do pose more problems and have obliged courts and jurists to devise legal tests to be applied in such cases. Mr Robinson's starting point was Rule 120 of Dicey (Dicey, Morris and Collins on The Conflict of Laws, 14th Ed. (2006), Vol.2 at p.1116): “The situs of things is determined as follows: (1) Choses in action generally are situate in the country where they are properly recoverable or can be enforced……..” (sub-rules (2) and (3) deal with land and chattels respectively). The authorities cited for this Rule are *New York Life Insurance Company v Public Trustee* [1924] CA 2 Ch 101 and *Kwok v Estate Duty Commissioner* [1988] Privy Council 1 WLR 1035.

153 Relevant principles that can, we think, safely be distilled from those cases and from the commentary on Rule 120 at paragraphs 22–026 to 22–029 of *Dicey* and which were largely common ground between Miss Lawrence and Mr Robinson include the following: (i) The situs of a debt owed by a corporate body is the place where that body resides. (ii) Residence for this purpose is where that body carries on business. (iii) If a body carries on business in more than one place, it is regarded as resident in each of those locations and, subject to the next point, a debt owed by it will be treated as being sited in each of those places. (iv) However, if one rather than another of those places has been expressly or impliedly selected as the place where it is recoverable, then that will be regarded as its situs. (v) A debt payable in the future is no less a debt than one that is currently payable, and is subject to the same rules as regards situs.

154 It is unnecessary to cite at length from the judgments in *New York Life Insurance* and *Kwok*: two passages from the judgments of Pollock MR LJ and Atkin LJ in the former, relating to points (iv) and (v) above, encapsulate the relevant principles:-

> ***“Now, when you are dealing with a corporation, you are dealing again with a legal notion, and you have to examine the question where the debt can be said to be situate.*** It appears to me plain that a corporation according to our law is deemed to reside for the purposes of suit in the place where it carries on business in its own name, and in the case of corporations which have many activities in many countries, such as the big insurance companies — for example, the plaintiffs in this case. It appears to me that the true view is that the corporation resides for the purposes of suit in as many places as it carries on

business. And it is to be noticed that in ordinary cases where an obligation is entered into by the corporation without any particular limits of the place where it is payable, inasmuch as that obligation is an ordinary personal obligation which follows the person, you have in each jurisdiction a right to sue the corporation there; the corporation is resident there, and the obligation is enforceable there. Under ordinary circumstances the debt would be situate in each place where the corporation can be found"…": Atkin LJ at p120 (emphasis added).

"If that be so, there is clear evidence that the plaintiffs in this case are resident both in New York and in London, in both places they carry on a business, and in both places they are subject to the jurisdiction of the Courts. Then how is the determination to be reached whether they are to be treated as subject to the present jurisdiction, so that it may be said that the debt is due from the plaintiffs as being resident here, inasmuch as the debtors reside both in London and in New York? It seems to me we are entitled, in those circumstances, to look at the terms of the contract, and to determine from them what, for this purpose, is to be the place in which, and at which, the debt would be recoverable. Following out that principle it seems to me clear that primarily the debt is recoverable in London": Pollock MR at p.111.

B Registered Office in Jersey

155 The focus of dispute in the present case revolved first and foremost around whether GTL can properly be regarded as resident in Jersey for present purposes; and, as a sub-heads of that question, whether the fact that it is incorporated has its registered office here is, without more, sufficient, and where, if anywhere else can it properly be said to be resident.

156 As regards the first, at the heart of Mr Robinson's case was the stark contrast, he suggested, between the absence of any connection between GTL and Jersey, other than its incorporation here and the location of its registered office, and the fact that all its business activities are conducted elsewhere; that while GTL might be resident here for, say, tax purposes, that should not make it resident here for the purpose of any process of execution against it assets; that to hold otherwise would be a nonsense and would run counter to the common expectations among those who set up companies in Jersey which conduct their affairs in other places.

157 We accept that what may or may not constitute "residence" for tax purposes is irrelevant for present purposes, and that what matters in the present context – as for the purposes of jurisdiction – is generally said to be where a corporation "carries on business". But the rationale underlying this is that where a corporation can be found and made subject to a process of enforcement: that is the heart of the matter. In *Kwok* the question was the situs of the obligation on the promissory note made the day before a testator resident in Hong Kong died there. The note was executed by a Liberian company and expressed to be payable in Monrovia, Liberia. The Privy Council, on appeal from the Court of Appeal of Hong Kong, held that the situs of the obligation was Liberia and therefore outside the colony of Hong

Kong. The Board did not shrink from making it clear that this conclusion was one at which they arrived with no feeling of satisfaction, given that the circumstances of the transactions were such that it might have been open to question as a sham or as otherwise ineffective but for the fact that no such challenge had been mounted by the Commissioner of Estate Duty in Hong Kong. Their Lordships even went so far as to express agreement with the trial judge's description of the proposition that Liberia was the situs as flying ***"in the teeth of common sense"*** (at 1042). The key factors that compelled the members of the Board (Lords Bridge, Brandon, Templeman, Ackner and Oliver) to their reluctant conclusion were that the company was, on any view, resident in Liberia in that ***"it is incorporated in Liberia, where presumably it has a registered office, and where certainly it has a registered address for service"*** (emphasis added) and that, while they were prepared to assume for the purposes of argument that the company could also be regarded as resident in Hong Kong, ***"the expressed contractual obligation is to pay after 60 days in Liberia and upon presentation in the city of Monrovia".***

158 *Kwok*, accordingly, is cited by *Dicey* as authority for the proposition that a corporation is also resident for situs purposes where it is incorporated (paragraph 22–07). Mr Robinson suggested that this was based on a misreading of the case, in that it was a key element of the Board's decision that the promissory note was payable in Liberia and that the company "was also, to some extent, trading in that jurisdiction and at the very least had a bank account in that jurisdiction" (skeleton argument, paragraph 11, note 1). We beg to differ. The Board's judgment makes it abundantly clear that the conclusion on residence in Liberia was founded on the company's formal presence in that country by reason of its incorporation, place for service and presumed registered office there and had nothing to do with any additional business activity in that country: "Where the question to be determined is the whereabouts of a company for the purpose of service, the inquiry is normally directed to ascertaining where it carries on its business or where it is incorporated and has its registered office" (at 1041, emphasis added). That precisely the same test was regarded by their Lordships as applying to the question of residence for the purpose of situs is inescapable: earlier in the judgment Lord Oliver had already observed that the matter fell to be determined by reference to first principles and had noted "It is clearly established that a simple contract debt is locally situate where the debtor resides – the reason being that that is, prima facie, where he can be sued: New York Life Insurance ……..per Warrington LJ" (at 1040). In any event, to speak of the company "trading" in Liberia is unrealistic: the only business activity ever conducted by it consisted of "acquiring assets from the testator in return for the conveniently worded promissory notes" (at 1038), of ***"the agreements and promissory notes"*** (at 1039). Nor, quite evidently, was the fact that all the directors of the company were resident in Hong Kong and its central management and control were in Hong Kong regarded as sufficient to displace Liberia as a candidate for "residence" for situs purposes on the basis of nothing more than that that was where the company had been incorporated and had its registered office. Had it been thought that there was a proper case for a contrary view, it is difficult to imagine that their Lordships, bearing in mind the composition of the Board in that case and their unease with the conclusion to which they felt impelled, would not have been robust enough to adopt it.

159 On the basis of the Privy Council's decision in *Kwok* it appears to us that Miss Lawrence's

submission that the fact that GTL was incorporated and has its registered office in here is sufficient to make it “resident” in Jersey for present purposes irrespective of where its daily business activities are conducted, or where its directors happen to live or where its bank accounts are located. Nor, as it seems to us, is there anything in the least perverse or surprising in principle about such a conclusion. Whether it is also resident in one or more other places is another matter.

C Residence of GTL in the DRC

160 The only other contender for residence specifically claimed by GTL was the DRC, on the basis – it was said — that on any view it carries on business there. But even if the evidence were to make good that contention, it would not assist GTL unless it could also be shown that the DRC was and is the contractually designated or implied place where the Slag Sales Payments are to be paid. The decided cases establish that, as a general rule, consideration of where performance is expected to take place only comes into play as the determining factor when a company is regarded as having more than one residence for situs purposes: in those situations, but only then — when residence and place of performance are one and the same – is the place of performance regarded as the situs to the exclusion of any other place. The point is clearly made in *Kwok*. Having assumed for the purposes of argument that the company could be regarded as also resident in Hong Kong for situs purposes (though doubting that this was justified by the evidence, other than for tax purposes) and, therefore as having two places of residence, the court continued:-

> ***“In that situation it is clearly established that the locality of the chose in action falls to be determined by reference to the place – assuming it to be also a place where the company is resident – where, under the contract creating the chose in action, the primary obligation is expressed to be performed: see*** *New York Life……; In re Russo-Asiatic Bank* [1934] Ch. 720, 738; ***and*** *F & K Jabbour v Custodian of Israeli Absentee Property* [1954] 1 WLR 139, 146.”

161 In the present case, one thing is perfectly clear: that, on GTL's own evidence, there is no contractual stipulation, express or implied, that the debts represented from time to time by the Slag Sales Payments are to be discharged in the DRC. Wherever the Payments are expected to be made, which we were not told, it is not there.

162 Mr Robinson sought to surmount this hurdle by reference to the New South Wales case of *Cambridge Credit Corporation v Lissenden* (1978) NSWLR, 411, submitting that it demonstrates that residence is not always a necessary condition. In that case Clarke J held that the situs of the contractual obligation in question – the right to indemnity under certain Lloyd's of London insurance policies – was the State of New South Wales because that was where recovery under policies could, in the normal course of business, be expected to be made notwithstanding the fact that the insurers had no place of business there. But that was an exceptional case. The plaintiff had obtained judgment for substantial damages against a firm of accountants as a result of the negligence of two of its several branches in

New South Wales and, in subsequent proceedings, had sought leave to institute proceedings directly against the firm's insurers on the basis of legislation, operative within the State of New South Wales but not in any other State, the terms of which, if applicable, would create a charge on the policy proceeds. One of the issues before Clarke J was, accordingly, whether the chose in action represented by the right of indemnity under the policy was to be regarded as located in New South Wales and thus subject to the relevant statutory charge or located somewhere else. The problem was that the policies, being underwritten with Lloyd's of London, there was a large number of underwriters, some individual members of syndicates and some corporate insurers none of whom was resident in New South Wales or had a place of business there: “There is no evidence that any single underwriter resides or carries on business in New South Wales. Consequently, I am bound to approach this application upon the basis that the residencies and places of business of the underwriters, or potential debtors, are spread over many countries and do not include New South Wales” (at 415).

163 Having made reference to *Dicey*, *New York Life*, and other cases, (including *In re Helbert Wegg & Co* [1956] Ch 323 in which Upjohn J had concluded that unless a debtor has a residence in the country in which the parties had, by their contract, stipulated that the debt should be repaid, the chosen place could not qualify as the situs of the debt) Clarke J observed that the residence test was of no use in the present case and that “the only solution” was to look to the place where the debt was expressly or impliedly required to be paid. That he held was New South Wales: not because of any express term but because the branches of the firm of accountants that had been negligent were located there (in Sydney and Newcastle), because the policy made reference to the accountants having a number of branch offices, because this was, as he put it “indicative of a recognition that that firm might be sued in one of the States in which a branch operated and seek to recover in the same state in respect of its potential liability”, and because it followed that “recovery would in the normal course of business be achieved in the State in which the branch concerned was situated”, which was New South Wales. The result is that, while justice may have been done, it is evident that the decision in that case was born of its own peculiar facts. The authorities, judicial and academic, recognise that where an abstract concept such as a chose in action is involved there will always be exceptional cases where normal rules fail to work and some other solution to the problem has to be found. Clearly, however, the decision in Cambridge Credit is not a reason for jettisoning the normal rule in circumstances where no equivalent difficulties arise.

164 Before leaving that case it is also pertinent to note that Clarke J rejected the submission by counsel for the insurers that the situs of the right of indemnity under the policies should be regarded as the State of Victoria on the basis that the policies contained express provisions that the governing law was to be that of Australia, that the Courts of that country were to have jurisdiction in any dispute and that any summons, and that notice or process was to be served on a law firm at it offices in Melbourne in the State of Victoria. These provisions, the learned judge observed, did not evince a contractual intention that either payment was to occur, or the moneys were only recoverable, in Victoria” (at 418).

165 On the basis, as previously indicated, that the Slag Sales Payments are not, on any view, payable in the DRC, the question whether GTL does or does not carry on business there so as to make it resident there for situs purposes does not arise; but it is appropriate that we should deal with it as the assertion that GTL does carry on business there appeared to be a significant element of its case.

166 The difficulty for Mr Robinson was that the only evidence proffered by GTL of residence other than in Jersey left him trying to make bricks out of straw. Mr Kalionen's evidence, so far as relevant to the whole matter of situs, was limited in scope and amounted to this (first affidavit of 12 th February, 2010.): GTL *"does not conduct its business in Jersey"; "the business of the joint venture operates in the State of the Democratic Republic of Congo"* (our emphasis); GTL's board members and signatories to its bank accounts are all located outside Jersey (in the DRC, Finland, USA and Belgium); although GTL has in the past had a bank account in Jersey, this was closed in June 2008; the Slag Sales Payments are made from *"accounts located in two jurisdictions, neither of which is Jersey",* to an account of Gécamines which *"is also not located in Jersey"*. Further than that he was not prepared to go. Unless ordered to do so, *"GTL would not choose to volunteer to FGH [Hemisphere] details of the jurisdiction where the GTL branch is located from which the Payments themselves are made".*

167 Mr. Robinson suggested that it was clear that GTL carried on business in the DRC; but what exactly this meant was anything but clear. All that Mr. Kalioinen said was that "the business of the joint venture operates in the Democratic Republic of Congo", which is ambiguous.

168 Technically, the "joint venture" here is a contractual arrangement between OMG BV (a Netherlands company), Groupe George Forrest SA (a Luxembourg company) and Gécamines entitled "Joint Venture Agreement", the object of which is the commercial exploitation of cobalt-rich slag produced by Gécamines from its mining operations in the DRC. Under that agreement the parties agreed to establish "a Joint Venture Company" to be named Groupement du Terril de Lumbashi (i.e. GTL) — referred to thereafter in the agreement as "the J.V." The principal objects of GTL were to establish a processing company in the DRC to be named Société de Traitement du Terril de Lubumbashi ("STL") in which the shares were to be primarily owned by GTL; to conclude certain agreements, including "the Agreement of the Parties concerning the Capital contributions, the loans and other finance of the project as well as optimising and distributing profits"; and "to organise the management and follow-up of the Project". In due course GTL was incorporated in Jersey and STL in the DRC and GTL entered into (a) an agreement with Gécamines for the purchase of cobalt-rich slag (the "Long Term Slag Sales Agreement"), the Slag Sales Payments being the price payable to Gécamines by GTL for the slag; (b) an agreement with STL for the conversion of the slag into cobalt alloy, by STL at its plant in the DRC (the "Tolling Agreement"); and (c) an agreement with OMG Kokkola OY for the purchased by that company form GTL of the processed alloy the "Long Term Cobalt Alloy Sales Agreement".

169 The term “joint venture”, without more, could therefore be any one of three things: short-hand for the overall three-stage project, or a reference to the Joint Venture Agreement (to which GTL was not a party), or a reference to GTL itself (on the basis of the way in which it was referred to in the Joint Venture Agreement, “the J,V.”, and indeed in the other agreements).

170 If Mr Kalioinen meant to testify that GTL itself carries on business in the DRC – which he could easily have said – his wording is unhelpful and uninformative in that it offers no details about premises, staff or what it actually does there on a day-to-day basis. On the other hand, if it was intended as a reference to the Joint Venture Agreement or to the aggregate of the operations and agreements described above (which is the most likely of the three options, given the context in which Mr. Kalioinen uses the same expression in paragraph 8 of his second affidavit), then it tells us nothing about GTL's own, distinct presence in the country. It is plain that the processing company, STL, has a substantial physical presence in the DRC, but by no means obvious that GTL has one or needs to have one. Its primary role, as Miss Lawrence suggested, appears to be no more than that of joint venture vehicle through which the substantive partners to the venture have chosen to structure their operations, rather than an operating entity itself.

171 In a colloquial or commercial sense GTL can, of course, be said to be “carrying on business” in the DRC inasmuch as it has contracts with two Congolese companies, Gécamines and STL, relating to operations in that country, in that it probably has title to the slag immediately before and during processing and to the cobalt alloy there up to at least the point of export to OMG, and in that it earns profit from operations carried on in the DRC. Whether that is sufficient for present purposes is, however, less obvious. The overall tenor of reported cases suggests that what matters in the context of the present discussion is whether a company has a physical presence within the jurisdiction in question in the form of an identifiable place with a degree of permanence about it from which it carries on business: a branch or office. On that basis, having a contractual counter-party who is resident there, or having a bank account or otherwise owning property there would not be enough. Mr Robinson suggested that presence of directors within the jurisdiction could be sufficient, but that is not borne out by *Kwok* where their Lordships expressed doubt whether the fact that the directors were all resident in Hong Kong and the management and control was there – so far as there was anything to do – would have been enough to make it resident there.

172 There is little in the evidence to suggest that GTL has any such distinct office or other place of business of its own in the DRC. Mr Kallioinen does not say that it has. And the only fragments of documentary evidence we have to go on tend to confirm that it has no such place of business. These come in the form of a handful of documents exhibited by Mr Kalioinen to his second affidavit, sworn in March this year, in support of an interlocutory application for security for costs and fortification of the undertakings given by Hemisphere in connection with the interim orders obtained in March last year (the circumstances and result of that application are dealt with in the judgment of this Court given on 23 rd April this year). The documents consist of two invoices from George Forrest Belgium SA addressed

to “GTL Ltd, C/o Bedell Group, PO Box 75, 26 New Street, St. Helier, Jersey” — which is GTL's registered office — requesting reimbursement in respect of a number of charges incurred by them following a temporary embargo by the Governor of Katanga province on the export of cobalt alloy at one point last year. Absent any other explanation, and there was none, one would expect invoices such as this to have been addressed to GTL in the DRC if it had had an office there.

173 On the basis of the evidence adduced by GTL we are, accordingly, in little doubt that GTL has no distinct place of business of its own in the DRC. We are also sceptical as to whether such other interests in and connections with that country as it has would be sufficient to constitute residence there, were that to be a material consideration – which, for the reasons already given, it is not. At the risk of repetition, we note again that no other specific place of residence was distinctly alleged, much less proved, by GTL; let alone another place where it is resident and where the Slag Sales Payments are contractually recoverable.

174 In summary therefore, we are satisfied, first, that Jersey is a valid situs of the chose in action represented by the Slag Sales Payments (on the basis that GTL was incorporated and has its registered office here) and secondly that GTL has not shown that there is another jurisdiction in which it is also resident and where the those Payments are contractually required to be made or should be expected to be paid in the ordinary course of business (the only contender other than Jersey being the DRC and there being no suggestion that the Payments are required to be made there). On the evidence, therefore, these Payments are located here and are susceptible to execution here by the process of *arrêt entre mains*.

D Double Jeopardy

175 In English law the effect of a final third party debt order or garnishee order absolute is not only to direct the third party or garnishee to pay the garnishor instead of his original creditor but, upon such payment, also to discharge, pro tanto, the third party garnishee from liability to his former creditor: the second element is regarded not just as a consequence of the first but as an integral part and necessary concomitant of the first. As authority for this it is unnecessary to look further than the decision of the House of Lords in *Eram* in which the history of this process and its treatment in decided cases were reviewed at length (and to which we have already made reference). The reasoning and conclusions expressed there are entirely consistent with those underlying the Jersey process of *arrêt entre mains*.

176 The plaintiff in *Eram* had obtained a judgment from a French Court and had registered it in England. The judgment debtors were resident in Hong Kong and had funds in an account there with a bank which was incorporated and carried on business in Hong Kong but also had a registered branch in London. The central issue was whether the plaintiff could properly be granted a third party debt order by the High Court in London in respect of the debt represented by the monies standing to the credit of the judgment debtors' favour in its Hong Kong bank account (the court having jurisdiction over the bank by reason of the

presence of its branch in London). The House of Lords, over-ruling the Court of Appeal and upholding the decision of the trial judge, held that no such order was permissible on the grounds that the debt in question was a “foreign debt”, sited in Hong Kong, and there was unchallenged evidence that the Courts of Hong Kong would not recognise an English third party debt order as being effective to discharge the bank's liability on the account to its customer, the judgment debtor.

177 Mr Robinson suggested that the situation in the present case is comparable with that in *Eram* in that the debt here is governed by foreign law and is payable elsewhere than in Jersey. The first point is unchallenged: the Slag Sales Agreement is expressly stated to be governed by the law of Belgium. As to the contractual place of payment all we are permitted to know is what is revealed by the terms of Clause 8.2 of that Agreement, which in our copy, read: “Method of payment – Payments by the Purchaser [GTL] to the Supplier [Gécamines] shall be made by bank transfer to the Supplier's account”. Whether there had been some redaction of further particulars of the account, in the same way that certain other details have been blanked out elsewhere in the Agreement (for example, the address for service of notices on GTL), is unclear. But there is no contractual definition of “Supplier's account”, so that without more – and Mr Killioinen made it clear that he was reluctant to disclose the exact source and destination of payments – both the court and Miss Lawrence were left in the dark as to the relevant facts.

178 But there is a crucial difference between the facts of *Eram* and those in the present case. In *Eram* all conceivably relevant aspects of the debt against which execution was sought were Hong Kong related: the bank itself was resident there, the account in question was there, the debt represented by the credit balance on that account was payable there, and the law governing the bank and its customer was that of Hong Kong. On any view the debt could properly be described as a “foreign debt” situate in Hong Kong. In the present case there is no equivalent convergence of circumstances in another, foreign jurisdiction. In the first place, the situs of the relevant debt is, we have held, Jersey. On any view, therefore, the present case is distinguishable on its facts from *Eram*.

179 The only question that might still be asked in the present case is whether the fact that the proper law of the debt is that of Belgium and/or the fact that the contract specifies the payment is to be made to an account of Gécamines which is said to be outside Jersey (but is otherwise unidentified), is of relevance to the double jeopardy argument, notwithstanding that – for the reasons given earlier – neither of these factors has any bearing on the situs of the Slag Sales Payments. The scope for raising this question, as Mr Robinson pointed out, arises out of one or two places in some of the judgments in *Eram* where, at first blush, it appears that the dominant factor in characterising a debt as “foreign” was considered to be the fact that the bank account was governed by Hong Kong law and/or that the debt was payable at the branch in Hong Kong: see, for example, paragraph 26 of the speech of Lord Bingham of Cornhill where he said: *“It is not open to the court to make an order in a case, such as the present, where it is clear that the making of the order will not discharge the debt of the third party to or garnishee to the judgment debtor according to the law which governs that debt”,* and the speech of Lord Hoffman, *“By foreign debt, I mean for present purposes a*

debt which is payable in a foreign country and governed by the foreign law. Different considerations may apply in cases in which one or more of these considerations is missing. But I put them aside because the facts of the present case are both simple and typical" (paragraph 32).

180 But taking each of their Lordship's speeches as a whole it is clear that the underlying premise was that the situs of the debt was Hong Kong. This is apparent from the tenor of the discussion, the authorities cited and the frequent use of the terms "situated", "sited" and "situs": see, for example, Lord Hobhouse at paragraph 71 and Lord Millett at paragraphs 76 and 111, and indeed Lord Bingham himself a little later on in the same paragraph as that mentioned above:-

> ***"I find myself in close agreement with the opinion of Hill J in*** *Richardson v Richardson* [1927] P228, ***subject only to the qualification (of no practical importance) that an order may be made relating to a chose in action sited abroad if it appears that by the law applicable in that situs the English order would be recognised as discharging pro tanto the liability of the third party to the judgment debtor."***

There is nothing in any of the speeches to suggest that any of their Lordships had in mind situations in which the debt has its sole situs in England but is governed by the law of another country or payable there: on the facts of *Eram* there was no occasion to do so. In short there is nothing in that decision that would warrant the conclusion that a debt the situs of which, according to established principles, is to be regarded as England for one purpose (execution by means of a third party debt order) is nonetheless to be regarded as a "foreign debt" for another purpose (the possibility of double jeopardy) simply because, in the latter case, its proper law and/or contractual place of payment are those of another country. So subtle a distinction and use of seemingly contradictory terminology, if really intended, would require far clearer statements to that effect than anything to be found in their Lordships speeches in *Eram*.

181 We are unable, therefore, to accept Mr. Robinson's submission that the Slag Sales Payments are to be regarded as "foreign debts" for the purposes of considering possible double jeopardy. That, however, is not the end of the matter. As Lord Bingham remarked in *Eram*, in a passage relied on by Mr. Robinson, ***"....*** discretion has been exercised against the making of an order even where the debt to be attached is situated in this country where it has appeared that the third party, despite the discharge of its debt to the judgment debtor as a matter of English law, may be at risk elsewhere of compulsion to pay a second time" (paragraph 17). The leading authority on this point is *Deutsche Shcachtbau-und Tiefbohrgesellschaft mbH v Shell International Petroleum Co Ltd* [1990] 1 AC 295, HL (Lords Keith, Brandon, Oliver and Goff, Lord Templeman dissenting), a case involving a commercial debt with an admitted situs in England. Together with *Eram*, it appears to us to justify the following propositions. Where a debt is situated (has its situs) abroad, an English court will not make a final third party debt order unless it is clearly shown that the foreign court would regard the debt as automatically discharged by the order of the English court; it is for the judgment creditor to establish this; this is the only relevant question; the court is

not called upon, in such circumstances, to try to evaluate the risk of the third party being compelled to pay twice (see in particular Lord Millett in *Eram* at paragraph 111). But where the debt is situated in the country where the third party debt order is sought, the court has, nonetheless, a discretion to refuse to make a final order where it is satisfied by evidence that there is a real risk that third party could be compelled to pay the debt again by its original creditor, even if this is the result of the foreign court purporting to exercise an extravagant extraterritorial jurisdiction.

182 In the latter case Lord Oliver, in *Deutsche Shcachtbau*, summarised the matter in this way:-

> ***"It has to be recognised that a debt is a species of property which may be recoverable by legal process from a debtor in more than one jurisdiction and that it would be entirely inequitable that the garnishee should, by process in different jurisdictions properly conducted in accordance with the local law, be compelled to pay twice over in order that a judgment with which he has no connection whatever should be satisfied at his expense.*** If the reality is that this is likely to be the result, the fact that the particular foreign legal process is not one that commends itself to our jurisprudence is really immaterial" (at 343).

183 Lord Goff, in the same case, explained the reasoning behind this at somewhat greater length. There had in the past, he said, been a tendency for courts to proceed on the basis that it could reasonably be assumed that foreign courts would give effect to an English judgment where (a) the English judgment had been entered by a court which is generally, by accepted standards of international law, a court of competent jurisdiction; (b) the situs of the attached debt is England; and (c) payment of the attached debt by the garnishee pursuant to the garnishee order absolute has the effect of discharging that debt. But, he concluded, this could not be treated as a conclusive assumption of law, precluding all possibility of the third party adducing evidence to show that it was at risk of having to pay twice. Weighing up what he described as powerful (but opposing) policy arguments in favour of, on the one hand the judgment creditor, and on the other the third party garnishee, he came to the conclusion the latter must prevail on the ground that;-

> ***"the principle which is here being applied is that a garnishee order absolute should not be made where it is inequitable to do so, and further that it is accepted in the authorities that it is inequitable to do so where the payment by the garnishee under the order absolute will not necessarily discharge his liability under the attached debt, there being a real risk that he may be held liable in some foreign court to pay a second time.*** To deprive the garnishee of the benefit of this equity merely because the court which may hold him liable a second time is not acting in accordance with accepted principles of international law would not be right, especially bearing in mind that the garnishee is a wholly innocent party who has been dragged into somebody else's dispute, and that the judgment creditor has the opportunity of seeking elsewhere for assets of the judgment debtor which he may seize in

satisfaction of the judgment debt."

184 But the risk must be real and – unlike the case of a foreign debt – it is for the third party garnishee to establish that it exists:- ***"the crucial feature is the reality of the risk",*** per Lord Goff at 358- ***"if the reality is…"*** per Lord Oliver in the passage cited above. And, per Lord Goff again (at 356):- ***"The propositions which I derive from the authorities are these.*** First, if it appears that there is a real risk that the garnishee will be compelled by some other court to pay the attached debt a second time, it will generally be inequitable to expose him to that risk by making the garnishee order absolute. But, second, in the absence of evidence establishing such a real risk, the assumption I have referred to will be applied" (the assumption being that referred to in the immediately preceding paragraph of this judgment).

And, per Hobhouse J (as he then was) at first instance in a passage endorsed by Lord Goff (at 347):-

> ***"The garnishee, if he is to resist the order absolute, must show that he is exposed to a real risk of being required by a foreign court to pay the debt again.*** If he can do so, as opposed to raising a mere speculative possibility, he has established the ground for exercising the discretion in his favour."

185 Commercial pressure on the third party from his original debtor is not generally enough, nor it seems is the mere threat or issue of legal proceedings: the relevant risk is of execution against assets of the third party: per Lord Goff at 352 and 356 to 260.

186 In *Deutsche Shcachtbau*, the third party adduced substantial affidavit evidence in support of its case and their Lordships, including Lord Templeman (who otherwise dissented), were satisfied that there was a real risk of it being compelled to pay twice. Lord Goff expressed his conclusion (at 360) in terms that also pointed up the fact that, in such a case, it is for the third party to make good any assertion that he is at risk of double jeopardy: "Looking at the matter as a whole, and bearing in mind that it is enough that Sitco establishes a real risk, I am satisfied that Sitco has discharged the burden upon it to establish the existence of such a risk." By contrast, in the present case GTL adduced no affidavit evidence of any such risk and, indeed, made no serious attempt to argue that there was one. This is, perhaps, not altogether surprising, given that the ties between Gécamines and GTL are not only contractual but corporate, in that Gécamines is one of the three shareholders in GTL, their joint venture vehicle. Perhaps this is also why we found ourselves wondering whether GTL "doth protest too much" about being caught up in a dispute between Hemisphere and Gécamines that had nothing to do with GTL: it is by no means obvious that, in practice, Gécamines would seek to render GTL liable to pay the same debt twice over.

187 We should perhaps add this. That if and insofar as the law governing the contract giving rise to the debt, Belgian law, has a part to play at any point in this analysis, the only evidence adduced was that contained in an opinion letter from Mr. Joost Verlinden a member of the Brussels Bar and a partner of Linklaters LLP, Brussels dated 22 nd April,

2010, and addressed to Ogier on behalf of Hemisphere: no countervailing evidence was put forward by GTL. The main question that Mr Verlinden was asked to address was whether a Belgian Court, applying Belgian law, would consider that payment of seized funds by GTL to Hemisphere pursuant to an order of the Royal Court of Jersey would constitute a breach of GTL's obligations to Gécamines under the Long Terms Slag Sales Agreement or the Joint Venture Agreement; but in order to answer this Mr Verlinden first addressed two other questions: (a) the effect in Belgium law of payment made pursuant to an attachment order made by a Belgian court and (b) the effect in Belgium law of payment made in compliance with an equivalent order made by the Royal Court of Jersey. As regards the first, his evidence was that a very similar third-party garnishee type of procedure (*saisie-arrêt exécutoire*) is available in Belgian law and that payment of seizing creditor by the third party discharges the third party's obligation to its contracting party. Turning to the second question, “whether a payment to a seizing creditor pursuant to the attachment order of the Royal Court of Jersey will constitute a valid discharge of debt under Belgian law”, it was, he said, his opinion that the order in question would qualify and be recognised as a foreign judgment and that to the extent that GTL pays Hemisphere pursuant to that order it would be treated in Belgian law as discharged from its original contractual obligations. Nor would such payment be regarded as involving any breach of contract on Gécamines' part.

188 The principles developed by the English courts as discussed in this sections of our judgment appear to us to be ones that it would entirely appropriate for the Royal Court to follow in relation to the confirmation of an *arrêt entre mains*. There is, accordingly, no ground on which, in the present case, we could or should, as a matter of discretion, decline to confirm the interim *arrêt entre mains*.

E Inutility and Abuse of Process

189 GTL's final submission as regards the *arrêt*, was that confirming it would, in any event, serve no useful purpose and should therefore be refused as a matter of discretion. Mr Robinson's argument was essentially one of inutility and improper process. There was, he suggested, no likelihood that the Viscount – whose role it would be to execute the court's order – could, in practice, achieve anything or that he would think it worth while attempting to do so: GTL has no assets within the jurisdiction (which we will assume to be the case); the Viscount has no power short of a declaration of *désastre* to compel GTL go bring assets into the jurisdiction (which is probably correct); GTL could not be declared *en désastre* because it is not insolvent; and even if that were theoretically possible it is improbable that the Viscount would think it appropriate to go so far as trying to recover overseas assets via a regime of *désastre*. It would therefore be wrong in principle for the Court to put the Viscount to the expense and trouble of trying to do something that was unattainable.

190 In support of this line of argument, he referred us to the decision last year of the Royal Court (Bailhache, Bailiff and Jurats Le Breton and Clapham) in *In re Kaplan* [2009] JLR 88 in which the Representor, Mr Kaplan, applied for the discharge of a *saisie judiciare* which

had been granted ex parte on the application of the Attorney General at the request of the US Department of Justice pursuant to the Proceeds of Crime (Jersey) Law 1999. The court rejected a number of jurisdictional attacks on the validity of the *saisie judiciaire* but on balance accepted the arguments of counsel for Mr Kaplan (Mr Harvey-Hills) that it should be discharged as a matter of discretion, primarily on the ground that events had taken a course which had resulted in a stalemate, or "lockdown" as counsel for the Attorney General put it, which had rendered it virtually impossible for the Viscount to make any progress in getting in the relevant property (the foreign assets of two Jersey trusts, consisting principally of a real estate in Costa Rica and cash in Switzerland); in addition, the liquid assets immediately available to meet the Viscount's costs had been exhausted and maintenance of the *saise judiciaire* would have meant the Viscount's future costs coming out of public funds. It is unnecessary for present purposes to go into the somewhat complicated circumstances. The situation was summarised by the Court in these terms:

> ***"In our judgment, the balance tips in favour of discharging the saisie judiciaire.*** Our principal reason for arriving at that conclusion is that we think it is inappropriate to allow the Viscount to remain in an impossible position. Power without responsibility is the prerogative of the harlot, but responsibility without power is equally dangerous. The Viscount is powerless to exercise effective control over the assets subject to the ……The Viscount is unable to fulfil [his] duty. The assets in Switzerland have been frozen as a result of action taken by the US Department of Justice. The assets in Costa Rica are principally immovable property which is beyond his reach" (paragraph 67).

Having regard to certain observations by Lord Philips of Worth Matravers in the decision of the House Lords in *King v Serious Fraud Office* [2009] 1 WLR, 718, [2009] UKHL 17 (the report of which was drawn to the Court's attention after judgment had been reserved), the Court also expressed the view that "Generally speaking, in the context of applications by foreign countries to enforce an external confiscation order, it seems to us, for all the reasons given by Lord Philips, that assistance should be confined to realisable property within the jurisdiction". There was, in addition "a real risk of conflicting orders by this court and courts of Switzerland which would place any trustee or person specified in the order in a very difficult position".

191 There are several answers to Mr Robinson's contentions. First, we see no good reason why this Court should proceed on the assumption, implied in these submissions, that GTL would not comply with an order in relation to the Slag Sales Payments that it pay Hemisphere what it owes Gécamines instead of paying Gécamines – which would be the effect of an *arrêt entre mains confirmée*. Secondly, there is no reason to suppose that were that, perchance, to happen, Hemisphere would not proceed to obtain a judgment against GTL for the amount in question and, in the event of a continuing failure to pay, would not apply for GTL to be declared *en désastre*. Thirdly, it is incorrect as a matter of Jersey law that such procedure would not be available because GTL is not without assets. The test of insolvency under the Bankruptcy (Désastre) Jersey Law 1990 is one of cash-flow, not what the balance sheet shows, and is accordingly concerned with the payment of debts as they fall due: *In re Rosedale Investments* [1995] JLR 123 (Hamon DB and Jurats Myles and Herbert). And default in paying one debt is sufficient evidence that a debtor is unable to pay

its debts as they fall due: ibid. at 134. Nor, as it seems to us, could GTL be heard in the present case to say that its failure to pay was not a matter of lack of cash resources, and thus inability to pay, but of a deliberate decision to disregard the orders of this Court.

192 Fourthly, a declaration of *en désastre* would have the effect of vesting the entirety of GTL's assets in the Viscount. How far the Viscount would be prepared, in practice, to go in trying to get in those assets would no doubt depend to a large extent on how far Hemisphere was prepared to fund his efforts. *Kaplan*, as Miss Lawrence observed, involved exceptional circumstances; and it does not appear to us to be necessary or appropriate for this Court to speculate about what obstacles the Viscount might or might not encounter in the course of any *en désastre* proceedings involving GTL. The nature of the application in *Kaplan*, being a request for assistance in the enforcement of a foreign penal process, was, of course, also very different from that of the present civil proceedings. We do not, therefore, see that decision, or any of the other elements of GTL's submissions, for exercising the Court's discretion in the way that Mr Robinson invited us to do.

F Conclusion on GTL case

193 For the foregoing reasons we are satisfied that GTL's attack on the interim *arrêt entre mains* is not made out and that there is no reason why the order should not be confirmed.

XII Summary of Conclusions

194 We find that Gécamines is an organ of state of the Democratic Republic of Congo and was so on 19 th March, 2009.

195 We find that Gécamines' assets at that point in time included both the Shares and the Slag Sales Payments; that those assets were in each case situated within the jurisdiction of this Court and are liable to execution in satisfaction or part satisfaction of the Awards pursuant to the Orders of 19 th March, 2009.

196 As regards the interim *arrêt entre mains* we find in principle:-

(i) that the order was properly made; that there is no reason either as a matter of principle or discretion to decline to confirm it; and that it should, accordingly, be confirmed irrespective of any other order; and

(ii) that its effect was to create an immediate proprietary interest in favour of Hemisphere in the Shares and in the Slag Sales Payments to the extent of (a) all such Payments then owing to Gécamines by GTL and (b) all future Payments falling due to the extent necessary to satisfy in full the Awards and accrued interest (subject only to any application that may be made in the future by Gécamines or GTL seeking

to vary or discharge this provision on grounds that Gécamines has ceased to be an organ of state or otherwise).

197 As to the precise wording of orders necessary to give effect to the foregoing conclusions and as to all other, ancillary orders, we will hear further argument, including GTL's submission that, on any view, the scope of the original orders is unjustifiable, on a date to be fixed. In the meantime, all existing orders (subject to such stays as have already been ordered) remain in force.