

NEW SOUTH WALES SUPREME COURT

CITATION:

FG Hemisphere Associates LLC v Democratic Republic of Congo [2010] NSWSC
1394

JURISDICTION:

FILE NUMBER(S):

2009/298610

HEARING DATE(S):

1 November 2010

EX TEMPORE DATE:

1 November 2010

PARTIES:

FG Hemisphere Associates LLC - Plaintiff
Democratic Republic of Congo - First Defendant
Societe Nationale d'Electricite - Second Defendant

JUDGMENT OF:

Hammerschlag J

LOWER COURT JURISDICTION:

Not Applicable

LOWER COURT FILE NUMBER(S):

Not Applicable

LOWER COURT JUDICIAL OFFICER:

Not Applicable

COUNSEL:

A.S. Bell SC [Plaintiff]

SOLICITORS:

Gilbert and Tobin [Plaintiff]
Defendants unrepresented

CATCHWORDS:

ARBITRATION – International Arbitration Act 1974 (Cth) – plaintiff moves for enforcement of two foreign arbitral awards of the International Court of Arbitration of the International Chamber of Commerce – no issue of principle

LEGISLATION CITED:

International Arbitration Act 1974 (Cth)

CATEGORY:

Principal judgment

CASES CITED:

TEXTS CITED:

DECISION:

Judgment for the plaintiff against the defendants for:

a US\$11,725,844.96 together with:

i. Interest at an annual rate of 9% on the sum of US\$11,179,266.36 to be calculated based on the amount of each overdue instalment payment included in said sum, starting on the respective due date and up to the date of full payment;

ii. Interest at an annual rate of 5% on the sum of US\$546,578.60 starting on 4 March 2001 and up to the date of full payment; and

iii. Arbitration expenses in the amount of US\$25,000 for ICC's administrative costs, US\$220,900 for the fees of arbitrators and US\$168,000 as reimbursement for Energoinvest DD's defence, as provided for in the First Arbitral Award; and

b US\$18,430,555.47 together with:

i. Interest at an annual rate of 8.75% on the sum of US\$18,073,746.94 to be calculated based on the amount of each overdue instalment payment included in said sum, starting on the respective due date and up to the date of full payment;

ii. Interest at an annual rate of 5% on the sum of US\$356,808.53 starting on 4 March 2001 and up to the date of full payment; and

iii. Arbitration expenses in the amount of US\$25,000 for ICC's administrative costs, US\$215,880 for the fees of arbitrators and \$168,000 as reimbursement for FG Hemisphere Associates LLC's defence, as provided for in the Second Arbitral Award. Defendants pay the plaintiff's costs as agreed or assessed on an indemnity basis.

JUDGMENT:

- 1 -

**IN THE SUPREME COURT
OF NEW SOUTH WALES
EQUITY DIVISION
COMMERCIAL LIST**

HAMMERSCHLAG J

1 NOVEMBER 2010

EX TEMPORE JUDGMENT

1 **HIS HONOUR:** The plaintiff moves for declaratory orders and judgment based on two final foreign arbitral awards of the International Court of Arbitration of the International Chamber of Commerce.

2 The plaintiff is a limited liability company organised under the laws of the State of Delaware in the United States of America.

3 The first defendant is the Democratic Republic of Congo, a sovereign nation-state on the African continent. The second defendant is a corporate enterprise organised under the laws of the first defendant and is wholly owned by it.

4 Both awards were made against the defendants jointly and severally in favour of Energoinvest DD a company based in Sarajevo, Bosnia and Herzegovina.

5 The evidence before the Court is by way of the affidavit of Peter James Grossman affirmed 29 April 2010 and documents exhibited thereto (including both awards). The evidence establishes that:

a the first award was made in Zurich, Switzerland on or around 30 April 2003 and the second award was made in Paris, France on or around 30 April 2003;

b under the first award, the defendants were held jointly and severally liable to pay Energoinvest US\$11,725,844.96 plus interest at a specified rate and costs in specified amounts. The precise amounts appear in the affidavit referred to;

c under the second award, the defendants were held jointly and severally liable to pay Energoinvest US\$18,430,555.47 with interest at a specified rate and costs in a specified amount; The precise amounts appear in the affidavit referred to;

d the benefit of both awards was assigned to the plaintiff under an assignment agreement dated 16 November 2004.

6 Section 8 of the *International Arbitration Act* 1974 (Cth) ("the Act") provides for the recognition by this Court of foreign arbitral awards. Section 8(1) provides relevantly that a foreign arbitral award is binding by virtue of the Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made. Section 8(2) provides relevantly that a foreign award may be enforced in this Court as if it were a judgment of this Court.

7 Section 3(1) of the Act defines "foreign award" to mean an arbitral award made, in pursuance of an arbitration agreement other than Australia being an arbitral award in relation to which the Convention applies. Under s 3(1) of the Act, the terms "agreement in writing" and "arbitral award" have the same meaning as in the Convention. "Convention" is defined in s 3(1) of the Act to mean the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its 24th meeting. "Convention Country" is defined in s 3(1) of the Act to mean a country (other than Australia) that is a Contracting State within the meaning of the Convention.

8 Under art I(2) of the Convention arbitral awards include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted, and under art II(2) the term "agreement in writing" includes an arbitral clause in a contract or arbitration agreement signed by the parties or contained in an exchange of letters of telegrams.

9 Each of Switzerland and France is a Convention country within the meaning of the Act.

10 Each award was based on an agreement in writing which contained provisions for the reference of disputes to an arbitration panel of the International Chamber of Commerce.

11 Accordingly each award is binding by virtue of the Act and may be enforced in this Court as if it were a judgment of it.

12 The benefit of the right of enforcement has been assigned to the plaintiff which is accordingly entitled to the relief which it seeks.

13 It may be observed that both awards have been recognised and become enforceable as judgments in other jurisdictions including the United States, Canada and South Africa.

14 The defendants participated in these proceedings from their inception until immediately before the commencement of the hearing today. On commencement of the hearing their solicitor sought and was granted leave to file a notice ceasing to act. The proceedings continued in their absence.

15 I am satisfied that the plaintiff has met all requirements for the relief which it seeks.

16 I make declarations and orders in accordance with the Short Minutes of Order which I have initialled dated today's date and placed with the papers.

17 I consider that the defendants should pay the plaintiff's costs on an indemnity basis. The defendants repeatedly failed to comply with orders and directions of this Court. At the final hearing they put up no defence. In those circumstances an order for costs on the indemnity basis is warranted.

18 The orders are to be entered forthwith.

LAST UPDATED:
17 December 2010