



SOVEREIGN IMMUNITY AND ENFORCEMENT

TEMPLARS

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10 JANUARY 2017

INTRODUCTION

- For commercial parties that contract with States and State-controlled entities and then seek to arbitrate disputes or execute judgments, an increasingly common problem is the attempt by these State parties to raise the defense of sovereign immunity to challenge the jurisdiction of the arbitral tribunal/court and/or to avoid enforcement of an arbitral award/judgment.
- The difficulties in handling disputes with these sovereign entities are a major concern, especially with the growing prospect of sovereign defaults leading to cross-border disputes.

INTRODUCTION contd...

- States are understandably unwilling to subject their sovereignty to the adjudicatory processes of the courts of an equal sovereign state in the event of a dispute arising from such international transaction.
- Arbitration has therefore become the most important mechanism for resolving international commercial disputes involving state parties in the last 50 years.
- A primary objective of this presentation is to analyse the concept of sovereign immunity, its applicability and effect in the enforcement of awards/ judgments and essentially the true extent to which the plea of sovereign immunity can protect a state entity from fulfilling its commitments under international transactions.



LEGAL INSTRUMENTS

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In this presentation, references will be made to:

- New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)
- UN Convention on Jurisdictional Immunities of States and Their Property 2003
- International Centre for Settlement of Investment Disputes (ICSID) Arbitration Rules
- International Chamber of Commerce (ICC) Rules of Arbitration (1988)

LEGAL INSTRUMENTS contd...

- UK State Immunity Act 1978 (c.33)
- US Foreign Sovereign Immunities Act of 1976 (as amended in 1988)
- The NNPC Act
- The CBN Act

MEANING OF SOVEREIGN IMMUNITY

Sovereign Immunity is an established principle of international law which is based on the principle of equality of States.

It is a legal doctrine by which a sovereign entity (a State) is immune from any suit be it civil or criminal before the courts of another sovereign entity.

- This includes enforcement of judgments or arbitral awards
 - E.g. Section 13 (2) (b) of the UK State Immunity Act provides that “The property of a state shall not be subject to any process for the enforcement of a judgment or arbitration award or in an action in rem for its arrest detention or sale.”

SCOPE OF THE DOCTRINE

POSER: *Who is a sovereign for purposes of the doctrine?*

- The doctrine of sovereign immunity applies not only to a State as a sovereign entity, but also to its enterprises, agencies and other appendages of the state representing its sovereign authority.
- State practice suggests that regardless of the status of the State agency or enterprise vis-à-vis the State, so long as the enterprise “is entitled to perform and is performing acts in the exercise of sovereign authority of the State,” it can invoke sovereign immunity as the State as it is viewed as an instrumentality of the sovereign state in the execution of its sovereign powers.

SCOPE OF THE DOCTRINE

The Convention on Jurisdictional Immunities of States and their Property, drawn on the ILC's final Draft Articles of 2003, defines the term "State" to include, inter alia, "Agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State".

By this definition, a legal action or arbitration proceedings commenced against a State agency, enterprise, or instrumentality would be considered to be against the State itself for the purpose of invoking a plea of sovereign immunity.

SCOPE OF THE DOCTRINE

JUDICIAL AUTHORITIES IN NIGERIA SUPPORT THIS POSITION:

Government of Akwa Ibom State v. Powercom Nigeria Ltd

- it is the ministries and extra-ministerial departments that make up the entire machinery of the government both at federal and state levels

E.A. Ind. Ltd v. NERFUND

- Agencies of the FGN cover all organs established by law through which the Federal government carries out its functions.

SCOPE OF THE DOCTRINE

Section 318 of the Constitution of the Federal Republic of Nigeria, 1999 (as Amended) defines “**Government**” to include “***the Government of the Federation or of any State, or of a local government council or any person who exercise power or authority on its behalf***”

THEORIES OF SOVEREIGN IMMUNITY

- **The Absolute Immunity**

Confers immunity on all actions of a State or State agency regardless of the purpose or nature of the transaction from which the dispute arose

- **The Restrictive immunity**

Confers immunity only on sovereign acts of a State – **acta jure imperii**, while acts of a State in respect to commercial transactions - **acta jure gestionis** - are not covered by immunity but governed by private law in the same way as a private person would not enjoy immunity.

THE LIMIT/EXCEPTION TO THE DOCTRINE

- The general rule in international law is that a plea of sovereign immunity applies to sovereign acts of a State
- The plea does not apply to commercial transactions entered into by a State.
- The classical exposition of this principle was stated by **Lord Denning** in the **Trendtex case**
- ***What amounts to a commercial transaction?***

WHAT AMOUNTS TO COMMERCIAL ACTIVITY?

- In the United States under the FSIA, a foreign sovereign that engages in the same type of commercial activity in which a private person could engage, loses its immunity.
- Section 3 (1) of the State Immunity Act 1978 of the United Kingdom defines ‘commercial transaction’ to mean-
 - i. **any contract for the supply of goods or services;**
 - ii. **Any loan or other transactions for the provision of finance and any guarantee or indemnity in respect of any such transaction or any other financial obligation;**
 - iii. **Any other transaction or activity (whether of a commercial, industrial, financial, professional or similar character) into which a state enters or in which it engages otherwise than in the exercise of sovereign authority.**

WHAT AMOUNTS TO COMMERCIAL ACTIVITY?

Generally, in understanding acts of state that can be considered **acta jure imperii** or **gestionis**, the court looks at:

1. **Contractual parties**
2. **Purpose of the transaction**
3. **Nature of the transaction**

WHAT AMOUNTS TO COMMERCIAL ACTIVITY?

- In **Connecticut Bank of Commerce v. Republic of Congo**, a creditor obtained a declaratory judgment against the Republic of Congo in a Texas state court and thereafter sought to execute against the country's property in the United States.
- In **Af-Cap Inc. v. Chevron Overseas (Congo) Limited**, another creditor sought to enforce a judgment against the Republic of Congo, citing royalties and tax obligations owed by third parties.

In both cases, the courts concluded that what matters under the Act is what the property is used for, not how the property was generated or produced, or whether the property has some nexus or connection to commercial activity in the United States.

ASSETS EXEMPTED FROM THE EXCEPTIONS

- Under section 1611 of the US FSIA, property of a **foreign central bank or monetary authority** is immune from attachment and execution provided that such property is “held for its own account” and the foreign State has not waived its immunity.
 - Section 14(4) of the UK State Immunity Act
 - **the CBN, NSIA are protected**
- This is so even if used for commercial purposes
- It also exempts properties used for military or consular activity

WAIVER OF SOVEREIGN IMMUNITY

Questions of sovereign immunity must be considered in relation to:

- Jurisdiction; and
- Execution

Both can be waived

WAIVER OF SOVEREIGN IMMUNITY

With respect to immunity from jurisdiction, in most cases, the agreement to arbitrate constitutes a waiver of that immunity – both in relation to the arbitral proceedings themselves and any ancillary proceedings in the national courts.

- **Article 54(3) of the ICSID Convention;**
- **Section 9 of the UK State Immunity Act;**
- **Section 1605(a) of the USA FSIA.**

WAIVER OF SOVEREIGN IMMUNITY

An agreement to arbitrate or the New York and ICSID Convention cannot constitute a waiver of the right to immunity from execution.

- The US Supreme Court has held that signing an arbitration agreement cannot amount to an implied waiver of immunity over execution of awards and judgments

- **Argentine Republic v. Amerada Shipping Corp.**

WAIVER OF SOVEREIGN IMMUNITY

Any waiver of immunity from execution must be express for it to be enforceable

Clause 15 of ICSID's Model Clauses 1993 is instructive:

“The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement.”

SOVEREIGN IMMUNITY AND ENFORCEMENT IN NIGERIA

The Federal Government of Nigeria (FGN) is not conferred with any immunity from enforcement of arbitral awards and court judgments in Nigerian courts

A party who obtains a favourable award or judgment against the FGN is at liberty to enforce same against the FGN at the appropriate court

APPLICABILITY OF THE DOCTRINE IN NIGERIA

However, there exist some statutory restrictions to enforcing against specified agencies of the FGN.

- E.gs.

- Section 14 of the NNPC Act;
- Section 52 of the CBN Act; ***
- Section 55 of the NSIA Act
- Section 84 of the Sheriffs and Civil Processes Act (SCPA)

Section 14 of the NNPC Act provides:

“In any action or suit against the [Corporation] no execution or attachment or process in the nature thereof shall be issued against the [Corporation]...”

APPLICABILITY OF THE DOCTRINE IN NIGERIA

POSER:

Can the FGN waive this provision –Section 14 of the NNPC Act?

- Under Nigerian law a statutory right can be waived
- Exceptions:
 - Where prohibited by statute;
 - Where will be against public policy

Attorney General of Bendel State v Attorney General of Nigeria

APPLICABILITY OF THE DOCTRINE IN NIGERIA

Poser:

Will the statutory provision be enforced by a foreign court?

- NNPC will enjoy immunity from execution only to the extent that Nigeria is clothed with such immunity in internal law.
- Commercial activities are expressly excluded
- The Supreme Court gave judicial recognition to this principle
 - **African Reinsurance Corporation v. AIM Consult Ltd**

APPLICABILITY OF THE DOCTRINE IN NIGERIA

In recent times the FGN has insisted on inserting the following indemnity clause in its contracts:

_____ (insert government counterparty) irrevocably and unconditionally agrees not to claim in any jurisdiction, for itself or in respect of its assets, immunity in respect of its obligations under this Agreement pursuant to any arbitral proceedings, to any proceedings before the English courts as permitted by the Rules in connection with any such arbitral proceedings or in connection with the enforcement of any arbitral award and any judgment entered on such award, provided that consular, diplomatic, public buildings distinct from property intended for use for commercial purposes and military assets belonging to the Government of the Federal Republic of Nigeria, and assets (not being assets of _____ (insert government counterparty)) of the Central Bank of Nigeria, the Nigerian National Petroleum Corporation and the Nigerian Sovereign Investment Authority shall in all cases be exempted from a process of suit or execution.

Poser: *Is this clause really necessary?*

CONCLUSION/RECOMMENDATION

- In light of the vigour with which States and State-owned entities are seeking to resist enforcement proceedings, it is necessary to seek, from the onset, an express waiver of immunity from jurisdiction and enforcement, in terms which are as specific as possible.
- It is important to ensure that the waiver is effective both in the jurisdictions in which enforcement may be sought and under the domestic laws of the State party.
- At the minimum, it is essential that companies engaging in cross border transactions or business involving States or State-owned entities turn their mind to the issue of sovereign immunity and the way in which it may limit the protection and relief they might otherwise be afforded.

Q&A

THANK YOU AND QUESTIONS

