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Sovereign Immunity and Enforcement of International Commercial Arbitration Awards- P&ID Case in Focus

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Introduction

In January 2010, the Federal Government of Nigeria entered into a 20-year gas and supply processing agreement (GSPA) with Process and Industrial Developments Limited (P&ID), to build a gas processing facility. Under the contract, P&ID was to refine associated natural gas into non-associated gas to power the national electric grid. The GSPA required the government to build a gas supply pipeline to the P&ID facility. P&ID claimed it had spent about $40 million on the project while Nigeria breached the agreement by not building the gas pipeline. The crisis went unresolved and in August 2012, the company activated the arbitration clause in the agreement, filing a case of breach of contract against Nigeria in London.[1]

In January 31, 2017, the tribunal issued its final award. The Tribunal was of the considered view that P&ID would have played its own part in the contract if Nigeria had not repudiated its obligations therein. It therefore ruled in favour of P&ID and ordered Nigeria to pay $6,597,000,000 being net present value of the profits which would have been earned by P&ID. The Federal Government was also ordered to pay interest on the amount at the rate of 7% per annum from March 2013. In March 2018, P&ID approached the Commercial Court in England to institute proceedings for the enforcement of the final award as declared by the Arbitration Tribunal. The Court found in favour of P&ID.[2]

Nigeria is currently taking all legal steps to stop the enforcement of what is easily one of the largest arbitration awards in human history. This is based on the assertion that Nigeria is a sovereign state and has an absolute right of its sovereign immunity. In

[1] That $9bn award against Nigeria <https://www.thecable.ng/that-9bn-award-against-nigeria> (accessed on 03/09/2019).

[2] The court in the case of Process & Industrial Developments Limited v Federal Republic of Nigeria [2019] EWHC 2241 (Comm) gave judgement and granted the Claimant's application. The court stated that $9.6 billion was the amount due to the Claimant.

other words, the argument is that Nigeria has immunity as a sovereign nation and therefore the judgment cannot be enforced against it. Furthermore, Nigeria is arguing that P&ID did not fulfil its part of the obligations under the contract and cannot make any claims on Nigeria.[3]

It is in this context that it becomes important to examine the concept of sovereignty as it relates to international commercial arbitration awards. Indeed, the formulation of the legal rules of international commercial arbitration occurred with very little input or involvement of many developing nations.[4] Having gained political independence, and invariably gaining sovereignty and control over their natural wealth and resources, the challenge African governments face is how to shift the emphasis, both in theory and in practice, to ensure that their interests are protected, in international commercial arbitration.

Furthermore, parties to international transactions predominantly prefer international arbitration because of the strong perception that an international forum for settling disputes provides some insurance against possible bias by a national judiciary. Thus, African countries have come to accept the virtual inevitability of international commercial arbitration. Indeed, the acceptance of international arbitration has become one of the conditions of the liberalisation package which African countries use as a strategy to attract foreign investment.[5]

Against this backdrop, this brief seeks to examine the implications of the doctrine of sovereign immunity as it relates to international commercial arbitration awards.

2. Issues to be considered

i) What is the legal significance of the concept of sovereign immunity in international law?

ii) What is the position of law regarding sovereign immunity from execution of international commercial arbitration awards?

iii) Is choice of seat of arbitration a means to protect sovereign interest in International commercial arbitration?

Legal significance of the Concept of sovereign immunity in international law

- **Meaning of sovereign immunity**

Sovereign Immunity is a 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 before the courts of another sovereign entity.[6] It is further being defined as a judicial doctrine that prevents a

[3] Ibid (n2).
[4] Samson L. Sempasa, 'Obstacles to International Commercial Arbitration in African Countries' [1992] *Int'l & Comp. L.Q.* (41) p. 390.
[5] Samuel K.B. Asante, 'The Perspectives of African Countries on International Commercial Arbitration' [1993] *LJIL* (6) p. 332.
[6] Lew, J., Mistelis, L., and Kroll, S., *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) p. 744.

sovereign government or its departments and agencies from being sued in any judicial forum without its consent.[7]

Consequently, the doctrine of sovereign immunity under International law is established on the grounds that a sovereign state should not face prosecution in courts of another State. This principle is expressed by the Latin maxim- "*par in parem no habet imperium*" – an equal has no power over an equal rank.[8] The rule that foreign States or their representatives could not be challenged in the courts of another country gained currency in both Common Law and Civil Law jurisdictions from the middle of the 19th Century. The basis of this doctrine in international law is grounded in the principles of sovereignty, independence, and the equality and dignity of States. Its legal justification in international law has always been the general practice of States.[9]

Over the last two decades, the extension of the doctrine of sovereign immunity to state agencies has gradually become a universally acceptable principle of international law on State jurisdictional immunity. In this regard, the Convention on Jurisdictional Immunities of States and their Property defines the term "State" to include, inter alia, "Agencies or in 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".[10] Looking at this definition, a legal action or arbitration proceedings commenced against a State agency would be considered to be against the State itself for the purpose of invoking a plea of sovereign immunity.

- **Theories of sovereign immunity**

There are two theories of sovereign immunity, the theory of absolute immunity and the theory of Restrictive immunity. Absolute immunity, as the name implies, 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 while 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.[11]

The distinction between the absolute and restrictive immunity theories is also reflected in the protection extended to State agencies as an extension of a State's sovereignty. According to the absolute immunity

[7] James R. Crawford, 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' [1983] *British Y.B. Int'l* (54).
[8] Georges R. D., 'Foreign Sovereign Immunity: Impact on Arbitration', [1983] *Arbitration Journal* (38) p.34.
[9] Yemi Osinbajo, 'Sovereign Immunity In International Commercial Arbitration: The Nigerian Experience And Emerging State Practice' [1992] *African Journal of Int'l & Comp. Law* (4).
[10] United Nations Convention on Jurisdictional Immunities of States and Their Property, New York, December, 2004. The Convention opened for signature at United Nations Headquarters in New York on 17 January 2005, but is not yet in force. <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&lang=en> (accessed on 18/09/2019).
[11] Varges, G.S., "Defining a Sovereign for Immunity Purposes: Proposals to Amend the International Law Association Draft Convention," (1985), *Harvard Journal of Int'l Law* (26) p. 103.

approach, a State enterprise is entitled to immunity from jurisdiction as an extension of the sovereign will of the State. Under the restrictive immunity approach, when a State enterprise has a distinct legal personality (i.e., one detached from the State itself) and it performs acts of a private or commercial nature, it cannot claim sovereign immunity. [12]

It should however be noted that since the purpose of sovereign immunity is to prevent one State from being subjected to the jurisdiction of another state before the latter's courts, it would be difficult for a State that is party to an arbitration agreement to invoke an immunity plea. Arbitral tribunals are independent and not under the control of any state; they derive legitimacy and jurisdiction from the parties themselves. A submission by a State or State enterprise to arbitration under the guidance of the International Centre for the Settlement of Investment Disputes (ICSID) constitutes, on its part or that of the State involved, an irrevocable waiver of immunity from the ensuing arbitration proceeding.[13]

Also, Section 9 of the UK State Immunity Act 1978 provides that "Where a state has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the state is not immune as respects proceedings in the courts of the United Kingdom which relate to arbitration."[14] A similar provision is contained in the US Foreign Sovereign Immunities Act (1976) (FSIA) which made it clear that a foreign State's agreement to arbitrate could be regarded as a waiver of immunity from the jurisdiction of a US court. This was reiterated in *Libyan American Oil Company (LIAMCO) V Socialist People's Libyan Arab Jamahiriy*a[15] where the court rejected Libya's jurisdictional argument and held that Libya had waived its defence of sovereign immunity by expressly agreeing to the arbitration and choice of law clauses in the deeds of concession.

- **Judicial attitude to sovereign immunity**

Generally, judicial attitude to the invocation of the doctrine of sovereign immunity varies according to national jurisdiction and on which of the two theories of immunity is applicable in a jurisdiction. The attitude of courts in countries that adopt the absolute immunity theory have been to uphold the plea of sovereign immunity whenever raised by a State or State entity, unless there has been an express or implied waiver of immunity by a state. Thus, in Nigeria for instance, the Supreme Court has held in John *Grisby v. MS Jubwe and 2 others*[16] that, the plea of sovereign immunity will operate to bar any suit against a sovereign entity regardless of the nature of the transaction that gave rise to the dispute.

The dispute arising from the Nigerian cement transactions also brought about far-reaching pronouncements on foreign sovereign immunity. The disputes arose from Nigeria's

[12] Ibid.
[13] Article 54(3) of ICSID Convention.
[14] The same provision is contained in Article 17 of the UN Convention on Sovereign Immunity.
[15] 923 F.2d 380, 385 (5th Cir. 1991).
[16] (1986) 1 NWLR Pt 14 Page 113.

repudiation of 109 cement contracts which it had signed, on discovering that her ports could not take delivery of the over 16 million metric tons ordered.[17] In the resulting case of *Trendtex Trading v. Central Bank of Nigeria*[18], the Central Bank of Nigeria (C.B.N.) was sued on one of the letters of credit issued by it in relation to the cement transactions. C.B.N. claimed that it could not be sued in the U.K. on the letters of credit issued by it in relation to the cement transactions as it was entitled to sovereign immunity.

Lord Denning M.R. held that the C.B.N. had no immunity once it entered into a commercial transaction. Repeating his earlier position in Thai-Europe Tapioca Service Ltd. v. Government of Pakistan[19] he said:

a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts. If a foreign government incorporates a legal entity which buys commodities on the London market, or if it has a State department which charters ships on the Baltic Exchange, it thereby enters into the market places of the world, and international comity requires that it should abide by the rules of the market.

Another issue of significance covered by the court, was the status of the Central Bank. Was it an arm of government or department of government in which case it could presumably benefit from any immunity open to the State? Remarkably, the court held that the Central Bank was not an organ or a department of the Federation of Nigeria. Nevertheless, Lord Denning concluded that even if the C.B.N. had been found to be a department of State, it would still not have immunity since even a State would lose its immunity where it was involved in commercial activities.

Position of law regarding sovereign immunity from execution of international commercial arbitration awards

When a state party loses in an arbitration proceeding, one of the options available to the party is to raise the issue of sovereign immunity to enforce the award against its assets abroad. This position is given statutory recognition by Section 13 (2) (b) of the UK State Immunity Act which 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". The US Supreme Court in the case of *Argentine Republic V Amerada Shipping Corp* has also held that signing an arbitration agreement cannot amount to an implied waiver of immunity over execution of awards and judgments.[20]

Furthermore, judicial approach amongst jurisdictions adopting the restrictive immunity theory are also similar, with an emphasis on the nature of the property sought to be attached and whether it is held for commercial or sovereign purposes. In the case of *AIG Capital Partners Inc v*

[17] Ibid (n9).
[18] (1977) 1 Q.B. 529.
[19] (1975) 1 W.L.R. 1485.
[20] (1989) 488 U.S at 442-443.

Kazakhstan,[21] a foreign investor's property was seized and expropriated by Kazakhstan. The investor obtained an ICSID arbitration award against Kazakhstan and sought the enforcement of the award in the UK. The State of Kazakhstan applied that both orders be dismissed, arguing that the assets were the property of the central bank and not the state itself. The court in interpreting section 14(4) and 13(2) of the State Immunity Act held that the assets held by the financial institution on behalf of the national bank of Kazakhstan were property of a central bank within the meaning of section 14(4) since National bank had an interest in the property within the definition. Thus, the assets were immune from the enforcement of jurisdiction of the UK courts. In the US, the case of *Maritime International Nominees Establishment v Republic of Guinea*[22] the court upheld a plea of sovereign immunity by Guinea to the execution of an award against its property on the ground of sovereign immunity.

It should be noted that even though the award over $9 billion is perhaps the largest award ever given against Nigeria, unless P&ID is able to enforce the award, the award will not be a reality. In fact, the sum of $50 billion was awarded against Russia in 2014 in *Yukos Universal Limited (Isle of Man) v The Russian Federation*[23], but the award is yet to be enforced.

Seat of arbitration as a means to protect sovereign interest in International Commercial Arbitration

The choice of seat of arbitration raises highly significant issues. Indeed, developing countries no longer wish to see their disputed commercial relations determined by Western-oriented arbitral bodies outside their countries.[24] On the other hand, the investor will probably want to avoid resolution of any dispute in the courts of a developing country where nationalistic sentiments may be perceived as militating against an impartial decision. The middle ground is for the parties to agree to a third country under internationally recognized rules, as a choice of forum. However, when the contracting party in the developing country is the government itself or one of its agencies, as is common in many cases, it may not agree to such an arbitration on the grounds that submission to arbitration in a third country would constitute an affront to its dignity as a sovereign. In such instances, the government may insist on dispute resolution procedure (arbitration) within its own borders. An instance of this is the Argentina agreement with the Pan Am International Company, where the country insisted on a clause providing for arbitration within its own borders.[25]

The importance of the seat theory is that it provides an established legal framework to an international arbitration, such that the

[21] (2006) 1 WLR 1420.
[22] 1981 693 F2D 1094; 75 AJIL 963.
[23] PCA Case No. AA 227.
[24] Domke & 0. Glossner, 'The Present State of the Law Regarding International Commercial Arbitration' in M. Bos (ed), *The Present State of International Law* (1973)
[25] McLaughlin, J. T. 'Arbitration and developing countries' [1979], International Lawyer 13(2), p. 211-232.

arbitration is anchored in a specific legal system. In other to protect their interests and assert their sovereignty, some countries of the Middle East forbid arbitration in foreign countries under most circumstances and require that the resolution of disputes be referred to their national tribunals. Saudi Arabian Decree No. 58 of 1963 specifically limited the authority of governmental organizations to subject themselves to foreign arbitration. Iran forbids arbitration outside its borders in the case of disputes involving governmental contracts. It has an internal arbitration tribunal for the settlement of disputes involving a governmental body or agency. Here, again, foreign investors must submit to the tribunal of the host country in the event of a dispute arises.[26] In Israel, government agencies will not, as a rule, submit to international arbitration.

3. Recommendations

i) The National Assembly may consider passing a law to forbid government agencies from agreeing to arbitration of disputes outside Nigeria's borders, in the case of disputes involving governmental contracts, unless prior approval is received from the Federal Executive Council.

ii) The Federal Government should consider appealing in UK courts to assert its sovereign immunity against the award in the case with P&ID to a logical conclusion so that Nigeria's assets abroad will not be jeopardised. Under international law, Nigeria's sovereign property cannot be tampered with, without its express consent. Also, the United Kingdom's State Immunity Act 1978 bars UK courts from confiscating assets of a foreign state without the consent of that state.

iii) The Federal Government should consider negotiating with P&ID in order to settle the matter out of court. Indeed, the Minister of Justice and Attorney-General of the Federation, Abubakar Malami (SAN) recently said that the Federal Government would consider negotiation as an option, despite the reservations of the government about the contract.[27]

iv) The Federal Government should consider setting up a committee of legal experts to determine what went wrong in the transaction that led Nigeria to be faced with a judgement debt of $9.6 billion, with daily interest accruing, and advise the Government accordingly.

4. Conclusion

The rules of international commercial arbitration are to a great extent a product of International political economy, and the designs of major world economic powers. In

[26] Setrakian, Arbitration under the Legal Systems of the Middle Eastern Countries, Ali-Aba Course of Study: Construction Contracting in the Middle East (1978).

[27] $9.6bn judgment: Our best option is to negotiate with P&ID —Malami <https://punchng.com/9-6bn-judgment-our-best-option-is-to-negotiate-with-pid-malami/> (accessed on 18/09/2019).

view of this, developing nations in many international commercial arbitration proceedings find that their interests are hardly ever accorded priority or parity in interpretation of agreements by arbitration tribunals. Therefore, developing countries need to recognise that these problem exists and ought to be addressed. This brief attempted to analyse the concept of sovereign immunity in international law, the position of law regarding sovereign immunity from execution and choice of seat of arbitration a means to protect sovereign interest in International commercial arbitration. Presently, the State Immunity Act in the UK prohibits the assets of a state from the enforcement of jurisdiction of the UK courts. In the United State also, the courts have upheld a plea of sovereign immunity to the execution of an international commercial arbitration award. Consequently, it is hoped that the federal government would continue to pursue the plea of sovereign immunity against execution of the award against the country, or negotiate with P&ID in order to settle the matter out of court. It is also hoped that the award against Nigeria will serve as an incentive for the government to take measures to prevent similar incidences in the future.