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ZHONGSHAN FUCHENG IND. INV. CO. LTD V. NIGERIA: THE INTERPLAY BETWEEN PRESERVATIVE ORDERS AND SOVEREIGN IMMUNITY IN THE SEIZURE OF NIGERIA'S PRESIDENTIAL JETS

INTRODUCTION

The intersection of pre-enforcement preservative orders and sovereign immunity presents a complex legal conundrum, particularly in cases where State assets are threatened with attachment to satisfy arbitral awards. This complexity was starkly illustrated in the recent seizure of Nigeria's presidential jets by Zhongshan Fucheng Industrial Investment Co. Ltd ("Zhongshan"). This Chinese company sought to enforce an arbitral award of approximately $70 million against the Federal Republic of Nigeria ("Nigeria"), stemming from a dispute with the Ogun State Government[1]. Apparently, Zhongshan seems to have adopted the concept of attribution in international investment arbitration to hold Nigeria accountable for the actions of one of its states – Ogun State - which we addressed in our maiden article on this case, published on 26th August 2024[2].

Building on the foundation of our maiden article, this article explores the complexities of enforcing such pre-enforcement preservative orders, commonly known as freezing orders, against sovereign assets, examining whether Nigeria's presidential jet constitutes a sovereign or commercial asset and how sovereign immunity may—or may not—shield it from attachment or seizure.

THE LEGAL TERRAIN OF PRE-ENFORCEMENT FREEZING ORDERS

Pre-enforcement freezing orders are legal mechanisms designed to preserve assets from being dissipated before a judgment or arbitral award can be enforced. In international arbitration, such orders are often sought to ensure that the party at a disadvantage does not render itself judgment-proof by transferring or concealing assets. However, when the assets in question belong to a sovereign state, the doctrine of sovereign immunity poses significant challenges[3].

In the case of Nigeria, Zhongshan pursued enforcement actions in various jurisdictions, including Quebec, the United Kingdom, and Paris, leveraging the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' ("New York Convention") provisions to seek freezing orders on Nigerian assets. These actions underscore the importance of preservative orders in securing assets ahead of enforcement, particularly in cross-border disputes.

[1] https://www.pulse.ng/news/fg-loses-dollar70m-arbitration-suit-as-us-court-sides-with-chinese-firm/cqhnbn1 (Accessed on 30th August 2024)
[2] https://topeadebayolp.com/wp-content/uploads/2024/08/ZHONGSHAN-FUCHENG-INDUSTRIAL-INVESTMENT-COMPANY-LTD.-V.-NIGERIA-HOW-THE-CONCEPT-OF-ATTRIBUTION-APPLIES-IN-INTERNATIONAL-INVESTMENT-ARBITRATION.pdf (Accessed 29th August 2024)
[3] Gélinas, Paul-Arthur. "Freezing Orders Against States in Investment Arbitration: From the Enforcement of Arbitral Awards to the Limits of Sovereign Immunity." Journal of International Arbitration, vol. 35, no. 5, 2018, pp. 627-649. This article examines the intersection of freezing orders in the context of international arbitration and the doctrine of sovereign immunity, highlighting the legal and practical challenges in enforcing such orders against sovereign assets.

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SOVEREIGN IMMUNITY: A SHIELD OR AN ILLUSION?

The application of pre-enforcement preservative orders against sovereign states is fraught with challenges due to the doctrine of sovereign immunity. This doctrine, a fundamental principle of international law, traditionally protects state assets from judicial processes, including attachment and seizure. This doctrine (which was extensively discussed in an article titled "An Appraisal of Defence of Sovereign Immunity in the Enforcement of Foreign Arbitral Awards", published by the authors on 28th August 2023[4]) asserts that a sovereign state cannot be sued in the courts of another state without its consent.

However, the modern application of sovereign immunity is far from absolute. In many jurisdictions, including the United States, courts have adopted a more restrictive view, particularly in cases involving commercial activities. The distinction between sovereign and commercial assets is critical in determining whether an asset can be seized to satisfy an arbitral award.

Nigeria invoked sovereign immunity in its defense against Zhongshan's enforcement actions, particularly in the U.S., arguing that its assets were immune from seizure. However, under the arbitration exception in the Federal Sovereign Immunities Act (FSIA) and similar provisions in other jurisdictions, courts may bypass sovereign immunity if the assets in question are deemed commercial rather than sovereign

immunity if the assets in question are deemed commercial rather than sovereign. This exception was applied by a U.S. federal court in the case of Zhongshan v. Nigeria. In this case, Zhongshan sought to enforce its arbitral award in the U.S., but Nigeria contested it, invoking sovereign immunity under the FSIA. The district court rejected Nigeria's claim, ruling that the FSIA's arbitration exception[5] applied because the New York Convention governed the award. Nigeria's subsequent appeal was also denied, affirming the applicability of the FSIA exception.

The court particularly held that the Final Award met the New York Convention's requirement that the arbitrated dispute be considered commercial[6], noting that the dispute involved "persons" engaged in a legal commercial relationship. As a result, Nigeria was deemed ineligible for sovereign immunity protection under the

[4] https://topeadebayolp.com/an-appraisal-of-defence-of-sovereign-immunity-in-the-enforcement-of-foreign-arbitral-awards/ (Accessed on 30th August 2024)
[5] The expropriation exception under the Foreign Sovereign Immunities Act (FSIA) stipulates that a foreign state is not immune from litigation involving property rights that have been taken in violation of international law, provided there is a relevant commercial-activity connection to the United States. See 28 U.S.C. § 1605(a)(3).
[6] https://jusmundi.com/en/document/decision/en-zhongshan-fucheng-industrial-investment-co-ltd-v-federal-republic-of-nigeria-opinion-of-the-united-states-court-of-appeals-for-the-district-of-columbia-circuit (Accessed on 30th August 2024)

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FSIA. The ruling authorized Zhongshan to impose final charging orders on two residential properties owned by Nigeria in the United States[7]. However, dissenting Judge Gregory Katsas argued that the New York Convention was not intended to encompass sovereign nations within the definition of "persons." Katsas further maintained that the actions of Ogun State should not be imputed to the Nigerian government as a whole, and asserted that the arbitration award addressed Nigeria's sovereign acts under public international law[8]. These split decisions underscore the ongoing debate over the scope of sovereign immunity under the Convention.

In the above case of Nigeria's presidential jets seized by Zhongshan, the question arises: Are the jets sovereign assets immune from attachment, or do they fall within the realm of commercial assets subject to enforcement measures?

NIGERIA'S PRESIDENTIAL JETS: SOVEREIGN OR COMMERCIAL ASSET?

The distinction between sovereign and commercial assets is critical in determining the applicability of sovereign immunity. While sovereign assets are generally immune from attachment, commercial assets may not enjoy the same protection as they may be subject to attachment as part of the enforcement of Zhongshan's arbitral award. In this context, the nature of the transaction between Ogun State Government and Zhongshan is pivotal. The transaction that led to the arbitral award involved the Ogun State Government and Zhongfu International Investment (NIG) FZE, a subsidiary of Zhongshan. Although the dispute originated from a subnational government (Ogun State), the enforcement actions targeted assets of the Federal Republic of Nigeria, bringing the issue of sovereign immunity to the forefront.

International conventions, notably the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), serve as foundational frameworks for the enforcement of arbitral awards across jurisdictions. The Convention's language, which refers to "persons," does not explicitly include sovereign states within its scope. This ambiguity has resulted in varied interpretations by courts around the world, particularly when dealing with the intersection of sovereign immunity and the enforcement of arbitral awards.

[7] https://www.pulse.ng/news/fg-loses-dollar70m-arbitration-suit-as-us-court-sides-with-chinese-firm/cqhnbn1 (Accessed on 30th August 2024)
[8] Ibid 6

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In the context of Nigeria, where the arbitration involving Zhongshan was conducted under the New York Convention, the classification of assets such as the presidential jets becomes a pivotal issue.

The Convention's primary purpose is to ensure that arbitral awards can be enforced against the assets of individuals and entities involved in commercial activities.

However, its application to sovereign assets is less straightforward, given that the Convention does not explicitly address whether national governments or sovereign authorities fall under its purview.

This ambiguity has been particularly pronounced in jurisdictions like the United States, where the FSIA comes into play. The FSIA generally shields foreign state assets from attachment, reflecting the principle of sovereign immunity. However, U.S. courts have occasionally made exceptions, particularly where the assets in question are deemed to be involved in commercial activities rather than being purely sovereign in nature[9].

The question of whether Nigeria's presidential jets qualify as sovereign or commercial assets is thus crucial. Sovereign assets are generally those used for governmental functions and are protected by immunity, while commercial assets are those used in activities that could be undertaken by private entities. In the case of the presidential jets, one might argue that they are inherently sovereign, given their use for official government functions, including the transportation of the head of state for diplomatic missions and other state affairs.

Nevertheless, the situation becomes more complex when considering the broader context, such as reports suggesting that some of Nigeria's presidential jets have been advertised for sale[10]. If a presidential jet is actively being sold, it could potentially be viewed as a commercial asset, thus opening the door for its attachment under the enforcement of an arbitral award. This blurring of lines between sovereign and commercial assets is where courts must

[9] Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) (holding that a foreign state's issuance of bonds was a commercial activity); Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (reiterating that sovereign immunity does not apply when a state engages in commercial activity); Helmerich & Payne International Drilling Co. v. Bolivarian Republic of Venezuela, 743 F.3d 110 (D.C. Cir. 2014). This case discusses the application of the FSIA's commercial activity exception in relation to the seizure of assets used in commercial enterprises, highlighting the court's approach to distinguishing between sovereign and commercial assets.

[10] https://www.premiumtimesng.com/news/724391-three-nigerian-presidential-jets-seized-abroad-as-ogun-state-chinese-firm-battle.html (Accessed on 30th August 2024)

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The release of one of the presidential jet - Airbus 330[11] for President Tinubu's official assignment in France could also suggest that the asset was recognized as sovereign, even by Zhongshan who sought its attachment. This acknowledgment may have influenced the decision to release the jet, underscoring the ongoing tension between sovereign immunity and the enforcement of arbitral awards.

Ultimately, the classification of Nigeria's presidential jets—whether as sovereign or commercial assets—will likely depend on a combination of their intended use, their involvement in any commercial transactions, and the interpretation of international conventions and domestic laws like the FSIA. The resolution of this issue will have significant implications not only for Nigeria but also for the broader international legal landscape regarding the enforcement of arbitral awards against state-owned assets.

CONCLUSION

The intersection of pre-enforcement preservative orders and sovereign immunity represents a complex legal challenge in international arbitration. While sovereign immunity traditionally shields state assets from legal actions, the evolving landscape of international arbitration law, as demonstrated by the New York Convention and the FSIA, is increasingly limiting this protection, particularly for assets with a commercial character. The case involving Nigeria and Zhongshan illustrates how pre-enforcement orders, coupled with the limitations on sovereign immunity, can significantly influence the outcome of enforcement proceedings, underscoring the importance of careful legal strategy in such high-stakes international disputes.

In the end, the question remains: will sovereign immunity continue to protect state assets, or will the evolving landscape of international law and arbitration erode this once-impenetrable shield? Only time, and further legal challenges, will tell.

[11] https://leadership.ng/chinese-firm-releases-nigerias-a330-presidential-jet/ (Accessed on 30th August 2024)

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