NIGERIA'S APPROACH TO STATE IMMUNITY IN INTERNATIONAL COMMERCIAL ARBITRATION: A CASE FOR THE ENACTMENT OF NIGERIA'S FOREIGN STATE IMMUNITIES ACT*

Abstract

The concept of State or sovereign immunity had in the time past proceeded on the principle that every State was completely immune from the jurisdiction of the court or legal system of another system based on the principle of equality of States. This was expressed in the terms of absolute immunity theory. Over the years, States started getting more and more involved in commercial activities. This led to the consideration of issues of fairness in relation to investors with which States would go into commercial transaction in respect of which a State might claim immunity for any dispute that might arise. Thus the concept of relative immunity in customary international law began to spring up whereby a State might not be able to claim immunity in respect of its commercial transactions with private investors. Consequently, various States began to pass legislations codifying the concept of relative immunity. The United Nations General Assembly also in 2004 adopted the United Nations Convention on Jurisdictional Immunities of States and Their Property in order to regulate State immunity. This Convention though not yet in force as it had not yet garnered the required accessions by States, represented a codification of the rules of customary international law on relative immunity principles. The problem concerning the issue of State immunity in Nigeria was that Nigeria was yet to pass a legislation on it. The aim of this work was to examine the legal position of Nigeria on State immunity from the standpoint of case law. The objectives of this study were to criticize Nigeria's approach to State immunity and to make recommendations on how to address it. This work used doctrinal method of legal research by consulting primary sources of law like the United Nations Convention on Jurisdictional Immunities of States and Their Property, domestic legislations of other States and case law. This study also consulted secondary sources like relevant law text books, journal articles and internet materials. This work found that Nigeria did not have a legislation regulating the issue of State immunity and that this had left the issue of State immunity to the courts which were still tended towards the obsolete absolute immunity theory. This paper therefore recommended for the enactment of a legislation on State immunity in Nigeria which would codify the established principles of customary international law on restrictive immunity doctrine in line with the global trend. The work also recommended that the Nigeria's legislation on State immunity should equally make provision on reciprocal treatment of judgments or arbitral awards from Nigeria by other States.

Keywords: States, Immunity, International Commercial Arbitration, Commercial

1. Introduction

The notion of equality of States originally operated to bar the exercise of jurisdiction by a domestic court over another State under whatever circumstances. This concept became known as the absolute immunity theory. However, as States began to get more involved in commercial transactions, the doctrine of absolute immunity started to give way to the relative immunity theory whereby the immunity of a State would be lifted whenever the State got involved in commercial transactions. The Council of Europe was the first institution to codify State immunity doctrines following the adoption of the European Convention on State Immunity in 1972[1] which embraced the relative immunity theory. This Convention is presently in force in Austria, Belgium, Germany, Luxembourg, Netherlands (for the European Netherlands), Switzerland and the United Kingdom. A number of other States outside the Council of Europe have also adopted and codified the principle of relative immunity doctrine in their respective domestic legislations on State immunity, notably the United States, the United Kingdom, the Republic of South Africa, Singapore, Australia and Pakistan.[2] The United Nations also followed suit in 2004 when the United Nations General Assembly adopted the United Nations Convention on Jurisdictional Immunities of States and Their Property, though this Convention is yet to come into force not having garnered enough accessions by States. Nigeria is yet to enact any legislation on State immunity and the case law in Nigeria tends towards the application of absolute immunity doctrine. The aim of this work therefore is to carry out a critical examination of Nigeria's legal position on State immunity from the standpoint of case law, as there is no legislation in force in Nigeria on State immunity. The objectives of the work are to criticize the Nigeria's legal position on State immunity as elicited from case law and to make recommendations on how to enhance Nigeria's position in line with the global trend.

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[1] European Convention on State Immunity, Basle 16.V. 1972 in force in Austria, Belgium, Germany, Luxembourg, Netherlands, (for the European Netherlands), Switzerland and the United Kingdom

[2] See the United States' Foreign Sovereign Immunities Act 1976; the United Kingdom's State Immunities Act 1978; South Africa's Foreign States Immunities Act 1981; Singapore's State Immunity Act 1979, Australia's Foreign States Immunities Act 1985; Pakistan's State Immunity Ordinance 1981

2. Conceptual Framework

International Commercial Arbitration

Arbitration is said to be international if:

a) The parties to an arbitration agreement have, at the time of the conclusion of that agreement their places of business in different States; or
b) One of the following places is situated outside the State in which the parties have their places of business:
   i) The place of arbitration if determined in, or pursuant to, the arbitration agreement;
   ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
c) The parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country[3]

Nigeria has also adopted this definition of international arbitration.[4] Arbitration, from the foregoing is therefore considered international if the parties have their places of business in different countries. Again, an arbitration can be considered international if the place of arbitration, or the State where a substantial part of their commercial obligation is to be performed or where the subject-matter of their dispute is most connected is different from the State the parties have their places of business.Finally, an arbitration can be considered international if the parties have expressly agreed that the subject-matter of the agreement relates to more than one State. However, under the Nigerian context, an otherwise purely domestic arbitration can be regarded as international if the parties expressly agree as such despite the nature of the contract.[5] Accordingly, Idornigie stated as follows-

> …..an arbitral proceeding can be international if, *inter alia*
> a) The parties have expressly agreed that the subject of the arbitration agreement relates to more than one country or
> b) The parties despite the nature of the contract expressly agree that the dispute arising from the commercial transaction shall be treated as an international arbitration[6]

Commercial

According to the UNCITRAL Model Law on International Commercial Arbitration, the term 'commercial' as it relates to international arbitration 'shall be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not'. The term 'commercial' is therefore open-ended and can cover any conceivable manner of commercial dealing.[7]

3. Theoretical Framework

There are two theories of immunity, namely, the theory of absolute immunity and the theory of restrictive immunity

Theory of Absolute Immunity

The theory of absolute immunity asserts that a State cannot be subjected to the jurisdiction of another State. This theory is based on the principle of equality of States and as such, an equal cannot have authority over his equal. This is expressed in the Latin maxim, *par in parem non habet imperium*. As Fox put it:

> Based on the assumption that states are equal, the essence of the plea is to correct the lopsided situation where one state by reason of its control of the legislation and courts of the legal system operating in its territory has an unfair advantage over a foreign state which appears as litigant in these courts. [8]

Theory of Restrictive Immunity

Restrictive immunity emerged to address possible abuse of immunity powers by a State in dispute that may arise out of a commercial transaction between the State and a private investor. The theory of restrictive immunity

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[3] See the UNCITRAL Model Law on International Arbitration, Article 1(3)
[4] See Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria 2004, section 57 (2)
[5] Ibid
[6] Idornigie*, Commercial Arbitration and Practice in Nigeria* (Abuja: Lawlords Publications 2015) 403-404
[7] The footnote on Article 1 of the UNCITRAL Model Law states that relationships of commercial nature include but not limited to any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency, factoring, leasing, construction of works, consulting; engineering; licensing; investment; financing; banking; insurance, exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road
[8] Hazel Fox, 'Sovereign Immunity and Arbitration' in Julian DM Law (ed), *Contemporary Problem in international Arbitration* (Springer Science + Business media B.V 1987) 29

therefore applies to restrict the claim of immunity by a State over its commercial transaction. According to Lim, *et al*, 'Reliance may be placed on the "restrictive immunity" theory of foreign State immunity… by which a foreign State which acts like a merchant is treated as one, rather than a sovereign'.[9] Thus, under the restrictive immunity theory, a distinction is drawn between the sovereign acts of a State known as *acta jure imperii* for which a State can claim immunity and *acta jure gestionis*, which are the commercial acts of a State for which a State may not claim immunity.

4. Global Trend on State Immunity

The Council of Europe was the first institution to adopt a Convention on State Immunity following the adoption of the European Convention on State Immunity in 1972. So far, the European Convention on State Immunity is in force in Austria, Belgium, Germany, Luxembourg, Netherland (for the European Netherland), Switzerland and the United Kingdom. Some other States led by Western countries have adopted the restrictive theory approach to issues of State immunity like the United States, the United Kingdom, South Africa, Singapore, Australia and Pakistan.[10] The United Nations General Assembly also in 2004 adopted the United Nations Convention on Jurisdictional Immunities of States and Their Property, though the Convention is yet to come into force not having garnered the requisite number of accessions by States. One remarkable feature of these domestic legislations and Conventions on State immunity is the incorporation of restrictive immunity doctrine. By this, an exception to State immunity is created whereby a State may not be able to claim immunity for its commercial transactions and other related circumstances. The domestic legislations of the United States, the United Kingdom, Singapore, Australia, South Africa and Pakistan on State immunity treat arbitration agreement signed by a State as a sufficient waiver of immunity from the jurisdiction of domestic courts.[11]

Another common ground in these domestic legislations and international conventions on State immunity is the classification of immunity from jurisdiction differently from immunity from enforcement which will involve the actual attachment or measures of restraint against the property of a State. Whereas, arbitration agreement signed by a State can amount to waiver of immunity from the jurisdiction, for the property of a State to be attached in actual execution of arbitration award, there must be an express waiver of the immunity from execution by the State or at least it will be shown that the property is in use or intended use for the commercial purposes of the State.[12] Some States have also in their State immunity legislations made provisions for reciprocal treatments of the judgments of a foreign State in relation to the judgment of that State in that foreign State.[13]

5. Nigeria's Approach To State Immunity

Nigeria as yet does not have a legislation on foreign State immunities. As such, Nigerian courts rely on the rules of customary international law whenever it is faced with the issue of immunity of a foreign State. The issue of foreign State immunity is to be distinguished from diplomatic immunity. Whereas foreign State immunity refers to immunity that may be extended to a foreign State *qua* foreign State as defined under the applicable rules of customary international law,[14] or even some domestic laws for the purposes of State immunity, diplomatic immunity refers to immunity extended to diplomats or foreign envoys and other international organisations. Nigeria has legislation on diplomatic immunities and privileges known as Diplomatic Immunities and Act[15] but does not have legislation on State immunity.

The leading Nigerian judicial authority on State immunity is the case of *African Re-insurance Corporation v Fantaye*[16] which followed the earlier WACA decision in *John Grisby V Jubwe & Ors.*[17] In *African Re-insurance Corporation Case*, the Supreme Court per Uwais J.S.C. stated as follows:

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[9] C.L Lim, Jean Ho and Martins Paparinskis, *International Investment Law and Arbitration*, *Commentary, Awards and Other Materials* (2nd ed, Cambridge: Cambridge University Press 2021) 557

[10] *Op cit*, note 2

[11] See the United States' Foreign Sovereign Immunities Act, section 1605 (a) (b); the United kingdom's State Immunity Act, section 9; the Singapore's State Immunity Act, section 11; the Australia's Foreign States Immunities Act, section 11; the South Africa's Foreign State Immunities Act, section 17; Pakistan's State Immunities Ordinance, section 10

[12] See for instance the United States' Act *op cit,* section 1610 (a) (1), & (2); the United Kingdom's Act *op cit,* section 13 (3) & (4); the South Africa's Act *op cit,* section 14 (2) & (3).

[13] See the United Kingdom's Act *op cit,* section 16; the South Africa's Act *op cit,* section 15

[14] See the definition of State under Article 2 (1) (b) of the United Nations Convention on Jurisdictional Immunities of State and Their Property which represents a codification of the rules of customary international law. In *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*, (2017) UK SC 62 @ para 39, the United kingdom's Supreme Court per Lord Sumption Stated that even though the United Nations Convention on Jurisdictional Immunities of States and Their Property is yet to come into force, 'so far as it seeks to codify existing customary international law, it is evidence of what (the) law is'

[15] Diplomatic immunity in Nigeria is regulated by the Diplomatic Immunities and Privileges Act 1962, Cap D9LFN 2004

[16] (1986) LPELR-214 (SC)

[17] 14 WACA 637

> Now the basic rule at common law as regards the jurisdiction of English Courts over sovereigns or sovereign states was that a foreign sovereign or sovereign foreign state was immune from the jurisdiction of the courts; although the courts would take jurisdiction if the sovereign submitted to their jurisdiction. It follows, therefore, that sovereign or diplomatic immunity can be waived…

This has been the position also in this country following the decision of the West African Court of Appeal in 1954 in *John Grisby V Jubwe & Ors* 14 WACA 637. Uwais J.S.C. further stated in the case as follows:

> The principle of immunity has been a feature of all systems of law but its application had been far from uniform. This led to its codification in 1961 by the Vienna Convention on Diplomatic Intercourse and Immunities. In England, the codification was given Expression in the Diplomatic Privileges Act, 1964. In this Country the law which governs the subject is the Diplomatic Immunities and Privileges Act, 1962.[18]

The above dicta of Uwais J.S.C. can be taken on two grounds. First is that from the perspective of the learned Justice, waiver of immunity appears to be the only situation or exception where jurisdiction could be exercised over a foreign State or sovereign. No consideration was given to the involvement of a foreign State in commercial transaction (*acta jure gestionis*) for which immunity should be deemed to have been waived by the State. This narrow position of the Supreme Court incidentally will lend credence to the absolute immunity theory which ultimately will accord States undue advantage against private investors in arbitration. For this reason, the global trend now is to discard the absolute immunity theory in favour of restrictive immunity whereby jurisdiction may be exercised over a foreign State in respect of its commercial transactions. Secondly, the above dictum of Uwais J.S.C. appears to mix up the issue of foreign State immunity with diplomatic immunity. Foreign state immunity or foreign sovereign immunity refers to the immunity granted to a foreign State *qua* foreign State as defined under the rules of customary international law.[19] Diplomatic immunities, on the other land, refer to the immunity granted to diplomats and foreign envoys. Both of them are regulated by different conventions at the international level, and different legislations at the domestic level.[20] Various States have also codified the law on foreign State or foreign sovereign immunity.[21] This decision of the Supreme Court has also been followed in other subsequent authorities in Nigeria notably *Oluwalogbon & Ors v The Government of United Kingdom & Anor*.[22] The facts of this case are that a land rover jeep belonging to the 1st Respondent (the Government of the United Kingdom which is a foreign State) being driven by the 2nd Respondent had an accident with the 1st Appellant's car at Lagos. The 1st Appellant filed an action at the Lagos State High Court claiming damages for negligence. The Respondents challenged the jurisdiction of the Lagos State High Court on the ground that under the principles of customary international law applicable in Nigeria, a foreign sovereign State could not be sued in courts of another sovereign in any legal proceedings on the ground of absolute immunity. The High Court of Lagos upheld the objection of the Respondents and struck out the name of the 1st Respondent. The Appellants appealed to the Court of Appeal Lagos Division. The Court of Appeal resolved that the cause of action being in torts, the respondents could not be impleaded in the Nigerian courts. Accordingly, the appeal was dismissed.

It is instructive to note that under the United Kingdom's State Immunity Act, foreign sovereign States are no longer immune from action in respect of death, pursuant injury, damages to or loss of property caused by an act or omission of a foreign state in the United Kingdom.[23] Nigeria has no similar legislation and no precedent can be found in the common law in force in England prior to 1st of January 1900. As such, the Court of Appeal followed the precedent set in the *African Re-insurance Corporation* case.[24] In *Federal Republic of Nigeria & Ors v Abacha & Ors*,[25] the 1st and 2nd Respondents who were the beneficiaries of the estate of late General Sami Abacha brought an action by way of Fundamental Right at the Federal High Court Kaduna seeking to set aside the judgment of the Federal Office of Justice Switzerland to repatriate funds of late General Sani Abacha stashed away in banks in Switzerland to Nigeria, among other reliefs. The Federal High Court Kaduna granted the 1st and 2nd Respondents' reliefs. Consequently, the Appellant appealed to the Court of Appeal Kaduna Judicial Division which allowed the appeal. The Court of Appeal considered the issue of State immunity and while placing reliance

[18] *Ibid*
[19] See Note 14
[20] Whereas the Vienna Convention on Diplomatic Relations 1961 regulates the diplomatic immunities internationally, the United Nations Convention on Jurisdictional Immunities Between States and Their Property regulates or codifies the law on State immunity even though it is yet to come into force. At the national level for instance, whereas the United Kingdom's Diplomatic Privileges Act 1964 regulates diplomatic immunities and privileges in the United Kingdom in line with the Vienna Convention on Diplomatic Relations, the State Immunity Act of 1978 regulates State immunity in the United Kingdom.
[21] See Note 10
[22] (2005) LPELR-11319 (CA)
[23] See the United Kingdom State Immunity Act 1978, section 5
[24] See also *Siewe v Cocoa Producers Alliance* (2013) LPELR-22033 (CA)
[25] (2014) LPELR-22355 (CA)

on the judgment of the International Court of Justice in *Germany, Italy: Greece Intervening*,[26] stated: 'It is quite distinct in the *Germany v Italy* (supra) case that the 1st and 2nd Respondents have no competence whatsoever to claim an action in Nigerian Courts against the said judgment of the Federal Office of Justice Switzerland'

It is obvious from the above that Nigerian courts have fairly consistently been in adopting what will be termed the absolute immunity theory. No exception has been made or applied for the commercial transaction of a foreign State for which immunity can be lifted in line with the global trend. However, in *Vese v West African Institute for Financial & Economic Management (WAIFEM)*[27], the Court of Appeal stated what might be considered a restrictive approach to sovereign immunity albeit *obiter* thus: 'the practice of granting Diplomatic Immunity to States has, in practice, been extended to government naval-ships, properties and government servants acting in their official capacities. Such immunity is no longer granted to a foreign State in respect of acts which are not governmental, which means in most cases, the acts of a foreign states as a trader'.

6. Conclusion and Recommendations

This work highlighted the global trend on State immunity which shows a shift from absolute immunity theory to restrictive immunity whereby the immunity of a foreign State can be lifted in commercial transactions of the State. In this way, investors' confidence in commercial transaction with State parties can be boosted as private investors can be re-assured that in the event of a dispute with a sovereign State, the State party will be checked or barred from throwing up its immunity at will to frustrate any arbitral proceedings to which the State party has consented and the enforcement of any resulting award. The work found that Nigeria has no legislation on state immunity and that case laws that have dealt with this issue still tend towards the obsolete absolute immunity theory which provides complete ban on any kind of action against a sovereign State on grounds of State or sovereign immunity. As such, this work recommends as follows:

Nigeria should enact a legislation on State immunity adopting the restrictive immunity theory in line with the trending global practice whereby the immunity of a State can be lifted with regards to it commercial transactions;

i) The exception to State immunity in the recommended Nigerian legislation should include situations whereby the foreign State has submitted to the jurisdiction; actions against the foreign State with respect to contracts of employment, death or personal injury or other forms of tortious claims, damage to property, ownership, possession use of property, intellectual property, membership of bodies corporate, agreement whereby a State has agreed to submit to arbitration, certain admiral cases, value added tax and customs duties;

ii) Regarding immunity from execution, the recommended legislation should provide for the right of a State to waive its immunity from execution, while also stating that the property of a State in use or intended use for commercial purposes of the State in respect of a particular proceedings should not be excluded from execution in the proceedings. This should be complemented by a list of properties of a State which should not be regarded as being in use or intended for use for commercial purposes;

iii) The recommended legislation should also make reciprocal provision mandating that the treatment of the arbitral award of a foreign State in Nigeria should correspond with the treatment of the arbitral awards from Nigeria receive in that State.

[26] Judgment, I.C.J. Reports 2012 page 99

[27] (2017) LPELR 51070 (CA)