

Abstract

The Federal Republic of Nigeria was in the news of late over enforcement actions taken against three of her presidential jets by a Chinese company known as Zhongshan Fucheng Industrial Investment in France. The question had always arisen as to the extent properties of a foreign state were barred from the enforcement jurisdiction of a domestic court. Under the relative immunity principle which France had adopted, sovereign or diplomatic properties of a foreign state were entitled to immunity from enforcement. It was only the assets of a foreign state that could be classified as being in use for commercial purposes that were exempted from immunity. This work aimed at examining the state of law in France as well as the rules of customary international law adopted by France on issues of sovereign immunity with the objective of determining how the Judicial Court of Paris complied with that in the case of Nigeria. Doctrinal method was employed in this research by analysis of the French case laws, legislations and the United Nations Convention on Jurisdictional Immunity of States and Their Property. It was found that France had formally adopted the relative immunity theory. This research also found that France had an obligation under their domestic law and customary international law to grant immunity to sovereign assets of Nigeria in France. This work further found that the Judicial Court of Paris wrongfully granted the seizure order against the three presidential jets of Nigeria in France as they ought to enjoy immunity as sovereign or diplomatic properties. This work recommended that the Federal Republic of Nigeria should appeal against the ruling of the Judicial Court of Paris to a higher French authority.

Keywords: Immunity, Sovereign Immunity, Diplomatic Properties, Sovereign Properties

1. Introduction

In August 2024, it was widely reported by the media that three Nigerian presidential jets on routine maintenance in France have been seized following an order obtained by a Chinese company known as Zhongshan Fucheng Industrial Investment from the Judicial Court of Paris.¹ This is sequel to an award of USD 74.5 million made against Nigeria by an arbitration panel sitting in the United Kingdom in 2021. The award was made in favour of Zhongshan Fucheng Industrial Investment as compensation for the violation of the terms of the contract for the construction of Free Trade Zone in Ogun State by Zhongshan Fucheng Industrial Investment entered into between Ogun State Government of Nigeria and Zhongshan Fucheng Industrial Investment in 2007. The contract was made under the terms of the China-Nigeria Bilateral Investment Treaty of 2001. The aim of this study is to examine the state of law in France and the rules of customary international law applicable to France on issues of sovereign immunity. The objective is to determine how the Judicial Court of Paris complied with the French legal position and international law on sovereign immunity in the case of Nigeria. France had long abandoned the absolute immunity approach to sovereign immunity in favour of the relative immunity approach. The absolute immunity approach bars any form of enforcement action against the assets of a foreign state while, in general, the relative immunity approach proclaims that the property of a foreign state, not being a diplomatic or sovereign asset, can be liable for enforcement action if it is in commercial use.

2. Sovereign Immunity

The terms 'sovereign' and 'state' have been used by authors interchangeably to denote the sovereign entity that has acquired international legal personality on issues of immunity.² According to Shaw, sovereign immunity constitutes a derogation from the host State's jurisdiction which is construed as 'an essential part of the recognition of the sovereignty of foreign states, as well as an aspect of the legal equality of all states'.³ There are two prevailing theories of sovereign immunity, namely, the absolute immunity theory and the relative immunity theory. Under the absolute immunity theory, a sovereign cannot be subject to the judicial process of another state and under no circumstances will this be derogated from. The independence and equality of states make it 'philosophically as well as practically difficult to permit municipal courts of a country to manifest their power over a foreign sovereign state without their consent'.⁴ This underscores the traditional international law principle that an equal cannot have authority over his equal, expressed in the Latin maxim, *par in parem non habet imperium*. The principle of relative immunity approach

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¹ W Chibelushi, 'France Seizes Three Nigerian Jets for Chinese Firm [16 August 2024] <<http://www.bbc.com>> accessed on 17 September 2024

² G R Delaume, 'Sovereign Immunity and Transnational Arbitration' in Julian D M Lew (ed), *Contemporary Problems in International Arbitration* (Springer – Science + Business Media B.V. 1987) 313; Hazel Fox, 'Sovereign Immunity and Arbitration' in Julian D M Lew (ed), *Contemporary Problems in International Arbitration* (Springer – Science + Business Media B.V. 1987) 323.

³ M N Shaw, *International Law* (7th edn, Cambridge University Press 2014) 506.

⁴ *Ibid* 507.

makes a distinction between the sovereign acts of a state (*acta jure imperii*) for which immunity cannot be lifted and commercial acts of a state (*act jure gestionis*) for which immunity can be lifted. The principle of relative immunity extends to classification of the assets of a foreign state or sovereign for which no enforcement action can be taken such as diplomatic or sovereign properties, and assets for which enforcement action can be taken such as property of a foreign state in commercial use, or where the state has waived her immunity.

3. The Legal Position of France on Foreign Sovereign Immunity

France had initially approached the issue of sovereign immunity under the absolute immunity theory perspective. This is clearly manifested in the aspect of the *LIAMCO* case⁵ that was determined in France where the award against Libya was initially granted *exequatur*. However, the attachments of Libyan accounts in Parisian banks were vacated, following the intervention of the Public Attorney. The Public Attorney claimed that under the absolute immunity doctrine, no measure of execution could obtain against the assets of Libya. Similarly, in the case of *Procureur de la Republique v SA Iptrade International*⁶ (the *Iptrade* case), the French *Tribunal de Grande Instance* held that Nigerian bank account accounts in France enjoyed absolute immunity from execution following the recognition in France of an arbitral award rendered in Switzerland. The position of France has, however, transited from absolute immunity theory to relative immunity theory following the decision in 1984 of the highest French Court known as *Cour de Cassation* in the *EURODIF Corporation v Islamic Republic of Iran* (the *EURODIF* case)⁷. In the *EURODIF* case, under the framework of cooperation agreements in 1974 between France and Iran, Eurodif, an uranium enrichment plant based in France was to supply enriched uranium to Iran. Under the agreement, Iran lent US \$1 billion to a French entity (CEA) engaged for the distribution of the enriched uranium to Iran. The repayment was guaranteed by the French government. Iran also lent some money to EURODIF to be paid by installments. Following the Islamic Revolution of 1978 in Iran, the third installment of FFr 400 million and other sums to be made in advance were never made by Iran and subsequently, Iran decided to discontinue the cooperation of agreements. EURODIF commenced arbitration proceedings and also petitioned the President of the Commercial Court Paris to attach the Iranian funds held by CEA (i.e. the US \$1 billion loan). The attachment was granted, but the First Chamber of Paris Court of Appeal questioned the attachment order and held that Iran could invoke immunity from execution. The Court of Appeal held that the funds were public funds since, if not attached, they would revert to Iran. The Court of Appeal further stated that once the public nature of the property was determined, it was useless to enquire whether the activity carried out by Iran had been sovereign or commercial. This decision was appealed by EURODIF to the *Cour de la Cassation* and this gave the court an opportunity to define the French position on State immunity from execution.

The *Cour de la Cassation* held that by way of exception, when the property to be attached is intended to be used for the state's commercial activity upon which the claim is based, immunity could be refused. The *Cour de la Cassation* therefore employed the principle enshrined in United States' Foreign Sovereign Act⁸. It is worthy of note that in this case, the Court of Appeal applied the nature-of-funds test and disregarded the nature of activity test. However, the *Cour de Cassation* held that the Court of Appeal ought to have determined the nature of the activity Iran carried out. Accordingly, the *Cour de Cassation* established three conditions that must be fulfilled before immunity from execution can be denied, namely: (i) The state's activity must be commercial; (ii) The funds must have a commercial nature, and (iii) The funds must be used for the activity upon which the claim is based. Thus, in this case, the decision of the (Paris) Court of Appeal having been reversed by the *Cour de Cassation*, the original attachment order of the commercial Court in Paris/Tribunal Commerce of Paris was reinstated.

Historically, the French law on sovereign immunity developed through case law. Prior to 2016, France had not enacted any legislation on state Immunity, and thus case law was the main source of the French rules on state immunity. In 2007, France signed the United Nations Convention on Jurisdictional Immunities of States and Their Property and later ratified same in 2011⁹. This Convention provides guiding principles to French judges dealing with state immunity even though the Convention is yet to come into force. Since 2016, France has enacted a few legislations dealing with certain issues on State immunity, namely, the Law on Transparency, Anti-Corruption and Modernization of Economic Life otherwise known as 'Loi Sapin 2' or in English as 'Sapin 2 Law'¹⁰, the French Civil Enforcement Proceedings Code 'CEPC' (specifically articles L.111-1-1 to L.111-1-3) and the French Monetary and Financial Code (article 153-1). 'Sapin 2' sets the conditions for state immunity from execution. Resort is still had to the French courts for areas not covered by the 'Sapin 2' Law. The new Article L.III-I-I of the Code provides that enforcement measures can only be taken against the properties of a foreign state only if the following cumulative conditions are satisfied, namely:

- i) The foreign state has expressly consented to the application of such measure.
- ii) The foreign state has reserved or assigned the property in accordance with the request.

⁵*Procureur de la Republique v Societe LIAMCO*, 106 *Clunet* 857 (1979).

⁶ TGI Paris, March 5, 1979,

⁷1984 LA SEMAINE JURIDIQUE (23 May 1984) 20205.

⁸ Public Law 94-583-Oct. 21, 1976.

⁹ <<https://treaties.un.org>> accessed on 17 September 2024.

¹⁰ Law on Transparency, Anti-Corruption and Modernization of Economic Life, Law No. 2016-1691.

- iii) Where the property in question is specifically used or intended for use by that state otherwise than for the purposes of public service.
- iv) There is a relationship with the state entity against which the proceedings were instituted.

The article defines goods that are to be considered as ‘property specifically used’ or ‘intended for use’ by the state for public service purposes to be:

- i) Property like bank accounts used or intended for use in the performance of the functions of the diplomatic mission of the state, or its consular posts, special mission, or missions to international organisations, or its delegations to the organs of international organisations or international conferences (Diplomatic property).
- ii) Property belonging to the military, or property used or used for use by the military.
- iii) Property forming part of the cultural heritage of the state, or its archives, which is not intended to be offered for sale.
- iv) Property forming part of an exhibition that is scientific, cultural or historical interest which is not intended to be offered for sale.
- v) The tax or social revenues of the state.

The above represents a direct codification and domestication of Articles 18 and 19 of the United Nations Convention on Jurisdictional Immunity of States and Their Property 2004 which France has ratified. Articles 18 and 19 of the Convention have similarly made provisions on instances when the immunity of a state over its assets can be upheld. In general, Nyssen and Hu described the French position on State immunity as follows:

State immunity in France is relative, and not absolute. This means that it can be waived. Immunity is only granted to a State’s acts when such acts are made in its sovereign capacity (*jure imperii*) and not when such acts are of a private or commercial nature (*jure gestionis*). State immunity cannot therefore be raised where a State has acted for a commercial purpose or intended to allocate certain assets for the performance of a purely commercial operation. State immunity will only apply to assets that are held by a state to perform its sovereign or public services.¹¹

The above unequivocally confirms France as a restrictive immunity state with its attendant features.

4. The Freezing Order of the Judicial Court of Paris Against Three Nigerian Jets

The order of the Judicial Court of Paris to freeze three Nigerian presidential jets for the satisfaction of award sum in favour of the Chinese company, Zhongshan Fucheng Industrial Investment, runs contrary to the French legal position on sovereign immunity as examined above, as well as the French commitment under international law. The Nigerian presidential jets ought to qualify either as sovereign assets or diplomatic property in the absence of any evidence that they have been converted to commercial use. These are jets in use for the office of the president of the Federal Republic of Nigeria. Obviously, Nigeria has not consented to their being attached for settlement of the debt to the Chinese companies. The French domestic law forbids attachment of a sovereign or diplomatic properties of a foreign sovereign when the latter has not consented to such. France has also ratified the United Nations Convention on Jurisdictional Immunities of States and Their Property. Article 19 of the Convention provides that no post-judgment measures of constraint such as attachment, arrest or execution against the property of state may be taken in a proceeding before a court of another state except to the extent that the state has expressly consented by:

- (i) International agreement;
- (ii) By an arbitration agreement or in a written contract; or
- (iii) By a declaration before the court or by a written communication after a dispute between the parties has arisen, or
- (iv) The state has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or
- (v) It has been established that the property is specifically in use or intended for use by the state for other than government non-commercial purposes and is in the territory of the state of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

In view of the above, a state would have taken clear and unequivocal action as spelt above before it can be said that it has waived its immunity against post-judgment execution or other measures of attachment. Under the Convention, the consent of a state to the exercise of jurisdiction under Article 7 does not imply consent to the taking of measures

¹¹ X Nyssen, Partner, and E Hu, Associate, International Arbitration, Dechert LLP, ‘State Immunity and Arbitration in France’ <<http://www.dechert.com>> accessed on 15 May 2023; See also Allen and Overy, ‘Sovereign Immunity in France’ (March 20, 2019) <<http://www.lexology.com>> accessed on 15 May 2023.

of constraint.¹² Even though this United Nations Convention is yet to come into force, it is taken as a codification of the rules of customary international law on sovereign immunity. Lord Sumption described the United Nations Convention on Jurisdictional Immunity of States and Their Property thus: : ‘so far as it seeks to codify existing customary international law, it is evidence of what (the) law is’.¹³ In the case of *Oleynikov v Russia*,¹⁴ the European Court of Human Rights ruled that the United Nations Convention on Jurisdictional Immunities of States and Their Property applied under customary international law, even if the state in question had not ratified the Convention, provided it was not opposed to it either. In this case, the European Court of Human Rights held Russia to be bound by the Convention, even though Russia has only signed but has not ratified the Convention. The case of France, in contrast, is made more compelling because France has gone further to ratify the Convention after signing it.

Furthermore, the International Court of Justice (ICJ) made a landmark decision in the case of *Germany v Italy*¹⁵ (Greece Intervening) over an action instituted by Germany in 2008 against Italy alleging a violation of its sovereign immunity by Italian courts. Between 2004 and 2008, Italian courts gave several judgments awarding damages against Germany in favour of the victims of war crimes and crimes against humanity committed by the German Third Reich during World War II. Germany framed a three-pronged claim against Italy at the ICJ as follows:

- (i) Italy breached international law by permitting civil claims to be brought against it in the Italian courts for war crimes committed by the German forces during World War II;
- (ii) Italy violated its sovereign by taking measures of constraint against a German property situated in Italy; and
- (iii) Italy violated its sovereign immunity by declaring enforceable a Greek judgment rendered against Germany concerning similar acts.

The ICJ found for Germany on all three grounds and held that Germany’s immunity from jurisdiction and execution was violated by Italy. The ICJ further held that Germany was entitled to sovereign immunity under customary international law in regards to acts committed by its armed forces in the course of World War II as those were sovereign acts (*acta jure imperii*) of the German state.

In summary, therefore, apart from the clear provisions of the domestic law of France, France has an obligation under customary international to uphold the sovereign assets of the Nigerian state. In a similar proceeding initiated by Zhongshan before the Commercial Court in London to enforce the award against Nigeria, Zhongshan secured the order to attach two Liverpool properties of Nigeria¹⁶. However, this is different from the scenario in France because the Commercial Court in London found that the two Liverpool properties had been converted to commercial use outside Nigeria’s diplomatic and consular activities having been leased to commercial tenants. On this ground, Nigeria’s sovereign immunity plea was rejected by the court in London. The ground upon which the court in London denied Nigeria’s plea of sovereign immunity ultimately finds justification because the property of a foreign sovereign that is in use for commercial activity no longer enjoys sovereign immunity under the principles of relative immunity. This is not the same situation with the Nigerian presidential jets seized in France.

5. Conclusion and Recommendation

This study traced the history of the transition of France from an absolute immunity-minded state to a relative immunity state. The case law and domestic legislations of France confirming adoption of relative immunity approach by France were also discussed. This is manifested in the *Eurodif* case and French domestic legislations like the Law on Transparency, Anti-Corruption and Modernization of Economic Life otherwise known as ‘Loi Sapin 2’, the French Civil Enforcement Proceedings Code and the French Monetary and Financial Code. France has also gone further to ratify the United Nations Convention on Jurisdictional Immunity of States and Their Property and should be seen to be bound by it. The work found that the decision of the Judicial Court of Paris to attach the three Nigerian presidential jets in France runs contrary to the French domestic law as well as her obligation under international law to eschew from taking any enforcement action against the sovereign or diplomatic assets of a foreign sovereign. It is hereby recommended that the Federal Republic of Nigeria should take steps to appeal the ruling of the Judicial Court of Paris to a higher French authority.

¹² *Ibid* Article 20.

¹³ *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* (2017) UKSC 62.

¹⁴ ECHR 079 (2013) 14.03.2013.

¹⁵ ICGJ (ICJ) 2012) 3rd February 2012.

¹⁶ *Zhongshan Fucheng Industrial Investment Co Ltd v Federal Republic of Nigeria*, 2024 EWHC 1503 Comm – 14 June 2024.