



Seizure of Nigeria's Presidential Jets by a Chinese Firm

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The What and The Why?

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LEGAL PRACTITIONERS & ARBITRATORS

Introduction

On 26 March 2021, Zhongshan Fucheng Industrial Investment Co. Ltd ("**Zhongshan**") obtained an arbitral award in the sum of about \$USD70 million against the Federal Republic of Nigeria ("**Nigeria**"). The award flowed from a dispute relating to the termination of an agreement between the Ogun State Government ("**the OSG**") and Zhongfu International Investment (NIG) FZE ("**Zhongfu**") – a subsidiary of Zhongshan.

Zhongshan had commenced arbitral proceedings against the Federal Republic of Nigeria, and was successful. Subsequently, when Zhongshan applied to enforce the arbitral award, Nigeria raised a sovereign immunity defence¹. However, the defence was rejected by the United States Court of Appeals for the District of Columbia. On 14 August 2024, a Paris Judicial Tribunal granted an order permitting the seizure (by Zhongshan) of three presidential jets owned by the Federal Republic of Nigeria, towards the enforcement of the arbitral award.

How did Zhongshan get to investment treaty arbitration? Why did Zhongshan commence the arbitral proceedings against the Federal Government of Nigeria rather than the OSG? Why was Zhongshan able to commence enforcement proceedings in various jurisdictions against Nigeria? Why was Nigeria's defence of sovereign immunity rejected? This article seeks to answer these questions in the succeeding paragraphs.

Factual Background/Timeline of Events Leading to the Dispute

- On 27 August 2001, the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria entered into a Bilateral Investment Treaty ("**the BIT**") to promote investment between the two countries. Under the BIT, both Parties agreed that where an investment dispute arises between an investor of one Contracting State and the other Contracting State, the dispute was to be settled (as far as possible) by negotiations². However, where such dispute could not be settled through negotiations within six months, the aggrieved Party was entitled to submit the dispute to the competent court to the Contracting State accepting the investment³. Also, it was agreed that if the dispute could not be settled within six months after resort to negotiations, it may be submitted at the request of either Party to an ad hoc arbitral tribunal provided the dispute had not been submitted to a competent court⁴.
- However, in 2010, Zhongshan – through its parent company – acquired rights from the OSG to develop the Ogun Guangdong Free Trade Zone ("**the FTZ**") in Ogun State, Nigeria.
- In 2011, Zhongshan set up Zhonghu to manage the development of the FTZ. Zhongfu carried out several works, including the development of infrastructure such as roads, sewerage and power networks, within the zone.

1. The defence of sovereign immunity also suggests that one sovereign State cannot be sued before the courts of another sovereign State without its consent.

2. Article 9(1) of the BIT

3. Article 9(2) Ibid.

4. Article 9(3) Ibid.

- In 2012, the OSG appointed Zhongfu as the interim manager of the FTZ.
- In 2013, the OSG entered into a Joint Venture Agreement (“**the JVA**”) with Zhongfu, making Zhongfu the permanent manager of the FTZ and giving it a majority shareholding in the project.
- Sometime in 2016, a dispute arose between the OSG and Zhongfu resulting in the abrupt termination of the JVA by the OSG. It is alleged that the OSG also took actions to expel Zhongfu from Nigeria, including harassment of its executives (by the OSG, the Police and “**NEPZA**” – Nigeria Export Processing Zones Authority) and revocation of immigration papers of its executives. Some of these allegations include that one of Zhongfu’s personnel, Mr. Wenxiao Zhao was arrested at gunpoint, physically beaten, detained by the Police, before subsequently being released on bail.
- On 30 August 2018, Zhongshan commenced arbitration proceedings against Nigeria, claiming breach of Articles 2 (on the promotion and protection of investments), 3 (on the treatment of investments) and 4 (prohibiting unlawful expropriation⁵) of the BIT and seeking compensation under Article 9 of the BIT (on the settlement of disputes between investors and one Contracting State). The Arbitral Tribunal (seated in London, United Kingdom) comprised co-arbitrators, Mr Rotimi Oguneso SAN and Mr Matthew Gearing QC, and presiding arbitrator, Lord Neuberger of Abbotsbury.
- On 26 March 2021, the Arbitral Tribunal ruled that Nigeria had breached its obligations under the BIT and issued a Final Award of **US\$55,675,000 (Fifty-Five Million, Six Hundred and Seventy-Five Thousand United States Dollars)** with interest of **US\$9,400,000 (Nine Million, Four Hundred Thousand United States Dollars)** and costs of **£2,864,445 (Two Million, Eight Hundred and Sixty-Four Thousand, Four Hundred and Forty-Five Euros, or the USD equivalent)** – “the Final Award” – payable by Nigeria to Zhongshan.
- On 23 April 2021, Nigeria filed a Challenge in the English High Court against the Final Award, on jurisdictional grounds, contending inter alia that the arbitration clause in the BIT was invalid. Nigeria also contended, in its Challenge, that court proceedings which had been commenced in Nigeria deprived the arbitral tribunal of jurisdiction under **Article 9(3)** of the BIT (called the “fork in the road” provision).
- However, Nigeria withdrew the Challenge, purportedly because Zhongshan filed an application requesting Nigeria to deposit security for the Final Award and security for costs before Nigeria’s application to challenge the Final Award could be heard.
- On 8 December 2021, Zhongshan commenced enforcement proceedings against Nigeria and, on 21 December 2021, an order recognising the Final Award was issued by the English Court.

5. Expropriation is the action, by a State or an authority, of taking property from its owner for public use or benefit.

- On 25 January 2022, due to Nigeria's failure to pay any of the sums due under the Final Award, Zhongshan filed a Petition in the United States District Court for the District of Columbia, for the recognition and enforcement of the Final Award (rendered by the Arbitral Tribunal on 26 March 2021) under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**the New York Convention**"). In its Petition, Zhongshan also argued that Nigeria was not entitled to rely on the defence of sovereign immunity on the basis that the Foreign Sovereign Immunities Act's arbitration exception was applicable, since the proceedings sought to recognise and enforce a foreign arbitral award governed by the New York Convention. Zhongshan also argued that Nigeria was precluded from raising the defence of immunity in court proceedings relating to an arbitration in respect of which the State agreed in writing (i.e., the BIT). Zhongshan's Petition for recognition and enforcement of the Final Award was thereby granted ex parte ("**the Enforcement Order**").
- Nigeria was served with the Enforcement Order on 30 May 2022, and was entitled to (within 74 days from the date of service) apply to set aside or vary the Enforcement Order. Nigeria's deadline expired on 16 August 2022.
- On 15 September 2022 (after time had expired), Nigeria filed an application, seeking relief from sanctions in respect of the delay in making the application and also sought an extension of time for its application to set aside or vary the Enforcement Order. It is, perhaps, worthy of note that the issue of state immunity was neither raised in Nigeria's application for extension of time nor in the witness statement in support of that application.
- On 30 September 2022, Zhongshan filed a response stating that Nigeria's failure to comply with the deadline in the Enforcement Order was significant and it had not identified any proper reason for its failure to file within time. Nigeria then missed the 7-day deadline required for its reply to Zhongshan's response and, on 29 November 2022 (three days before the hearing of Nigeria's application for relief from sanctions due to the delay, and three months after the deadline to set aside the Enforcement Order) served a further extension of time application in respect of the missed reply deadline. It was only in the second witness statement, in support of that further application for extension of time, that Nigeria first indicated that it might wish to raise the defence of state immunity.
- On 2 December 2022, the English Commercial Court dismissed both applications for extension of time. The court also held that the justice of the case weighed in favour of not granting Nigeria's application for relief from sanctions due to its delay, and that application was also dismissed.
- Nigeria filed an application for permission to appeal, which was refused and on 14 February 2023, Nigeria filed another application to reopen the refusal of permission to appeal.
- On 20 July 2023, the English Court of Appeal upheld the Final Award against Nigeria, and refused Nigeria's application to reopen the refusal of permission to appeal on the basis that none of Nigeria's four grounds of appeal had any real prospect of success. The English Court of Appeal also rejected Nigeria's defence of state immunity, on the basis that Nigeria had exceeded the time limit to set aside the Enforcement Order.

- On 16 June 2023 and 18 August 2023, the English Commercial Court granted interim charging orders in favour of Zhongshan, in respect of two properties belonging to Nigeria in the United Kingdom. Both properties were estimated as likely to be worth between £1.3 and £1.7 million. Nigeria argued that the two properties were used for consular services and as residences for Nigerian officials, thus granting them immunity from seizure. However, the court dismissed this claim, finding that the properties had not been used for diplomatic purposes in over 34 years. On 14 June 2024, the Court granted a final charging order over the two properties in the United Kingdom.
- It is also noteworthy that Zhongshan took steps to have the Final Award recognised in Quebec and, on 25 January 2023, the Canadian Superior Court in the Province of Quebec granted an order permitting Zhongshan to seize a Bombardier 6000 Jet which belonged to Nigeria.
- Despite being notified on 19 April 2023 of the legal action to recognise the Final Award in Quebec, Nigeria failed to submit its response within the time limit set by the Code of Civil Procedure and the Court (due to Zhongshan's application for a default judgement), set a hearing date of 16 February 2024, for the default judgement application.
- Nigeria only submitted a response in Quebec on 11 January 2024 (i.e., about nine months after being notified of Zhongshan's request to have the arbitral award recognised in Quebec) and also submitted its request to be relieved from its failure to respond in time on 15 February 2024 (i.e., the day before the scheduled hearing). The Court dismissed Nigeria's request to be relieved from its default of responding in time, and ordered that the case should proceed to a full hearing on the merits, where the issue of state immunity (along with other potential defences) could be thoroughly examined.
- In any event, on 9 August 2024, the United States Court of Appeals for the District of Columbia Circuit affirmed the decision of the English Court of Appeal, on the enforceability of the Final Award.
- Finally, on 14 August 2024, a Paris Judicial Tribunal ordered the seizure (by Zhongshan) of three presidential jets owned by the Federal Republic of Nigeria, towards the enforcement of the Final Award. It is alleged that, at the time of seizure, the jets were receiving routine maintenance in Paris.

How did Zhongshan get to investment treaty arbitration?

Disputes are often referred to arbitration due to the perceived advantages of arbitration over traditional litigation, hence arbitration is widely considered as more effective and time saving, especially in commercial or investment disputes involving huge monetary sums.

Indeed, under **Article 9(3) of the BIT**, disputes between the investors of one Contracting State and the other Contracting State could be referred to arbitration, where negotiations to resolve the dispute fails. However [as mentioned earlier under **Article 9(2) and (3) of the BIT**, the concerned investor would be unable to refer the dispute to arbitration if he had submitted the dispute to the competent court to the Contracting State accepting the investment.

Hence, Zhongshan initiated an ad hoc arbitration⁶ under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules.

Why did Zhongshan commence arbitral proceedings against the Federal Government of Nigeria rather than the Ogun State Government?

The arbitral proceedings were commenced by Zhongshan against Nigeria on the basis that the OSG, the Nigeria Police and NEPZA are all entities whose actions are attributable to Nigeria under international law.

In opposition, Nigeria contended inter alia that Zhongshan's complaints were principally against the conduct of the OSG, rather than Nigeria, hence Zhongshan had no claim against Nigeria.

In resolving this issue, the Arbitral Tribunal accepted that Zhongshan's case was primarily based on the actions of the OSG as well as those of the Nigeria Police and NEPZA – all of which have an independent existence under Nigeria's municipal law. Nevertheless, relying on the principles of customary international law and the provisions of the Articles on Responsibility of States for Internationally Wrongful Acts ("**the Responsibility of States Articles**")⁷, the Arbitral Tribunal held that the claim was validly brought against Nigeria.

Why was Zhongshan able to commence enforcement proceedings in various jurisdictions against Nigeria?

The New York Convention provides for the recognition and enforcement of foreign arbitral awards and it has been ratified by over 170 countries (including Nigeria), making it one of the most widely-accepted treaties in international law. Hence, due to the standardised legal framework for the recognition and enforcement of arbitral awards across its signatory states, an arbitral award issued in one member state can be recognised and enforced in any other member state, provided certain conditions are met.

6. An ad hoc arbitration is not administered by a specific arbitration institution but is conducted according to agreed-upon rules, in this case, the UNCITRAL rules.

7. The Responsibility of States Articles is applicable to both China and Nigeria. It is worthy of note that **Article 2 of the Responsibility of States Articles** provides that "**there is an internationally wrongful act of a State where conduct consisting of an act or omission (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State**".

Also, **Article 4.1 Ibid** provides that "**the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organisation of the State, and whatever its character as an organ of the central government or of a territorial unit of the State**".

On its part, **Article 5 Ibid** provides that "**the conduct of any person or entity which is not an organ of the State under article 4, but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law...**"

For instance, in Nigeria, those conditions are as follows:

- The party seeking to enforce the award will apply to the Court (i.e., the High Court of a State, or the High Court of the Federal Capital Territory or the Federal High Court) within the jurisdiction where it wishes to enforce for recognition and enforcement of the award.
- The other party must be notified.
- The application must include the original or a certified true copy of the arbitration agreement and the award.
- If the award or arbitration agreement is not in English, a certified translation into English must also be provided.

Zhongshan thereby sought to enforce the Final Award in various jurisdictions such as Quebec, the United Kingdom and Paris.

Why was Nigeria's defence of sovereign immunity rejected?

The enforcement of foreign arbitral awards against States or State entities parties can be challenging, especially where such States raise the defence of sovereign immunity – a principle of international law that affords protection to a sovereign State from lawsuits including, in some cases, enforcement proceedings. As mentioned earlier, the defence of sovereign immunity also suggests that one sovereign State cannot be sued before the courts of another sovereign State without its consent. Indeed, the defence of sovereign immunity was raised by Nigeria in the case of *Process & Industrial Developments Ltd (P&ID) v. Federal Republic of Nigeria (FRN)*⁸. In any event, as referenced above in the factual background of this article, Zhongshan had argued that Nigeria was not entitled to the defence of sovereign immunity on the basis that the Foreign Sovereign Immunities Act's arbitration exception applied, since the court

proceedings sought to recognise and enforce a foreign arbitral award governed by the New York Convention⁹. The English Court of Appeal agreed with this position and held that, in any event, Nigeria had exceeded the time limit to set aside the Enforcement Order.

Conclusion

It is, perhaps, quite clear that time is an essential factor in the resolution of disputes via arbitration. In any event, while we remain interested in the development of the issues arising from this dispute, it is noteworthy that on 16 August 2024, a spokesperson for Zhongshan announced that Zhongshan had lifted the seizure of one of the Nigerian presidential jets – the Airbus A330 – to show that Zhongshan has "consistently sought to act reasonably and fairly in the course of a legal dispute" that was not of its making. The said jet was released for the President of the Federal Republic of Nigeria to travel to a scheduled meeting with President Macron of France, while the other two presidential jets remain seized.

Adedapo Tunde-Olowu, SAN heads our Dispute Resolution Practice Group where Adeyemi Gomes and Esther Siyaidon represent clients on complex commercial disputes in Arbitration and before various courts of record in Nigeria.

For further information on this article, please send them an email via drp@aelex.com

8. (2019) EWHC2241 (Comm).

9. Thus, the principle under international law is that if a foreign state agrees to arbitrate in a country that has signed the New York Convention, it waives its sovereign immunity in all of the signatory countries. This exception (for signatories of the New York Convention) is also reflected under the Foreign Sovereign Immunities Act.

Authors



**Adedapo
*Tunde-Olowu, SAN***

Partner

atolowu@aelex.com



**Adeyemi
*Gomes***

Senior Associate

agomes@aelex.com



**Esther
*Siyaidon***

Associate

eafu-adajo@aelex.com



LEGAL PRACTITIONERS & ARBITRATORS

LAGOS, NIGERIA

4th Floor, Marble House
1, Kingsway Road, Falomo
Ikoyi, Lagos

Telephone: +234(0)201 279336-7

Facsimile: (+ 234 1) 2692072; 4617092

E-mail: lagos@aelex.com

ABUJA, NIGERIA

4th Floor, Adamawa Plaza
1st Avenue, off Shehu Shagari Way,
Central Business Area,
FCT Abuja, Nigeria.

Telephone: (+234 9) 8704187, 6723568,
07098808416

Facsimile: (+234 9) 5230276

E-mail: abuja@aelex.com

PORT HARCOURT, NIGERIA

2nd Floor, Right Wing UPDC Building 26,
Aba Road P.O. Box 12636, Port Harcourt
Rivers State, Nigeria.

Telephone: (+234 84) 464514, 464515,
574628, 574636

Facsimile: (+234 84) 464516, 574628

E-mail: portharcourt@aelex.com

ACCRA, GHANA

Suite C, Casa Maria, 28 Angola Road, Kuku
Hill, Osu GP Address 080-3525 Accra,
Ghana

Telephone: (+233-302) 224828, 224845

Facsimile: (+233-302) 224824

E-mail: accra@aelex.com