THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHCM 2022/0017

BETWEEN:

ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT CO LTD

Claimant/Judgment Creditor

and

[1] THE FEDERAL REPUBLIC OF NIGERIA

Defendant/Judgment Debtor

[2] PROCESS & INDUSTRIAL DEVELOPMENTS LIMITED

Garnishee

Appearances:

Tim Otty KC with him Lauren Peaty of Withers BVI for the Claimant/Judgment Creditor

Michael Bools KC with him Gareth Timms of Forbes Hare for the Defendant/Judgment Debtor

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2024: July 12

November 8

JUDGMENT

Attachment of debts – State Immunity – State's consent to enforcement and execution - State Immunity Act 1978 – BIT Treaty – ICSID Convention

[1] **WEBSTER J [Ag.]** This is the court's decision on an application by the claimant/judgment creditor for a final attachment of debts order attaching a debt of £20 million payable by Process & Industrial Developments Ltd ("**the Garnishee**") to the defendant/judgment debtor, the Federal Republic of Nigeria ("**FRN**").

Background and parties

[2] The Claimant, Zhongshan Fucheng Industrial Investment Co Ltd ("**Zhongshan**"), is a company incorporated under the laws of the People's Republic of China.

[3] The Defendant is the State of the Federal Republic of Nigeria.

[4] In August 2001 the Government of the People's Republic of China ("**PRC**") and the Government of the Federal Republic of Nigeria entered into a bilateral investment treaty for the reciprocal promotion and protection of investments in their respective countries. Zhongshan is a qualified investor within the meaning of the treaty and benefits directly from its provisions. The bilateral investment treaty is referred to in the parties' skeleton arguments and other documents as the "**BIT**" and I will do the same. It plays an important part in the dispute between the parties in this matter and I will be referring to it in detail later in this judgment.

[5] Beginning in about June 2007 Ogun, a state in Nigeria and an arm of the government of FRN, entered into a joint venture with Chinese entities to develop a commercial area in Ogun State as a free trade zone ("**Free Trade Zone**"). Without going into the details that are not material for my decision, Zhongshan and its related companies made substantial investments in the Free Trade Zone and participated in the development activities. The operation of the Free Trade Zone was generally successful and by the end of 2015 the Zone had approximately 4,900 employees and 60 tenants.

[6] Beginning in May 2016 FRN took steps to terminate the arrangements with Zhongshan and evict them from the Free Trade Zone. FRN effectively expropriated the assets of Zhongshan. This resulted in significant losses and damage to Zhongshan.

The arbitration

[7] On 30 August 2018 Zhongshan commenced arbitration proceedings against FRN under the arbitration provisions in the BIT seeking damages and other relief. Zhongshan is not a party to BIT. However, Article 9 of the BIT deals with "The Settlement of Disputes between Investors and One Contracting Party." Zhongshan is a qualified investor within the meaning of BIT and is entitled to its benefits and subject to its obligations. The "One Contracting party" is FRN. The arbitrators dismissed FRN's jurisdictional objections to the arbitration.

[8] The paragraphs of Article 9 dealing with the arbitration process are

> "1. Any dispute between an investor of the other contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.
> 2.If the dispute cannot the settled through negotiations within six months, the (sic) either Party to the dispute shall be entitled to submit the dispute to the competent court to the Contracting Party accepting the investment.
> 3.If a dispute cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article it may be submitted at the request of either Party to an ad hoc arbitral tribunal. The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article.
> 4.Such an ad hoc arbitral tribunal shall be constituted for each individual case in the following way: each Party to the dispute shall appoint one arbitrator, and these two shall select a national of a third State which has diplomatic relations with the two Contracting Parties as the Chairman. The first two arbitrators shall be appointed within two months of the written notice for arbitration by either party to the dispute to the other, and the Chairman shall be selected within four months. If within the period specified above, the tribunal has not been constituted, either Party to the dispute may invite the Secretary General of the International Center for Settlement of Investment Disputes to make the necessary appointments.
> 5. The tribunal shall determine its own procedure. However, the tribunal may, in the course of determination of procedure, take as guidance the Arbitration Rules of International Center for Settlement of Investment Disputes.
> 6.The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding upon both parties to the dispute. Both Contracting Parties shall commit themselves to the enforcement of the award.7. The tribunal shall adjudicate in accordance with the

> law of the Contracting Party to the dispute accepting the investment including its rules on the conflict of laws, the provisions of this Agreement as well as the generally recognized principles of international law accepting by both parties."

[9] The ad hoc tribunal was duly constituted, conducted the arbitration and made a final award on 26 March 2021 by which it ordered FRN to pay Zhongshan the following:

(1) US$55.6 million as compensation for expropriation
(2) $75,000.00 as moral damages
(3) Interest and legal costs

[10] Zhongshan estimated that as at 14 December 2023 the amount outstanding on the final award, including interest, was $73,413,608 and £3,232,076. FRN has not made any payments on account of the award and the total amount remains outstanding.

BVI Proceedings

[11] On 28 January 2022 Zhongshan initiated these proceedings by filing a claim form seeking recognition and enforcement of the final award. Zhongshan also applied ex parte for (among other things) permission to serve the claim on FRN outside the jurisdiction and to enforce the Award as a judgment or order of the court. On 15 February 2022 Jack J ordered (among other things) that judgment be entered in terms of the Award in the amounts of US$65,075,000.00 and £2,864,445.00 (including interest) and be enforceable under sections 81, 84 and 85 of the Arbitration Act 2013 (**"the Enforcement Order"**). He further ordered that Zhongshan has permission to serve the claim form on FRN outside the jurisdiction through the Foreign and Commonwealth Development Office of the United Kingdom. The claim form, Enforcement Order and other relevant documents were duly served on FRN.

[12] In unrelated arbitration proceedings in England, Process & Industrial Developments Limited (**"the Garnishee"**) obtained a substantial award against FRN. FRN applied to set aside the award. On 23 October 2023 Knowles J acceded to the application and set aside the award. In a consequentials hearing

on 8 December 2023 in open court Knowles J ordered the Garnishee to pay £20 million to FRN within 28 days as an interim payment on account of FRN's costs. The £20 million was not paid and remains a debt owing to FRN by the Garnishee (**"the Third Party Debt"**).

[13] The Garnishee is a BVI company and Zhongshan was desirous of attaching the Third Party Debt in partial satisfaction of the Enforcement Order. Zhongshan applied ex parte under CPR part 50 for a provisional attachment of debts order barring the Garnishee from paying the Third Party Debt to FRN until the final determination of the attachment of debts application. The Court granted a provisional attachment of debts order on 8 March 2024 and ordered that it be served on the Garnishee in the BVI, on FRN in Nigeria through the Foreign and Commonwealth Development Office, and that FRN's legal practitioners in the BVI be notified of the attachment of debt proceedings.

[14] On 1 May 2024 the Court made a further order giving Zhongshan permission to serve the attachment of debt application by alternative means on FRN's legal practitioners in the BVI. Service on FRN was affected by the alternative means. FRN applied to set aside the alternative service order and that service be effected in accordance with the order of 8 March 2024. Further, that the hearing date for the final attachment of debts application scheduled for 12 July 2024 be vacated pending proper service under the 8 March 2024 order.

[15] On 15 May 2024 the Court gave directions for the filing of evidence in relation to Zhongshan's application for a final attachment of debts order and FRN's application to set aside the order for alternative service of the attachment of debt application. The hearing of both applications was set for 12 July 2024.

[16] On 11 July 2024 FRN withdrew its application to set aside the order for alternative service leaving only the application for final attachment of debts order to be heard on 12 July 2024.

The final attachment of debts order

[17] The procedure for making a final attachment of debts order is in CPR 50.11. The rule states that

> "At the hearing fixed by the provisional order the court, if satisfied that the order has been properly served, may –
> (a) discharge the provisional order;
> (b) give directions for the resolution of any dispute; or
> (c) make a final attachment of debts order."

I am satisfied that the provisional attachment of debts order was served on FRN and service is no longer being challenged. The issues that remain to be determined at the hearing for the final attachment of debts order were properly defined and no further directions were necessary to resolve the dispute between the parties. What remains is to decide whether to discharge the provisional attachment of debts order or make a final order.

[18] FRN disputes Zhongshan's entitlement to an attachment of debts order against the Third Party Debt because it is property that belongs to the FRN and it is immune from execution under the State Immunity Act 1978.

[19] State immunity is a principle of international law that allows a state to claim that certain courts and tribunals do not have jurisdiction to try disputes against it (adjudicative jurisdiction) or to enforce an award or judgment against any of its assets (enforcement jurisdiction).

[20] The State Immunity Act 1978 ("**the SIA**") is United Kingdom legislation that was extended to the Virgin Islands in 1979 by the State Immunity (Overseas Territories) Order 1979, SI 458/1979. The adjudicative immunity is set out in basic terms in section 1(1) of the SIA and elaborated in sections 2-12. Section 1 reads –

> "(1) A State is immune from the jurisdiction of the courts of the United Kingdom except as provided in the following provisions of this part of the Act
> (2) A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question."

This case is not concerned with adjudicative immunity and sections 2-12 are material only as background to the real issue in the case. The case concerns the enforcement jurisdiction section 13 of the SIA. The section gives a State immunity from enforcement against its property. The property in this case is the Third Party Debt from the Garnishee.

[21] The relevant parts of section 13 are subsections (2) and (3) which read:

> "(2) Subject to subsection (3) and (4) below –
>
> (a) relief shall not be given against a State by way of an injunction or order for specific performance or the recovery of the land or other property; and
>
> (b) 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.
>
> ...
>
> (3) Subsections (2) [and (2A)] above do not prevent the giving of any relief or the issue of any process with the written consent of the State concerned; and any such consent (which may be contained in a prior agreement) may be expressed so as to apply to a limited extent or generally; but a provision merely submitting to the jurisdiction of the courts is not to be regarded as consent for the purposes of this subsection.
>
> (4) Subsection 2(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes;" ...

[22] A State (FRN) enjoys enforcement immunity against its property under subsection 2(b) of the SIA. However, that immunity is subject to the exceptions in subsections (3) and (4). Subsection (3) allows the issue of any process (of enforcement) with the written consent of the State. The consent may be in a prior agreement and may be general or specific. Submitting to the jurisdiction of the Court (adjudicative jurisdiction) is not consent for the purposes of subsection (3).

[23] Subsection (4) lifts the shield of immunity in respect of property that is for the time being in use or intended for use by the State for commercial purposes.

[24] Zhongshan relied on both exceptions to say that the Third Party Debt is subject to enforcement to recover at least a part of the judgment debt in the Enforcement Order. Mr Timothy Otty KC, who appeared for Zhongshan, submitted that FRN

consented in writing to enforcement and execution of the Enforcement Order. Evidence of such consent can be inferred from article 9.6 of the BIT by which FRN committed itself to the enforcement of an award made in the BIT arbitration proceedings. He relied on the decision of Judge Pelling KC sitting as a judge of the High Court in **General Dynamics United Kingdom Ltd v State of Libya.**[1]

[25] Mr Michael Bools KC for FRN submitted that FRN did not consent to its property being subject to the execution of an award under the BIT, or otherwise. The better source for deciding whether FRN consented within the meaning of subsection (3) of the SIA is the treaty known as the International Centre for the Settlement of Investment Disputes (**"the ICSID Convention"**), which makes a clear distinction between enforcement and execution. If FRN consented (which he denies) it was to the enforcement of the Enforcement Order, not execution. He relied on the decision of Dias J in **Border Timbers Limited and another v Republic of Zimbabwe.**[2]

Section 13(3) – consent to enforcement - Analysis

[26] The meaning of subsection (3) is clear. If FRN consented to enforcement Zhongshan should be able to get the final attachment of debts order and take steps to recover the Third Party Debt. The heavily disputed issues in this case are whether FRN consented to enforcement and, if so, whether enforcement includes execution.

[27] The Final Award was obtained in arbitration proceedings conducted under the BIT. I dealt with the arbitration procedures and article 9 of the BIT in paragraph 8 above. Article 9(6) deals with the decision-making process. It provides -

> "The tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding upon both parties to the dispute. Both Contracting Parties shall commit themselves to the enforcement of the award." (Emphasis added)

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[1] [2024] 4 WLR 37
[2] [2024] EWHC 58 (Comm)

[28] Mr Otty KC contended that the underlined words, when read in the context of the entire treaty, mean that FRN, a contracting party, consented to the enforcement of awards made in arbitration conducted under BIT, and enforcement includes the execution of such awards against the property of FRN. He said that **General Dynamics**[3] supports his position. In **General Dynamics** the claimant and the State of Libya entered into a contract with an arbitration clause that provided that any decision of the arbitration panel would be "wholly enforceable". The claimant obtained an award and sought to enforce it by applying for a final charging order against the property of Libya in London. Libya resisted the application, relying on its immunity from enforcement in section 13 of the SIA. The learned judge found that no special or particular words were required to satisfy the issue of consent in section 13(3) of the SIA and that on a proper construction of the arbitration clause in the agreement between the parties the use of the words "wholly" demonstrated an intention that the word enforceable was not limited to adjudication immunity. It was capable of applying to both the adjudication process and the enforcement process by execution against Libya's assets. In coming to his conclusion on the construction of the arbitration clause Judge Pelling noted at paragraph 22

> "In my judgment the use of the word "wholly" emphasises an intention on the part of the parties that the word "enforceable" was not to be regarded as limited in effect, particularly given the inclusion of the words final and binding that precede it, which in my judgment were included as words of emphasis rather than merely to repeat needlessly what had gone before."

[29] I appreciate that **General Dynamics** is distinguishable on the facts. The case dealt with the interpretation of an arbitration agreement between parties, whereas in the instant case the BIT is treaty between FRN and the People's Republic of China. Zhongshan is not a party to BIT, but a qualified investor within the meaning of the treaty. However, the reasoning of the learned judge is compelling and the case is not being relied on by Zhongshan to say that the BIT is binding on the parties. The case is relied on by Zhongshan to assist the court

[3] Supra note

in determining whether FRN waived its right to immunity against enforcement within the meaning of section 13 of the SIA.

[30] Applying the reasoning in **General Dynamics** the use of the sentence "Both Contracting Parties shall commit themselves to the enforcement of the award" in article 9.6 must mean something. The preceding two sentences in article 9.6 make complete sense standing on their own. The first sentence states how the arbitrators make their decision (by majority votes) and the second sentence states that the decision shall be final and binding on the parties to the dispute. Noting more needed to have been said. The addition of the final sentence shows that the contracting parties to BIT (FRN and PRC) committed themselves to the additional step of enforcing awards made in BIT arbitration proceedings. This, in my opinion, is tantamount to FRN saying that it consented to the enforcement of awards made in BIT arbitration proceedings.

[31] The further issue is whether the enforcement of an award includes the execution of the award, for example, by an attachment of debts order. The word enforcement is not a term of art and it must be given its ordinary meaning in the context of interpreting treaties. Mr Otty KC reminded the Court that the guiding principle in interpreting a treaty is that the court must act "In good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[4]

[32] The ordinary meaning of enforcement includes to give force or effect to something or to compel obedience to something.[5] This is what was intended by the parties when they committed themselves to enforcement of a BIT award. Put another way, FRN and PRC agreed to waive immunity from enforcement against their property by whatever legal means was available to an investor and it was not necessary to include the word execution in article 9.6. Execution is by necessary implication included in the word enforcement.

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[4] Vienna Convention on the Law of Treaties, 23 May 1969 UN Doc A/Conf 39/28 at Article 31.
[5] Blacks Law Dictionary 10th edition

[33] Mr Bools KC pressed his position that execution is not contemplated by the word enforcement in article 9.6 of BIT by reference to **Border Timbers**[6] and the ICSID Convention. The ICSID Convention is a multinational convention ratified by 158 contracting states for the conciliation and arbitration of international investment disputes. Mr Bools KC reproduced section 6 of the Convention dealing with Recognition and Enforcement of an Award in his skeleton argument. Articles 54 and 55 in section 6 are directly relevant to the distinction that the Convention makes between enforcement and execution. They provide:

> **"Article 54**
> (1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State...
> (2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.
> (3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."
>
> **Article 55**
> Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."

[34] It is apparent that Article 54(1) deals with the obligation of contracting States to recognise and enforce a convention award and Article 54(3) deals with the separate issue of execution. Mr Bools KC submitted that the distinction in section 6 between enforcement and execution is a recognised principle of international law and applies in this case to the interpretation of article 9 of BIT. Therefore, article 9 should be interpreted as referring to enforcement only and the issue of execution is a separate matter for local law. Section 13 of the SIA provides immunity to FRN from execution against its property, in this case the Third Party Debt.

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[6] Supra note 2

[35] The bifurcation of enforcement and execution in section 6 of the ICSID Convention was picked up by Dias J in **Border Timbers** where she said -

> "However, "enforcement" in this context means no more than according to an ICSID award the same status as a final judgment of the national court. By contrast, questions of execution are left to individual national courts so that if the enforcing court's law of state immunity prevents any further steps being taken to execute the award, that will be the end of the matter."

[36] Mr Bools KC relied on section 6 of ICSID and **Border Timbers** to support his position that if FRN is found to have consented to enforcement against its property because it is a party to BIT, that consent does not extend to execution of an award against its property. Execution is a separate issue and under section 13 of the SIA its property is immune from execution. I do not get any assistance from **Border Timbers**. The case was dealt with the interpretation of another treaty with different wording and subject matter. It does not help to decide if FRN consented to waive execution against its property within the meaning of section 13(3) of to the SIA by acceding to BIT.

[37] Pausing here, I remind myself that the central issue that the Court has to resolve is whether FRN consented to enforcement against its property or, put another way, whether it waived its entitlement to immunity from enforcement in section 13(2)(b) of the SIA. The references to the BIT and the ICSID Convention and the cases interpreting these treaties are to assist the Court to determine whether FRN consented to enforcement, and by extension, execution, within the meaning of section 13(3) of the SIA. Mr Otty KC made clear in his written and oral submissions that the treaties are not being relied upon as a source of law but as evidence of the fact that FRN consented to execution. This is my understanding of the central issue that is before the Court.

[38] Zhongshan's case is that the written consent of FRN to execution is in article 9 of the BIT and that the ICSID Convention is a different treaty dealing with a different subject matter and should not be relied on in interpreting section 13(3) of the SIA. I agree and repeat that the ICSID Convention is a multinational treaty ratified by more than 150 countries. It deals with the resolution of investment disputes by arbitration or conciliation. The BIT is a bilateral treaty between FRN

and PRC "[F]or the Reciprocal Promotion and Protection of Investments." The use of these words in the title of the treaty gives a clear insight into the main purpose of the treaty. It is to promote investments between the contracting States. This is also apparent from the preambles to the treaty –

> "Recognizing that the reciprocal encouragement, promotion, and protection of such investments will be conducive to stimulating business initiative of the investors and will increase prosperity in both States;
>
> Recognizing investor's duty to respect the host country's sovereignty and laws;
>
> Desiring to intensify the cooperation of both States on the basis of equality and mutual benefits;
>
> Determined to create favourable conditions for greater investment by investors of one Contracting Party in the territory of the other Contracting Party"

In this atmosphere of mutual investment and cooperation it is not surprising that the contracting parties saw fit to waive their statutory entitlement to immunity from enforcement, including execution. This is in the spirit of cooperation and encouragement that was an important part of the policy of the treaty.

[39] I also note that there is an important difference in the wording of the treaties on the issue of enforcement. The ICSID Convention treats enforcement and execution as different concepts and accords them different treatment in articles 54 and 55. This is not surprising in a multinational treaty between over 150 countries dealing with the resolution of disputes. The distinction is not made in the BIT and there is no separate treatment of execution. If the drafters of the BIT intended to limit the waiver of state immunity to enforcement in the narrow sense suggested by FRN, it would have been simple to make the distinction in article 9 of the treaty as was done in articles 54 and 55 of the ICSID Convention. There can be no doubt that the drafters of the BIT were aware of the provisions of the ICSID Convention – they referred to the treaty twice in article 9 of the BIT for other reasons. The non-inclusion of a specific reference to execution appears to be deliberate.

[40] I do not accept Mr Bools' criticism of the decision in **General Dynamics**. But even if he is correct that would not affect my decision. I repeat that the core of the decision is whether FRN consented in writing to the waiver of immunity in section 13(3) of the SIA, and I have found that it did consent in writing by acceding to the BIT. I would have come to the same conclusion without the guidance in **General Dynamics**.

Section 13(4) of the SIA

[41] Section 13(4) lifts the shield of immunity in respect of state property that is for the time being in use or intended for use by the State for commercial purposes. The application for the provisional attachment of debts order was presented on the basis that FRN had waived immunity because the Third Party Debt was "in use" for a commercial purpose. However, Zhongshan's legal practitioners informed the legal practitioners for FRN that they were no longer relying on this section and were relying instead on the consent exception in section 13(3). In paragraph 38 of their skeleton argument they informed the Court that "[F]or present purposes it is not necessary for the court to rule upon the potential application of section 13(4)." Accordingly, no order is made in relation to section 13(4) but the matter will be considered in the costs order.

[42] Following the circulation of the draft judgment on 5 November 2024 the legal practitioners for FRN, Forbes Hare, wrote to the Court pointing out that FRN's submission that the provisional attachment of debts order should be set aside in any event because Zhongshan is no longer pursuing the only ground on which it obtained the provisional order. FRN invited the Court to deal with this submission as it is likely that there will be an appeal. I will do so very briefly.

[43] Having regard to the fact that the Court's decision is based on the interpretation of the provisions of the SIA and the BIT, and that FRN has not made any payments on the final award since it was made in March 2021 and the full amount is still outstanding, I will not set aside the provisional order. Even if I did, I would re-grant it.

[44] Forbes Hare also asked the Court to grant a short stay of its order pending an application for a stay pending appeal. I have not heard from the legal practitioners for Zhongshan on this application, but I will grant an interim stay of seven days to allow FRN to apply for a stay pending appeal.

Related proceedings

[45] I am aware that there is an outstanding application before the Commercial Court by FRN for the appointment of liquidators of the Garnishee. It is not clear how those proceedings will impact the final attachment of debts order.

Disposal

[46] It is ordered as follows:

(1) The provisional attachment of debts order dated 8 March 2024 is made final.

(2) FRN is granted an interim stay of this order until 4 pm on 15 November 2024.

(3) The parties shall file written submissions on the terms of the final order and the incidence of costs of these proceedings on or before 22 November 2024.

(4) The legal practitioners for the parties and the Garnishee are at liberty to share this judgment with their clients and the overseas solicitors and counsel involved in the BVI matter.

Paul Webster
High Court Judge [Ag]

By The Court

Dep. Registrar