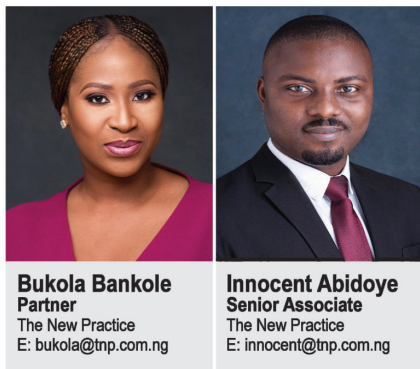


# The New Practice (TNP) - An Andersen Collaborating Firm



**Bukola Bankole**  
Partner  
The New Practice  
E: bukola@tnp.com.ng

**Innocent Abidoye**  
Senior Associate  
The New Practice  
E: innocent@tnp.com.ng

## Waiver of Sovereign Immunity Clause in Finance Documentation

There has been an uproar in the media (both print and across social media platforms) about the Nigerian government allegedly ceding its sovereignty to China by virtue of the “waiver of sovereign immunity” clause contained in the \$400 Million loan Agreement (Exim Loan Agreement) it signed with China in 2018, with respect to the National Information and Communication Technology (ICT) Infrastructure backbone Phase II project.

To the average Nigerian mind, waiving sovereign immunity is akin to selling off the “Crown Jewels” (thankfully we don’t have any) in order to get money from China. To the initiated, this is obviously not the case as there is a difference between a waiver of “sovereignty” and a waiver of “sovereign immunity”. We will attempt to explain this difference before discussing the importance of the concept of “waiver of sovereign immunity” to financing documentation involving sovereigns.

Put in mild and elementary terms, “sovereignty” is the supreme authority within a territory. It is the power of a state or government to govern itself without any external interference. “Sovereign immunity” on the other hand, is a legal doctrine which gives a state or nation immunity from civil or criminal prosecution in the courts of another state.

Sovereign immunity can be in the form of an immunity from suits or immunity from enforcement of a judgement or an arbitral award. It is important to state that the sovereignty of a nation cannot simply be waived by a commercial document. However, sovereign immunity, which rests on the legal thesis that all states are equal, and that one state should therefore not be subjected to the judicial instrumentalities of another, can be waived by the relevant state or government.

### Significance of Waiver of Sovereign Immunity

In addition to the inherent risks involved in any transnational lending transaction, transactions involving a sovereign or its public entities as borrower usually carry the risk that the lender may not be able to get justice in the borrower’s local courts when there’s a default. Consequently, lenders have a preference to have the option to sue the borrower in the courts of other states (where the borrower has assets). To achieve this, lenders will usually demand that the borrower

waive its immunity against being sued in the courts of another state.

Even if the sovereign and its public entities can be sued in the courts of another state, the doctrine of sovereign immunity may still prevent the lender from enforcing the resultant judgment against the property of the borrower in foreign jurisdictions. These are issues that no prudent lender can easily wish away in the negotiations and drafting of commercial documents and this is where the waiver of sovereign immunity is usually demanded to protect the interest of the lender.

From media reports, the waiver of sovereign immunity clause in the Exim Loan Agreement provides that:

*“The Borrower hereby irrevocably waives any immunity on the grounds of sovereign or otherwise for itself or its property in connection with any arbitration proceeding pursuant to Article 8(5) thereof with the enforcement of any arbitral award pursuant thereto except for the military assets and diplomatic assets.”*

In transnational financing transactions, it is not unusual to find similar waiver of sovereign immunity clauses. As a matter of fact, most waiver of sovereign immunity clauses include an express waiver of the borrower’s immunity “from attachment prior to entry of judgment and from attachment in aid of execution against any of its property and assets irrespective of their use or intended use”. It is also common in agreements such as the Exim Loan Agreement for the state to issue a sovereign guarantee or a Government Support Indemnity as some form of comfort in favour of the lender.

### Inclusion of waiver of sovereign immunity clause in a transnational lending documentation and the legal issues involved in such arrangement

As briefly explained above, the rule of sovereign immunity protects the state from being sued in another state (jurisdictional immunity) and its assets in other states cannot be seized to enforce a court judgment or arbitral award (execution immunity). This is referred to as the rule of absolute immunity.

By this principle, a foreign sovereign cannot be sued without its consent, and where it consents to being sued, its assets will remain immune from enforcement of judgment or arbitral awards. It is important to note that under contemporary international law, there has been a shift from an absolute to a restrictive immunity and under the latter principle, governments are no longer immune in cases arising from their commercial (as opposed to public or government) acts.

Because sovereign borrowers often default and given that the borrower’s legal system would likely be inhospitable to a foreign lender, the latter would usually favour an independent forum to adjudicate on any disputes arising out of the agreement and also for the purpose of enforcement of judgments or arbitral awards. Accordingly, waiver of sovereign immunity clauses are rarely omitted in the negotiation and documentation of transnational lending arrangements involving a sovereign borrower.

“**For countries like Nigeria that do not have statutes codifying the restrictive doctrine of sovereign immunity, no foreign investor or lender will be willing to finance a large-scale infrastructure project without a contractual waiver of sovereign immunity. This is in sharp contrast to the United Kingdom and the United States of America, where jurisdictional immunity has been removed by the SIA and FSIA respectively.**”

The doctrine of restrictive immunity has been codified into law by the United States (in the Foreign States Immunity Act - FSIA), the United Kingdom (in the State Immunity Act - SIA), and several other jurisdictions. Given the impact of this doctrine on commercial arrangements involving sovereigns, the FSIA and the SIA appear to be the most remarkable developments in the evolution of the law on sovereign immunity.

It has been shown from existing literature and experience that borrowers without a strong reputation for repayment or those perceived to lack an independent judiciary are usually amenable to waiving their sovereign immunity while creditworthy governments usually have unfettered

access to capital market funding without agreeing to waive their sovereign immunity.

For countries like Nigeria that do not have statutes codifying the restrictive doctrine of sovereign immunity, no foreign investor or lender will be willing to finance a large-scale infrastructure project without a contractual waiver of sovereign immunity. This is in sharp contrast to the United Kingdom and the United States of America, where jurisdictional immunity has been removed by the SIA and FSIA respectively. The same statutes also limit execution rights in cases arising out of a sovereign’s commercial activities and allow lenders to contract for more expansive rights.

Immunity from suits and execution may be waived by a sovereign borrower subscribing to an arbitration clause in a loan documentation. However, it is prudent that an express waiver is drafted in clear terms and included in the agreement. This is because it has been decided in some foreign jurisdictions that the fact that a sovereign has subscribed to resolve disputes by arbitration is itself not sufficient to waive jurisdictional immunity in the absence of an express waiver. In the case of the Exim Loan Agreement, both implied and express waivers were utilised.

### Conclusion

The waiver of sovereign immunity clause contained in the Exim Loan Agreement is a standard clause in commercial documentation involving sovereigns and there is nothing unusual about its inclusion in the agreement. The language of the agreement was clear and both parties were aligned. Several sovereign borrowers have executed agreements with similar provisions.

The practice of lenders anticipating sovereign immunity issues by means of express waiver provisions appears entirely justified. It is also important to mention that once a waiver of sovereign immunity clause has been agreed upon by the parties, it cannot be unilaterally revoked by the borrower. Accordingly, the only way for the Nigerian government not to be subjected to this provision is for it to fulfil its obligations to China under the loan agreement.

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