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## Fight To Enforce \$22M Nigeria Award Goes To High Court

By **Caroline Simson**

Law360 (February 8, 2022, 9:13 PM EST) -- A former Enron unit is asking the U.S. Supreme Court to review a Fifth Circuit decision nixing its claim to funds allegedly tied to a massive Nigerian corruption scandal, arguing in a Tuesday petition that the appeals court misinterpreted an exception to foreign sovereign immunity law.

Enron Nigeria Power Holding Ltd. told the justices that the Fifth Circuit decision last September finding that it could not target assets allegedly connected to the bribery scheme to enforce a decade-old \$22 million arbitral award against Nigeria is "bad for American business, contrary to the intent of Congress, and harmful to the institutional interests of the federal judiciary."

The circuit court had found that the funds in question — the proceeds from the sale of a massive, 213-foot super yacht called the M/Y Galactica Star that was allegedly purchased using funds from the scheme — were off limits under the Foreign Sovereign Immunities Act since the U.S. government had ultimate authority over certain aspects of the sale.

But Enron Nigeria says the money should fall under an exception in the FSIA for property that's been used for "commercial activity," since Nigeria made a legal claim to the funds and participated in the yacht's sale.

"In effect, the Fifth Circuit engrafted a limitation on the meaning of 'commercial activity' in the FSIA that confines the scope of that term to only those transactions in which a foreign state is the sole or leading player on its side of a deal," according to the petition. "Not only does this novel limitation find no support in the text of the statute, it creates a split with other circuits, which have recognized the irrefutable proposition that a foreign state's 'commercial activity' does not lose its 'commercial' character merely because another party has played a more prominent role in a transaction."

Counsel for Enron Nigeria declined to comment on Tuesday. Representatives for the U.S. and Nigeria could not immediately be reached for comment.

Enron Nigeria had won the underlying award from an international tribunal back in 2012 after Nigeria terminated a power purchase agreement under which the company had agreed to construct and operate power plants in the country. The award was confirmed in Washington, D.C., in 2015.

Since then, Enron Nigeria has been trying to collect what it's owed. When the U.S. government initiated a forfeiture action over the yacht, Enron Nigeria saw its chance to stake a claim to the funds as a judgment creditor of Nigeria, since the country has asked that the money be returned to its coffers. But those efforts have thus far fallen short, most recently when the Fifth Circuit rejected Enron Nigeria's claim.

In the ruling in question, the Fifth Circuit held that Enron Nigeria was barred from targeting some of the \$37.4 million being held by the court after U.S. authorities sold the yacht, which had been purchased by a Nigerian oil magnate who had allegedly bribed his way to a series of lucrative contacts with the government in Abuja.

In its decision, the circuit court concluded that Enron Nigeria's claim to the previously embezzled funds was barred by sovereign immunity.

Enron Nigeria claimed that Nigeria had waived its sovereign immunity by encouraging U.S. authorities to sell the Galactica Star, arguing that this fell under an exception in the FSIA for property of a foreign government used for a commercial activity in the U.S. The sale constituted commercial activity, Enron Nigeria told the court.

But the Fifth Circuit found that it was the U.S. that had orchestrated the sale and received the funds from the buyer.

The yacht was part of some \$144 million in assets that U.S. authorities said could be traced to a massive bribery and corruption conspiracy in which oil magnate Kolawole Aluko offered luxury real estate, furniture, artwork, and other gifts to Diezani Alison-Madueke, the Nigerian Minister of Petroleum Resources from 2010 until 2015, in exchange for lucrative government contracts.

Aluko allegedly used the proceeds of the contracts to purchase the Galactica Star, an estate in Santa Barbara, a swanky duplex on New York's Fifth Avenue and a condominium adjacent to Carnegie Hall.

After the U.S. government filed its forfeiture action, Nigeria filed a verified claim to the assets in 2017, asserting that the conspirators had misappropriated funds from the country's coffers and that the money should be returned.

Enron Nigeria then filed a motion seeking to enforce its arbitral award against Nigeria's claim in the forfeiture proceeding.

In the underlying arbitration, Enron Nigeria won \$11.2 million in damages, plus interest and fees, from the Nigerian government over the early termination of a contract through which Enron Nigeria was to build and operate electric plants and gas pipelines in the Lagos area. The award is said to be worth some \$22 million with interest.

Enron Nigeria is represented by Philip N. Elbert, Nathan C. Sanders, Jeffrey A. Zager and Moziano S. Reliford III of Neal & Harwell PLC and Kenneth Royce Barrett of KRB Law.

Counsel information for Nigeria and the U.S. government was not yet available.

The case is Enron Nigeria Power Holding Ltd. v. United States of America and Federal Republic of Nigeria, case number unavailable, in the U.S. Supreme Court.

--Editing by Ellen Johnson.