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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Nigeria Case Could Force Issue Of Arb. Intervention To Fore

By **Caroline Simson**

Law360 (October 24, 2023, 10:10 PM EDT) -- A London judge's blockbuster decision Monday that an $11 billion arbitral award against Nigeria had been procured by fraud has focused attention on a particularly thorny issue: Is an arbitral tribunal responsible for intervening if it believes one side isn't being adequately represented?

Following an eight-week trial conducted earlier this year, Judge Robin Knowles of England's High Court of Justice concluded that Process and Industrial Developments Ltd. won the massive award — the result of an ill-fated contract for a natural gas processing facility — "only after and by practising the most severe abuses of the arbitral process."

That included bribing Nigerian officials in order to secure the initial deal and lying about it to the arbitral tribunal, and then paying bribes during the arbitration. P&ID's lawyers, including an English solicitor and a King's Counsel, who both held stakes in the outcome of the arbitration, also secured access to Nigeria's privileged documents during the arbitration, according to the decision.

Judge Knowles' ruling was highly anticipated. For nearly two decades, countries have increasingly begun mounting corruption defenses to fight claims brought by investors. But actually proving the existence of bribery and corruption is no easy matter.

For Nigeria to have prevailed, especially in a case involving an amount its government has said is "well over a quarter of [Nigeria's] gross foreign reserves," is significant.

"What seems most striking to me is that evidence came to light of the corruption before the court," said Wiley Rein LLP partner Joshua B. Simmons, who specializes in representing clients in high-stakes international disputes. "I think that's one of the challenges with corruption cases, is that that evidence is often lacking."

The decision could potentially help countries that mount a corruption defense, according to Crowell & Moring LLP's Laurence Winston, co-chair of his firm's international dispute resolution group.

"While the judgment does not necessarily widen the scope of any corruption defense, it is likely to be seen as a very helpful precedent from which to advance such defenses in future cases, especially where there are very large sums of money in issue involving states," he told Law360.

Taking a deeper dive into the ruling, however, some experts have focused on several points Judge

Knowles made at the end of his decision.

There, the judge questioned whether the arbitral tribunal that issued the award should have departed from its "traditional approach" to adopt a more "direct and interventionist" approach, once it became clear Nigeria wasn't being adequately defended in the dispute.

The concept of encouraging more interventionist tribunals isn't new, according to Gibson Dunn & Crutcher LLP's Cyrus Benson, who co-chairs his firm's international arbitration practice group.

But "there's definitely not a consensus as to how to answer it," he told Law360. "[Judge Knowles] is putting his finger on a question that, from my perspective, probably hasn't received the attention that it needs to have."

The judge issued the suggestion as one of four points that he hoped "may provoke debate and reflection" among stakeholders in the arbitration community, including countries that use that form of dispute resolution.

Judge Knowles said that while he had not found Nigeria's lawyers in the arbitration to be corrupt, the case had "shown examples where legal representatives did not do their work to the standard needed, where experts failed to do their work, and where politicians and civil servants failed to ensure that Nigeria as a state participated properly in the arbitration."

The judge seems to be pleading with the arbitration community to consider a more active approach for a tribunal, cautioning that, without any changes, "[t]he risk is that arbitration as a process becomes less reliable, less able to find difficult but important new legal ground, and more vulnerable to fraud."

But arbitration experts say the issue is complicated.

"It's perhaps asking too much of the tribunal," said William T. O'Brien, the head of Eversheds Sutherland's cross-border litigation and international commercial arbitration practice. "It's incumbent on the parties to make sure that they have competent counsel and that those counsel do their job and then try the case as effectively as possible."

"Certainly the tribunal has an obligation to make sure both parties have every opportunity to make their case," he continued. "But it's not the tribunal's obligation to try that case for either of the parties."

Baker McKenzie partner Andrew S. Riccio agreed.

"Under the principle of ultra petita, an arbitral body is only empowered to decide disputes that the parties presented," he told Law360. "It's not necessarily incumbent on the tribunal to search for elements of corruption."

The danger of a tribunal becoming more interventionist is that an opposing party could claim the tribunal lacked impartiality, experts said. Although convincing a court to vacate an international arbitral award is notoriously difficult, one of the grounds on which to do so is a tribunal's bias or, in some instances, perceived bias.

Benson of Gibson Dunn said another difficulty that could arise if a tribunal takes a more interventionist approach is that, after the arbitration is concluded, the award's enforceability can vary depending on the

legal regime where the arbitration took place, and the view on this issue from courts in enforcement jurisdictions.

Different arbitral rules can also take a different perspective on the issue, he said. The London Court of International Arbitration, for example, recently added a section to its rules giving tribunals "the power, upon the application of any party or ... upon its own initiative" to allow one party to supplement or modify its claim or to conduct inquiries that help the tribunal identify relevant issues and ascertain relevant facts.

The International Chamber of Commerce's International Court of Arbitration rules contain no such provision, Benson said.

"The silence [in the ICC rules] is reflective of, I think, what the judgment referred to as the 'traditional approach,'" he said. "The idea that [arbitration] is a private method of dispute resolution, and the parties create the record, and the job of the tribunal is to decide on the basis of the record created by the parties — not to act like a judge and require them to develop it in a way that they're not already doing."

In his four points at the end of Monday's decision, Judge Knowles also touched on the drafting of major commercial contracts involving a state, disclosure or discovery of documents, and the issue of transparency in arbitrations involving public funds, saying that because the case was conducted behind closed doors, there was no public or press scrutiny of the proceedings, exacerbating the issues with Nigeria's representation.

Transparency is not a novel issue in international arbitration, and some critics say it may be high time for stakeholders to take heed of Judge Knowles' words.

"I think that in this particular case, the arbitration panel completely failed in its obligations to look further into the contract, or to really try and figure out what was going on here," said Rachel Brewster, the Jeffrey and Bettysue Hughes distinguished professor of law at Duke University School of Law. "It sounds like they did a pretty superficial job, and given the huge award that they gave, you think there should be some proportionality to the number on the award … and the amount of care that they take in making sure that it's warranted."

"An interventionist approach is demanded when ... there's evidence of corruption and when one of the parties is a government party, and the people who will pay the judgment is not a private party, but is rather the public fisc," she said.

--Editing by Jill Coffey and Lakshna Mehta.
