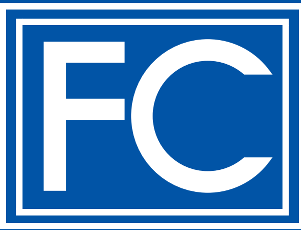

E-News

Vol. 2 Issue 2 August, 2013

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Editor's Note

Welcome to the Second E-news publication of 2013. There has been quite a stir in the Country over various controversial bills and it is on that note that we choose to discuss the implication of certain industry related Bills and some apparently conflicting Carriage legislation in this edition.

We have addressed decommissioning issues arising under the Petroleum Industry Bill currently before the National Assembly, Sustainable development in the Maritime Industry and a commentary on the prevalent Carriage regimes.

We hope you will find these articles thought provoking and relaxing as you enjoy the rest of your summer and Court vacation.

We welcome comments or enquiries regarding the contents of this E-News. Kindly address these to the Editor at
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Kashimana Tsumba - Editor

SUSTAINABLE DEVELOPMENT OF THE MARITIME INDUSTRY IN NIGERIA

Background:

Exactly a year ago the UN Conference on Sustainable Development, Rio +20 took place in Rio de Janeiro and was of vital importance to everyone including the shipping industry. The original Earth Summit in Rio and the Rio +20 Summit have led to valuable and effective work by the International Maritime Organisation (IMO) who are supporting and creating a way forward for shipping in the context of sustainable development. The Secretary General of the IMO announced the theme for the 2013 World Maritime Day which is "Sustainable Development: IMO's contribution beyond Rio +20". This theme was chosen to focus the Organization's goals on advancing the commitments made at the Rio +2o Summit to contribute towards formulating sustainable maritime development goals.

> **"The need and significance of sustainable development in the maritime industry continues to increase and evolve in a diversifying global economy"**

The need and significance of sustainable development in the maritime industry continues to increase and evolve in a diversifying global economy, which is apparent in the technological innovation involved in building new ships, the supply side of shipping, the emerging financial and commercial advantages and the rising demand for maritime safety. Nonetheless, it is somewhat difficult for industry professionals in the shipping sector to realise the long-term benefits of integrating sustainable development standards and CSR initiatives into their own organizations. The IMO in an effort to develop and implement sustainable global standards have provided the appropriate institutional framework for sustainable maritime devlopment through the introduction of the eight pillars of Sustainable Development Goals for the maritime industry which are:

- Safety culture and environmental stewardship Energy efficiency.
- New technology and innovation.
- Maritime education and training.
- Maritime security and anti-piracy actions.
- Maritime traffic management.
- Maritime infrastructure development; and
- Global standards at IMO.

Sustainability:

In Nigeria, the platform for raising the visibility of sustainability in the shipping and offshore industries has to be done now. With greater industry sophistication, awareness and expectations, sustainable development is an increasingly important issue that the maritime industry in Nigeria cannot afford to ignore. Shipping as we know contributes particularly to the three pillars of sustainable development – social, environmental and economic. The sustainable development and growth of the world's economy will not be possible without similar sustainable growth in shipping and, therefore, in the entire maritime sector. Likewise, the growth of the Nigerian economy will not be possible without similar growth in the shipping industry. Shipping and its ancillary activities have the potential to create an abundance of wealth and prosperity among the peoples by

> **"In Nigeria, the platform for raising the visibility of sustainability in the shipping and offshore industries has to be done now."**

creating a wide variety of jobs. Therefore, to achieve noticeable sustainable development in shipping in Nigeria, it is fundamental that an integrated approach to maritime policies has to be established. How then do we transform the

concept of sustainable development into something tangible in Nigeria? The loss of lives at sea, damage to the marine environment, maritime fraud, piracy at sea and over regulation of the maritime environment have created externalities which have contributed to the poor public image of the maritime industry in Nigeria. Adopting a strategy of sustainable development policies in the shipping industry and efficient and effective regulators monitoring the activities of the maritime industry are what is needed in Nigeria.

The maritime industry has international rules and regulations guiding the activities of the industry in respect of social, safety and environmental practices. The IMO is charged with the responsibility of making and supervising environmental and safety standards for the maritime industry and has also developed international conventions relating to sea, environment protection and safety regulations like MARPOL, SOLAS and the ISPC Code. There are also various bodies within the shipping industry that help to ensure sustainable standards in the industry like ISC, INTERTANKO and BIMCO.

> **“How then do we transform the concept of sustainable development into something tangible in Nigeria?”**

In spite of this, the responsibility of enforcement still remains a big issue and the enforcement of these international conventions and regulations lie with the signatory countries who are obliged to fulfill their obligations through industry regulation and controls imposed by a ship's flag state or by a port state. Adjustments to legislation should be made by these states to conform to international best practices. It is time for the Nigerian maritime industry to begin to adopt a formal and standardised approach to CSR and sustainable development by enforcing these international conventions through proactive national legislation and efficient agencies of government. The recent Summit of the Nigerian Head of State and other African Heads of States in Yaoundé, Cameroun to discuss the serious Maritime Security and safety concerns in the Gulf of Guinea are steps in the right direction towards contributing to the development of sustainable development goals for the maritime industry and this must be translated into constructive and well-funded initiatives towards stemming the embarrassing piracy menace in the region.

Comments:

In developing and maintaining a comprehensive framework for a safe, secure, efficient and environmentally sound maritime industry, Nigeria should strive to adopt and implement the sustainable development goals as set out by the IMO. We should also develop an institutional framework for sustainable maritime development strengthened with policies and actions which aim at improving the services provided by the maritime industry. Complementary rail and inter-modal transport infrastructure should be developed as part of the sustainability policies and new technology and innovation should through maritime training and education be part of our nation's maritime development process.

The theme chosen by the IMO for the 2013 World Maritime Day, – “Sustainable Development: IMO's contribution beyond Rio+20” – gives an opportunity in which Government and other stakeholders in the maritime industry should be able to unite and make a positive contribution to turn the notion of sustainability into reality.

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OIL & GAS ASSETS TRADING AND DECOMMISSIONING LIABILITY ISSUES IN NIGERIA

Background:

There has been a surge in oil and gas assets divestment and acquisition in Nigeria in recent times by the traditional and experienced multinational oil companies to new entrants. The new entrants are mainly foreign independents, local, smaller and less experienced companies. While this development has some commendable advantages, it is expedient to consider decommissioning liability obligations.

Decommissioning Liability:

There is no clear cut provision relating to decommissioning of onshore/offshore installations and structures under the current regime except Regulation 36 of the Petroleum (Drilling & Production) Regulations which relates only to abandonment of a borehole or existing well. The provisions are grossly inadequate to regulate the modern day installations and structures including the practicalities associated with them. Under the proposed Petroleum Industry Bill (PIB), Section 204 (1) provides that decommissioning of onshore/offshore installations and structures shall be conducted in accordance with good oilfield practice and regulations and be implemented by the Offshore Petroleum Inspectorate (the body designated to regulate the offshore industry). The Inspectorate shall by a written notice require a Licensee or Lessee to provide a decommissioning plan. The Licensee or Lessee may on the other hand request the Inspectorate to issue such notice to it. The Lessee upon receipt of the notice shall prepare a programme setting out among others an estimate of the cost of the proposed decommissioning and health, safety and environmental undertakings.

“Under the proposed Petroleum Industry Bill (PIB), Section 204 (1) provides that decommissioning of onshore/offshore installations and structures shall be conducted in accordance with good oilfield practice and regulations and be implemented by the Offshore Petroleum Inspectorate (the body designated to regulate the offshore industry).”

The programme shall not be approved by the Inspectorate unless all relevant environmental, technical and commercial regulation standards are met. The Inspectorate is empowered at its discretion to recall any Licensee or Lessee responsible for the decommissioning programme with respect to a Licence or Lease that has expired to carry out its decommissioning obligations. This is to ensure that the obligation to decommission an installation inures beyond the life time of the License/Lease and also to ensure that there is a responsible person to meet the decommissioning obligation of every installation.

Section 204 (11) of the PIB on the other hand, empowers the Inspectorate to require a lessee to set up and manage an abandonment fund for purposes of decommissioning with a caveat that the Inspectorate shall have access to the fund in case the lessee fails to carry out the decommissioning obligation. The implication of the above provisions to a divesting IOC, who has been served with a Notice to prepare the decommissioning programme under Section 204 (3) is that it may in principle remain liable to bear the decommissioning costs after divestment since there is no provision in the PIB that provides for withdrawal of the Notice by the Minister.

Consequently, the divesting IOC may need an indemnity from the proposed Assignee by way of a clause in the transfer documentation excluding it from any liability relating to the decommissioning of the installations. Where this is the case, the obligation for carrying out the decommissioning programme seems to squarely rest on the new entrants. More so, the current regime makes no requirement for the lessees to set up a fund towards carrying out the decommissioning programme. The implication is that new entrants acquire the assets including its decommissioning liability. The PIB's requirement for a decommissioning fund to be set up by the licensee/lessee and its policy on decommissioning generally may be one of the unspoken reasons the IOCs are divesting their assets speedily before PIB becomes operative.

This precarious position coupled with the not-too strong financial strength of the new entrants compared to the IOCs, as well as the expected huge sums required for carrying out the decommissioning programme raise serious issues of default. This may lead to confusion and expose the government to the burden of meeting decommissioning obligations through tax payers' money. Consequently, the provisions of PIB on decommissioning need to be strengthened further to mitigate incidents of default in carrying out decommissioning obligations in order to save tax payers from eventually paying for decommissioning cost. Another related issue is the requirement for the lessee to set up a fund towards meeting the decommissioning obligations. The good news however is Section 305 (I) (iii a-c) of PIB allows the fund to be deducted before calculating tax payable but any amount in excess of that expended for the decommissioning shall be treated as taxable income. This notwithstanding, the fund set aside for decommissioning is capable of affecting investment as the money that could have been ploughed back into further investment is tied down somewhere in bank. However, PIB does not seem to contemplate granting tax relief on the fund actually applied in carrying out the decommissioning obligation as it provides that a company that has claimed deduction on any amount set aside for decommissioning shall not claim further deduction upon incurring the decommissioning expenditure except on amounts incurred in excess of the money set aside for that purpose. This is in line with the proposed abolition of the Investment Tax Credit and Investment Tax Allowance by PIB. This will also increase the potential liability of new entrants in terms of decommissioning costs.

“The PIB's requirement for a decommissioning fund to be set up by the licensee/lessee and its policy on decommissioning generally may be one of the unspoken reasons the IOCs are divesting their assets speedily before PIB becomes operative.”

Comments:

The current asset trading activity is encouraging but the government, the regulator and the industry need to look beyond the opportunities the trend offers by considering other issues that will have greater impact in the industry. The Regulator should through Regulations, Guidelines, Standards and Directives pursuant to Section 205 (1) PIB provide a clearer position as to the liability regime for decommissioning. Prospective new entrants should likewise consider the cost of decommissioning and factor in the cost while negotiating an asset transfer.

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THE HAMBURG RULES TO BE OR NOT TO BE IN NIGERIA?

This paper aims at throwing up issues which are begging for answers in maritime law, conflict of laws, and bilateral treaties jurisprudence in Nigeria.

The maritime sector is critical to the Nigerian economy as imports and exports play a crucial role in meeting demand and supply services. Carriage contracts are usually governed by either the carriage regimes or contract of sale. The Hague and Hague Visby regimes are seen as protective of the interests of Ship Owners, while the Hamburg Rules are perceived as more favourable to cargo interests. The Rotterdam Rules which are yet to come into force can be seen as a further attempt to bridge the gap between both interests.

Most Bills of Lading are standard contracts issued pursuant to The Hague or Hague Visby Rules. It is observed that the Hamburg Rules have not been weaved into contracts of affrieghtment in any significant measure, consequently most goods are shipped into Nigeria pursuant to either Hague or Hague-Visby Regime contracts. This poses the vital question of which regime should prevail –the port of discharge regime or the regime governing the contract?

The Hamburg versus the Hague Rules:
The Hamburg Rules have been given effect in Nigeria in 2005 as an Act of the National Assembly. Prior to that, the Hague Rules applied with respect to outward carriage of goods from Nigeria. It is critical to note that the Hague Rules were not expressly repealed when the Hamburg Rules were passed into law even though Article 31 (1) of the Hamburg Rules required denunciation of the Hague Rules with effect from the date the Hamburg Rules came into effect . As Nigeria did not expressly denounce the Hague Rules, this raises the question - which cargo regime governs carriage of goods by sea in Nigeria? According to the rules of Customary international law under the Vienna Convention on the Law of Treaties 1969, termination of a treaty may take place only in conformity with the provisions of the treaty. Furthermore, withdrawal ca only be implied when the treaty does not expressly state the mode of denunciation. The Hamburg Rules expressly state that the mode of denunciation must be in writing and as such denunciation cannot be implied merely because Nigeria ratified the Hamburg Rules. It is therefore a moot point whether the Hamburg Rules legitimately have the force of law in Nigeria as an international Convention. Be that as it may, the Hamburg Rules are recognised as part of Nigerian law by virtue of being enacted as an Act of National Assembly. Can it be argued that the Hamburg Rules override the Hague Rules or operate concurrently with it in Nigeria?

Pacta Sund Servanda:
In practice Parties often exercise the choice to opt for The Hague Rules by virtue of the carriage contract. The question is, if the Hamburg Rules are said to currently have the force of law in Nigeria is it possible for The Hague Rules to apply by contract?

> **"As Nigeria did not expressly denounce the Hague Rules, this raises the question - which cargo regime governs carriage of goods by sea in Nigeria?"**

Article 2(1) (b) of the Hamburg Rules state that it applies to all contracts of carriage by sea if the Port of discharge is located in a contracting State. This provision implies that the Hamburg Rules

apply to cargo shipped to Nigeria regardless of the carriage regime incorporated in the carriage documents. The Hamburg Rules do not permit parties to contract out of its provisions and the only contracts excluded are Charter parties. In that sense can the doctrine of pacta sund servanda be said to operate?

Can the Hague Rules operate by contract in a Hamburg Rule jurisdiction, when the Hague Rules provide for a one year time bar while the Hamburg Rules provide for a two year time bar? The Hamburg Rules also provide that any contractual stipulation that derogates from its provisions is null and void. It would seem that the one year time bar provision in the Hague rules will be inapplicable even if incorporated by contract in a bill of lading because it derogates from the provisions of the Hamburg Rules.

Under The Hague Rules the Carrier is bound

“It would seem that the one year time bar provision in the Hague rules will be inapplicable even if incorporated by contract in a bill of lading because it derogates from the provisions of the Hamburg Rules.”

before and at the beginning of the voyage to make the ship seaworthy while the Hamburg Rules cover the period during which the Carrier is in charge of the goods at the port of loading, during the carriage and at the Port of discharge. In such circumstances, which provisions would be applicable in a Hamburg jurisdiction like Nigeria? The Hamburg Rules would appear to apply notwithstanding the contract. Can it be concluded, without more, that the pacta sund servanda theory is dead on arrival in Nigeria?

The approach in the United Kingdom is well illustrated by such cases as the MORVIKEN [1983] 1 Lloyd's Rep. 1, where it was decided that where a cargo claim comes before an English tribunal an express choice of law in the bill of lading will be ignored if the facts surrounding the carriage set in motion any of the triggers set out in the Carriage of Goods by Sea Act 1971. Hence in cargo claims litigated in England, it is virtually certain that the Hague-Visby Rules will apply notwithstanding provisions of the Bill of Lading itself. Also see the TRAFIGURA V MSC AMSTERDAM [2007] 2 Lloyd's Report p. 622.

If the Nigerian Courts adopt this approach, it will no doubt have far-reaching implications in the dynamics of shipment of cargo to and fro Nigeria.

The future: The Rotterdam Rules:
The Rotterdam Rules constitute the most recent Carriage of Goods by Sea Convention. The Rules make it compulsory for acceding states to denounce The Hague Rules, Hague-Visby Rules and the Hamburg Rules. The ratification of the Rotterdam Rules does not come into effect until the denunciation of all the prior carriage conventions has become effective.

While it can be argued that the Rotterdam Rules strike a better balance than previous carriage conventions, it is also contended that it may create more room for conflict between parties as to the exact meaning of certain terms and their practical implications e.g. “volume of contracts”.
The activation of Inland Container Depots (ICDs) project in Nigeria and the ongoing rail rehabilitation may render the application of Rotterdam Rules more useful thereby challenging the operation of the Hamburg Rules which may become overtaken by subsequent legislation.

Conclusion
The question therefore remains for Nigeria - Quo Vadis Hamburg Rules? As for the future much will depend on the evolving trend in international trade. Presently there is an uncomfortable state of flux in the Carriage of goods regime jurisprudence in Nigeria which needs to be urgently addressed by well articulated cases and judicial pronouncements. Until then the question remains: the Hamburg Rules, to be or not to be in Nigeria?

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NEWSFLASH!

We are pleased to announce that ADEDOYIN ADELOYE, formerly Senior Counsel in the Practice has been elevated to the position of Executive Partner with effect from May 2013.

Adedoyin was admitted to the Nigerian Bar in 2003, after graduating with an LLB (Hons.) from the Obafemi Awolowo University Ile-Ife. He obtained an LLM Degree in Maritime Law from the University of Swansea, Wales, UK in 2010. He joined the practice in March 2004 and has been involved in the core of the firm's maritime and commercial practice, actively advising local and international Clients on contentious and non-contentious matters in those areas.

Adedoyin is a member of the Maritime Law Committee of the Business Law Section, Nigerian Bar Association, Maritime Arbitrators Association of Nigeria as well as the Maritime and Arbitration Committees of the International Bar Association (IBA). He is also a Notary Public of the Supreme Court of Nigeria.

We wish him many productive and exciting years ahead as a Partner in the firm.

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One of our clients West African Ventures Limited (WAV), a leading Operator in the offshore support services sector, providing 100% Local Content to the Nigerian Oil & Gas industry, in July 2013 took delivery of a new offshore vessel, the JASCON 55.

JASCON 55 is a DP-2 construction support vessel, fitted with two AHC deepwater cranes, storage tanks for drilling operations and a helipad. It can offer a range of services including installation of pipeline spool pieces, umblicals and modules; inspection and drilling support services.

We congratulate WAV as this unique acquisition will surely enhance local content delivery in the Oil and Gas sector.

TIT-BITS

What's the difference between a lawyer and a boxing referee? A boxing referee doesn't get paid more for a longer fight.

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How can I ever thank you?" gushed a woman to Clarence Darrow, after he had solved her legal troubles. "My dear woman," Darrow replied, "ever since the Phoenicians invented money there has been only one answer to that question."

****

One afternoon a wealthy lawyer was riding in the back of his limousine when he saw two men eating grass by the roadside. He ordered his driver to stop and he got out to investigate. "Why are you eating grass?" he asked them. "We don't have any money for food," the poor man replied. "Oh, come along with me then," said the lawyer. "But sir, I have a wife with six children," the second man answered."Bring them as well." They all climbed into the limousine - no easy task - and one of the poor fellows said, "Sir, you are too kind. Thank you for taking all of us with you." "No problem," said the lawyer, "The grass in my yard is about two feet tall."

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A young lawyer, defending a businessman in a lawsuit, feared the worst. He asked a senior partner whether he ought to send the judge a box of cigars. "The judge is an honorable man," the horrified senior partner exclaimed. "If you do, I guarantee you'll lose the case." The judge eventually ruled in favor of the young lawyer's client. "Aren't you glad you didn't send those cigars?" the senior partner asked. "I did send them," the young lawyer answered, "I just enclosed the opposition's business card."

FOUNDATION CHAMBERS is a specialized firm committed to high ethical standards providing integrated legal services mainly to the maritime, aviation and oil & gas industries.

The views expressed here do not necessarily reflect the opinion of the Firm.
This information is not intended to replace the need to obtain your own professional advice in relation to any topic discussed.

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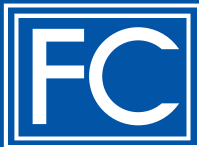

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