The Shipping Law Review

Editors
James Gosling and Rebecca Warder

Law Business Research

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CONTENTS

EDITORS' PREFACE

This book aims to provide those involved in handling wet and dry shipping disputes in multiple jurisdictions with an overview of the key issues relevant to each jurisdiction. We have sought contributions on the law of leading maritime nations, including both major flag states and the countries in which most shipping companies are located. We also include chapters on the law of the major shipbuilding centres and a range of other jurisdictions.

We begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry internationally: piracy, marine insurance, shipbuilding, logistics, and competition and regulatory law.

Each jurisdictional chapter then gives an overview of the procedures for handling shipping disputes in each country, including arbitration, court litigation and any alternative dispute resolution mechanisms. Jurisdiction, enforcement and limitation periods are all covered. Contributors have summarised the key provisions of local law in relation to shipbuilding contracts, contracts of carriage and cargo claims. We have also asked each author to address limitation of liability, including which parties can limit, which claims are subject to limitation and the circumstances in which the limits can be broken. Ship arrest procedure, which ships may be arrested, any security or counter-security requirements and the potential for wrongful arrest claims are also included.

The authors review the vessel safety regime in force in each country, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, along with the local rules in respect of collisions, wreck removal, salvage and recycling.

Passenger and seafarer rights have both recently been enhanced with the entry into force in 2014 of the 2002 Protocol to the 1974 Athens Convention and the Maritime Labour Convention in 2013, and contributors set out the current position in each jurisdiction. The authors have then looked forward and have commented on what they believe are likely to be the most important forthcoming developments in their jurisdictions.

The shipping industry continues to be one of the most significant sectors worldwide, with the United Nations estimating that commercial shipping represents around US$380 billion in terms of global freight rates, amounting to around 5 per cent of global trade overall. More than 90 per cent of the world's freight is transported by sea. The law of shipping remains as interesting as the sector itself and the contributions to this book reflect that.

This past year has, of course, been a challenging one for the international shipping industry, as it continues to feel the effects of the global financial recession. At the same time, the shipping industry has witnessed increased regulation and environmental scrutiny. There has been a recent plethora of increasingly stringent emissions regulation measures focused on sulphur oxides and nitrogen oxides emissions.

Within emissions control areas, the current limit is 1.0 per cent sulphur content, falling to a tougher 0.1 per cent from 1 January 2015 (although California has accelerated its sulphur emissions limits to the new standard already). Tier II limits on nitrogen oxides emissions have been in place globally since 2011. Tier III, which represents a significantly more stringent regime than Tier II limits, will be implemented in emissions control areas from 2016. Furthermore, also from 2016, the United States Clean Air Act will introduce a target of an 80 per cent reduction in nitrogen oxides emissions from vessels by 2030.

The International Maritime Organisation (IMO) has so far not introduced similar limits on the emission of greenhouse gases, such as carbon dioxide, although it is generally perceived that the IMO is in the future likely to further regulate global carbon dioxide emissions from vessels. Outside of the IMO, the EU and individual countries are focusing on greenhouse gas reduction policies. In particular, the European Commission's current proposal is that, from 2018, vessels calling at ports in the EU should be expected to monitor, report and verify carbon dioxide emissions. The strategy is intended to evolve into carbon dioxide reduction targets and market-based measures in the longer term, in line with the EU's approach to land-based greenhouse gas emissions. Steps have already been taken in this regard in France where, since October 2013, vessels calling at French ports have been required to record and report their carbon dioxide emissions. Any EU market-based measures are expected to include tradeable emissions permits for the shipping industry.

Another challenge facing the shipping industry relates to the handling of ever-larger casualties. The most recent high-profile container ship casualties, such as the *MSC Napoli* or the *Rena*, involved relatively small vessels with a maximum capacity of up to 4,688 containers; however, the latest mega-containerships can carry up to 15,000 containers. It is likely that at some stage there will be a casualty involving one of these new larger vessels and this may prove a major test for the industry. It has been suggested that the current salvage industry may find it difficult to deal with the scale of any wreckage. The regulatory environment is becoming increasingly stringent, with far stricter controls on both clean-up and wreck removal, which will also make handling any mega-container ship casualty more challenging. The London underwriting community has responded to concerns about the general average implications by evolving a new insurance product, which, it is suggested, could replace the traditional approach to general average for large container ships. It remains to be seen whether this will be accepted by the market.

Piracy remains a considerable issue for the shipping industry worldwide. There has been a decline in the number of incidents off Somalia since the peak in 2010/11, but an increase in West Africa and (to an extent) elsewhere. Although the use of armed guards and increased naval policing in recent years have undoubtedly contributed to the decline, challenges remain and the shipping industry must continue to be alive to the threat.

We would like to thank all the contributors for their assistance with producing this inaugural edition of *The Shipping Law Review*. We hope that this volume will provide a useful source of information for those in the industry handling cross-jurisdictional shipping disputes.

Finally, we would like to thank our colleague, Tessa Huzarski, for all her hard work in compiling this book.

James Gosling and Rebecca Warder
Holman Fenwick Willan LLP
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Chapter 30

NIGERIA

L Chidi Ilogu and Adedoyin Adeloye[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Nigeria accounts for over 70 per cent of the West African seaborne trade in terms of volume. The shipping industry in Nigeria is largely characterised by the importation activities of traders, industries and individuals and the exportation of crude oil. Much of the commercial shipping activity involves the importation of household consumables such as rice, vegetable oils, cereals; white goods such as television sets, air conditioners and refrigerators; clothing and luxury goods; vehicles; raw materials for manufacturing; and commodities such as fertilisers. Furthermore, refined petroleum products are imported in very substantial quantities to service the energy needs of the country's sizeable and growing population.[2]

In light of the foregoing, the greater focus of the commercial shipping activities in Nigeria revolves around the sea ports, the types and volume of cargo that come into them, the efficiency of the port infrastructure and available personnel to adequately handle the cargo traffic. There is also significant export activity, especially with regard to crude oil and liquefied natural gas, which, as in the case of imported cargo, essentially involves the use of foreign-owned vessels for their carriage.

There are seven major ports in Nigeria (excluding oil terminals), but active commercial activity takes place in only six of them.[3] These seaports provide a total of about 93 general cargo berths, five Ro-Ro berths, seven bulk solid berths, 63 buoy berths,

1 L Chidi Ilogu is the principal counsel and Adedoyin Adeloye is a partner at Foundation Chambers.

2 The United Nation projects that Nigeria's population will increase from about 170 million in 2010 to about 289 million in 2040.

3 The active ports are Apapa, Tin Can Island, Port Harcourt, Onne, Warri and Calabar. Koko Port is no longer functional.

11 bulk liquid cargo berths and several private jetties. Also available in the ports is a fleet of 54 harbour craft and over 600 different types of cargo-handling equipment.[4] Cargo volume at the ports has seen a remarkable rise since 2006 when the port privatisation exercise was concluded. This exercise transferred management of port terminals in Nigeria into private hands away from government control.

According to statistics obtained from the Nigeria Ports Authority (NPA),[5] cargo throughput increased from 46,150,518 tonnes in 2006 to 77,104,738 in 2012, with inward cargo being at least 30 to 40 per cent higher in volume than outward cargo. Nigerian seaports recorded cargo throughput of 76,886,997 tonnes from 5,185 ocean-going vessels with a total of 131,674,337 GT during 2013.

The tonnage of Nigerian-flagged ocean-going vessels is low generally, but the increase in offshore supply and service vessels and oil tankers is quite notable. Most liquefied natural gas carriers, container vessels and bulk carriers are flagged abroad for financial and other considerations.

The volume of trade with Far Eastern countries, notably China, has increased significantly in the past 10 years, thereby increasing the traffic on the Far East trade route.

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

The legislative framework that guides and regulates activities at the country's ports is the Nigeria Ports Authority Act 2004. This Act is to be revised as port terminals are no longer solely within the exclusive control of the NPA. The port terminals and supporting infrastructure have, since the port concession programme conducted by the federal government of Nigeria between 2004 and 2006, been transferred to, and are superintended by, private investors and operators on the basis of leases from the NPA of between 15 and 25 years under a landlord–tenant concession model.

The NPA continues to exercise exclusive technical management over port infrastructure, especially with regard to port precincts, vessel traffic, pilotage, dredging, quay walls and channel controls and such services, while the terminal operators undertake cargo handling, discharge, storage and delivery to designated receivers.

In recent years, shipping industry operators have been urging the enactment of more comprehensive legislation that would adequately regulate activities and interrelationships at the ports, and encourage further growth and development of the industry. To this end, a number of bills are currently before the National Assembly, such as the National Transport Commission Bill. This bill, *inter alia*, establishes the National Transport Commission to commercially regulate all transport services and facilities, including ports, inland waterways, and all forms of land transport, including rail and road transportation in Nigeria and within coastal waters. The Bill is yet to be passed by the National Assembly. The Ports and Harbours Bill, a necessary replacement to the Nigeria Ports Authority Act, aims to provide the much-needed framework to enable the

4 Source: NPA, Annual Abstract of Ports Statistics.

5 As presented in the article titled: 'Performance Evaluation of Nigerian Ports: Pre and Post Concession Eras,' OJ Eniola, www.iiste.org/Journals/index.php/CER/article/view/10841.

NPA to effectively perform its role as the technical supervisor of the port system. This Bill is also pending before the state legislators.

III FORUM AND JURISDICTION

i Courts

Pursuant to Section 251(1)(g) of the Constitution of the Federal Republic of Nigeria (CFRN) and Sections 1 and 2 of the Admiralty Jurisdiction Act 2004 (AJA), the Federal High Court has exclusive jurisdiction over shipping matters. The CFRN expressly states that the Federal High Court will exercise jurisdiction in civil causes or matters in 'any admiralty jurisdiction', while Section 1 of the AJA provides the scope of admiralty jurisdiction in Nigeria.

It is important to note that Section 20(a)–(h) of the AJA stipulates that the Federal High Court can exercise jurisdiction over admiralty matters notwithstanding any exclusive jurisdictional clauses contained in any agreement or contract related to such a matter, where the following circumstances exist:

a the place of performance of the contract is in Nigeria;
b any of the parties reside in Nigeria;
c payment was (or was to be) made in Nigeria;
d the plaintiff submits to Nigerian Jurisdiction;
e the *res* is within Nigeria;
f the state or federal government of Nigeria is a party and submits to the Court's jurisdiction;
g some financial consideration is to be derived from the contract in Nigeria; or
h in the Court's opinion, the matter is one that should be adjudicated in Nigeria.

The interpretation of Section 20 of the AJA by the courts tends to suggest that jurisdiction clauses that seek to oust Nigerian courts' jurisdiction will be considered 'null and void'. Only the jurisdictional aspects of the clause are affected, however, not the entire agreement. The cases of *Owners of MV Lupex v. Nigerian Overseas Chartering and Shipping Limited* (2003) and *Lignes Aeriennes Congolese v. Air Atlantic Nigeria Ltd* (2005) underscore this point.

Section 18 of the AJA states that proceedings in a maritime claim, maritime lien or other charge shall be commenced within any stipulated period provided in the contract in respect of such claim. Where none is so provided by agreement or law, action must be brought within three years of the accrual of the cause of action.

The Merchant Shipping Act 2007 (MSA 2007) bars the commencement of any action for payment by a salvor beyond two years after the termination of salvage.[6] Also, collision claims cannot be maintained beyond two years after the accrual of the cause of action.

6 Such time may, however, be extended by a court where the salvor has been unable to arrest the salvaged vessel.

ii Arbitration and ADR

The Arbitration and Conciliation Act (ACA) is the national legislation governing commercial arbitration in Nigeria. It primarily grants parties the freedom through arbitration agreements to determine the arbitral procedure to govern their dispute. Where parties do not agree the procedure to govern the dispute, the arbitrator will apply the procedural rules set out in the first schedule to the Arbitration Act, which are based on the UNCITRAL Arbitration Rules.[7] There are some other very active arbitral institutions in Nigeria, with their own arbitral procedures and which entertain commercial disputes, including maritime and shipping disputes. Notable in this regard are the Chartered Institute of Arbitrators UK, Nigeria branch and the Lagos Regional Centre for International Arbitration,[8] the formation of which is backed by federal legislation.[9]

There is no specific maritime arbitration procedure legislated in Nigeria. There is a non-governmental body known as the Maritime Arbitrators Association of Nigeria (MAAN) comprising maritime and commercial law practitioners, master mariners, shipping companies and other maritime operators, and experienced arbitrators committed to providing specialised arbitration services for the settlement of maritime and shipping disputes. MAAN has developed arbitration rules for large and small-scale arbitration schemes involving maritime industry claims.

There has been a progressive effort in the past 10 years or so to institutionalise the use of ADR, especially mediation, into the procedure of the judicial process in Nigeria. The first and most advanced of these is the Lagos Multi-Door Courthouse (LMDC), which not only accepts direct referrals from the public, but works in conjunction with the High Court of Lagos State, whereby the court may first refer commercial cases before it to mediation. In the event the parties fail to resolve their dispute through ADR, the court would proceed to a trial of the action. Matters resolved by mediation at LMDC are entered as consent judgments of the High Court and are enforceable. The efforts of ADR through LMDC have been effective in decongesting the case list of the Lagos High Court.

iii Enforcement of foreign judgments and arbitral awards

Enforcement of foreign judgments in Nigeria has been very topical. The main issue that affects it is the position of the two federal legislations regulating it: the Foreign Judgment (Reciprocal Enforcement) Act 2004 (FJA) and the Reciprocal Enforcement of Judgment Act Ordinance 1958 (REJ).

Both Acts provide that the registration and enforcement of foreign judgments (including maritime judgments) be based on 'reciprocity'. While the REJ (originally enacted in 1922) contains a number of (Commonwealth) countries in favour of which reciprocal status was granted for judgments of their superior courts, the FJA (originally enacted in 1960) empowers the Minister of Justice to make orders in respect of countries

7 Section 15 of the ACA.

8 Established in 1989 under the Asian-African Consultative Committee, an intergovernmental body with about 45 Member States.

9 The Regional Centre For International Commercial Arbitration Act 2004.

that he or she is assured would grant reciprocal enforcement to Nigerian judgments, before the provisions of that Act would be applicable to the judgment of such countries. However, no such Order has been made to date, making the provisions of the FJA effectively inoperative, even though it was enacted well after the REJ. Equally significant is the fact that the later FJA did not repeal the REJ.

While there have been several court decisions suggesting that the registration and enforcement of judgments should follow the provisions of the FJA, the Supreme Court has, in *Grosvenor Casinos Limited v. Halaoui* (2009), confirmed its earlier decision in *Marine & General Insurance v. Overseas Union* (2006) that the REJ is the applicable law for the United Kingdom and other named Commonwealth countries (pursuant to Section 5 of the FJA)[10] on reciprocity for the time being and until relevant orders are made by the Minister of Justice pursuant to the FJA.

It remains a moot point whether the one-year limitation period under the FJA or the six-year limitation under the REJ should be applicable.

The number of foreign judgments enforced has not been high, not only as a result of the restricted number of countries that have been recognised by law as reciprocating enforcement of Nigerian judgments, but also because of the conditions contained in the REJ, which may prevent a duly obtained judgment in any jurisdiction from being registered and enforced in Nigeria – for example, the non-appearance of a judgment debtor at the foreign court.[11]

Nigeria is a signatory to the New York Convention, which is included as a schedule to the ACA. It would appear that an arbitral award may be enforced pursuant to either Section 51 or Section 54 of the ACA. While Section 51 allows recognition and enforcement of an award from any country,[12] Section 54 applies to the recognition and enforcement of awards between Nigeria and any other contracting state to the New York Convention pursuant to the conditions stipulated thereunder.

There is no limitation period specified in the ACA, but the Limitation Law of the applicable state of Nigeria where the enforcement proceeding is maintained would apply: six years under the Limitation Law of Lagos State, the Federal Capital Territory, Abuja and most other states.

10 The Governor General of Nigeria had, pursuant to Section 5 of REJ, made a Proclamation extending reciprocal status to apply in favour of Sierra Leone, Gold Coast (Ghana), the Gambia; Newfoundland, New South Wales, State of Victoria (territories of Australia), Barbados, Bermuda, British Guiana, Gibraltar, Grenada, Jamaica, Leeward Island, St Lucia, St Vincent and Trinidad and Tobago.

11 Some of the other conditions include that the original court must have jurisdiction, that the judgment was not obtained by fraud, that the judgment is subject to appeal in another country or that the judgment is contrary to public policy in Nigeria.

12 *Tulip (Nig) Limited v. NTMSAS* [2011] 4 NWLR (Part 1237) 254.

IV SHIPPING CONTRACTS

i Shipbuilding

There is no large-scale shipbuilding activity in Nigeria at the moment. Most newbuilds are ordered from abroad. Although the promotion of shipbuilding activities in Nigeria is partly the aim of the Coastal and Inland Shipping (Cabotage) Act, which, *inter alia*, stipulates that all ships engaging in coastal trading activities within Nigeria should be built in Nigeria, development of adequate capacity in this regard is still in its infancy. There are, however, some local shipyards where barges, tugboats and small craft (generally below 5,000 GT) are constructed on a regular basis for use within the inland waterways, coastal operations and support services in the oil and gas industry.

ii Contract of carriage

The Carriage of Goods by Sea Act (COGSA), which contains in its Schedule the Hague Rules of 1924, has, since 1926 (when it was enacted), been the leading legislation in Nigeria in respect of goods carried by sea pursuant to various bill of lading contracts. However, this Act expressly states that the Hague Rules apply in respect of outward carriage of goods from ports in Nigeria to ports outside Nigeria or other ports within Nigeria. For this reason, the choice-of-law clauses of most bills of lading in respect of shipments to Nigeria, providing for reliance on the terms of the Hague Rules Convention[13] have been upheld.

Nigeria never signed or ratified the Hague-Visby Rules, but ratified the Hamburg Rules in 1988,[14] which were implemented[15] by virtue of the United Nations Convention on the Carriage of Goods by Sea (Ratification and Enforcement) Act 2005. The 2005 Act contains no specific provision repealing the COGSA. Although there has not been any judicial interpretation of the current status of both carriage regimes (the Hague or Hamburg Rules), it is generally acknowledged that the Hamburg Rules now supersede the Hague Rules for both inward and outward carriage in Nigeria.

Nigeria is one of the 25 signatories to the Rotterdam Rules, which will come into force after ratification by 20 countries.[16]

13 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Hague Rules), and Protocol of Signature, 1924.

14 United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules 1978) – Explanatory Documentation prepared for Commonwealth Jurisdictions by HM Joko Smart in association with the Commonwealth Secretariat, www.uncitral.org/pdf/english/texts/transport/hamburg/Hamburg-Rules-Commonwealth.pdf.

15 By virtue of being a common law jurisdiction, conventions that have been ratified and come into force do not automatically become enforceable in Nigeria until they have been passed into law by an act of the Nigerian National Assembly.

16 Only three countries (Spain, Togo and Congo) have ratified the Convention as at the end of May 2014.

iii Cargo claims

Cargo disputes often arise at the instance of importers as a result of loss or damage during carriage or at the ports during discharge. The rights and entitlements to sue with regard to cargo claims in Nigeria was originally premised on the Bill of Lading Act 1855, being a pre-1900 statute of general application in Nigeria. By virtue of the 1855 Act, only the consignor, consignee and endorsee have privity and right to sue, as illustrated in the cases of *Adesanya v. Leigh Hoegh & Co* and *Kaycee (Nig) Ltd v. Prompt Shipping Corp*.

The essential features of the 1855 Act were subsequently incorporated into the Merchant Shipping Act (MSA 2004), in Section 375. Regrettably, when the MSA 2004 was repealed by the MSA 2007, Section 375 was not preserved. As such, there is now a lacuna as to applicable legislation detailing the right-of-suit principle in Nigeria.[17] At best, it remains applicable as a common law principle of contract in Nigeria.

Be that as it may, Nigerian courts have given credence to the rules conferring a right of suit to consignees or endorsees when there has been a transfer of the property in the bill of lading. *Nigerbrass Shipping Line v. Aluminium Extrusion Industries* (1994) is a case in point.

Some notable exceptions to these rules have been recognised, including the *Brandt v. Liverpool*[18] doctrine, whereby the bill of lading holder can maintain an action at common law where the court is able to infer or imply a contract on the bill of lading terms between the holder and the carrier in circumstances where the holder:

a takes delivery of the goods;
b pays freight or demurrage;[19] or
c presents the bill of lading.[20]

The lack of capacity of a notified party to sue on a bill of lading was underscored by the Supreme Court in the case of *Pacer Multi-Dynamic Ltd v. MV Dancing Sisters & Anor*, (2012).

The urgent need to introduce a bill of lading act or similar legislation in Nigeria has been addressed by the Nigerian Maritime Administration and Safety Agency (NIMASA), which has produced a draft Bill of Lading Act, otherwise known as the Carriage Documents Bill, addressing the issue of right of suit and seeking to expand the scope beyond the bill of lading *per se* to cover electronic and other forms of carriage documentation applicable in international trade and carriage of goods by sea. The Bill is expected to be presented as an executive bill through the Federal Attorney General to the National Assembly.

17 Notwithstanding the cases which provide judicial precedent for it.

18 *Brandt v. Liverpool, Brazil & River Plate Navigation Co Ltd* [1924] 1 KB 575.

19 Here, the consideration needs not be financial. Non-financial consideration may be acceptable, as adequacy of consideration needs not be looked into.

20 While the court would enforce bill of lading terms on these grounds, there must, however, be delivery or at least existence of the goods and also, possession of the bill of lading must certainly have passed from the shipper.

iv Limitation of liability

The circumstances in which shipowners (including charterers, managers and operators of a ship), salvors and their insurers[21] may limit their liability for maritime claims, as well as the calculation for such limitation, are provided in Sections 352–358 of the MSA 2007. Section 352(1)(a)–(g) states the types of claim that are subject to limitation, while Section 353(a)–(e) lists the claims that may not be subject to limitation, such as claims for salvage or contribution in general average, oil pollution liability and claims in respect of nuclear damage.

The admiralty jurisdiction of the Federal High Court includes 'any action or application relating to any cause or matter by any shipowner or aircraft operator or any other person under the Merchant Shipping Act or any other enactment relating to a ship or an aircraft for the limitation of the amount of his liability'[22] and the procedure is laid down in Order 15 of the Admiralty Jurisdiction Procedure Rules 2011 (AJPR 2011). An action for limitation is commenced as an admiralty action *in personam* against at least one of the (possible) claimants in a maritime claim (as a defendant), who must be served before the case may be sent down for hearing or determination given in default of appearance. After determination of the applicant's entitlement to a limitation of its liability, the court may order advertisement of its determination in order to allow anyone with a maritime claim against the vessel or such other parties named above to apply to set aside, vary the determination or lodge its interest.

V REMEDIES

i Ship arrest

The right to arrest a ship in Nigeria is predicated on the provisions of the AJA, especially Section 5 thereof, while the procedure for carrying out an arrest is contained in the AJPR 2011. Section 2 of the AJA contains a comprehensive list and description of Maritime Claims.[23] Section 5(1) specifies the proprietary maritime claims for which a ship (or other property) may be subject to arrest,[24] while Section 5(4) provides the conditions under which an action *in rem* may be brought against a ship for a general maritime claim, which are the same as is provided in Section 21(4)(a) and (b) of the UK Senior Courts Act 1981. The conditions are that:

a the claim arises in connection with a ship;

b the person who would be liable in an *in personam* action in respect of the claim (referred to as the 'relevant person') was at the time the claim arose the owner, or charterer, or in possession or control of the ship; and

21 Section 351(5) of the MSA 2007 extends the right to limit liability to the insurers of owners and salvors.

22 Section 1(1)(d) of the AJA.

23 Broadly, maritime claims are divided into proprietary and general maritime claims – Section 2(1) of the AJA.

24 Those concerned with questions of title to, or possession of ships; mortgage claims; co-ownership disputes [in Section 2(2)(a)(i)–(iv) and Section 2(2)(b)]; as well as claims for interest arising out of all the proprietary maritime liens stated in Section 2(2)(a)–(c) of the AJA.

c the relevant person is, at the time the claim is brought (commenced):
- the beneficial owner of all the shares in the ship or its demise charterer; or
- the beneficial owner of all the shares in another ship.

The last condition refers to the concept of sister ship arrest, which is allowed under Nigerian admiralty practice. Associated ship arrest is not recognised under Nigerian maritime law. There must be clear proof of beneficial ownership by the owner of the original 'offending ship' for the arrest of a sister ship to be sustained.

The above conditions must be strictly followed by a claimant before arresting a ship, failing which the shipowner may apply to vacate a wrongful order of arrest and successfully claim damages for wrongful arrest.

Additionally, Section 5(3) of the AJA provides that a ship will be liable to arrest for a claim that constitutes a maritime lien (i.e., liens for salvage, damage done by a ship, wages of the master or member of crew, or for a master's disbursements).

An application to arrest a vessel must be founded on an action *in rem*, which is commenced by issuing a writ *in rem* accompanied by a statement of claim and copies of every document to be relied on at the trial.[25] The claimant seeking to arrest a vessel is obliged to conduct a search into the caveat book to ascertain that no caveat against arrest is in force against the vessel before applying to arrest the vessel.

An arrest application can only be brought if the ship is within Nigerian territorial waters or is expected to arrive there within three days. The territorial waters of Nigeria extend to 12 nautical miles off the coast of Nigeria, measured from the low-water mark or of the seaward limits of inland waters. It is therefore possible to serve a warrant of arrest on a vessel anywhere within the court's jurisdiction, even when the vessel is yet to enter berth.

Section 10 of the AJA entitles parties to an action *in rem* in which there is a foreign jurisdiction (or arbitration) clause to have the action stayed pending the outcome of the foreign proceedings. An order to stay the action may be granted by the court on the condition, *inter alia*, that the arrest is maintained during the period of the foreign proceedings or that suitable security is provided by the defendants in a form that would be acceptable to satisfy a foreign judgment.[26] However, under Nigerian admiralty practice, an arrest order will not be granted merely for the purpose of obtaining security in respect of a claim or an arbitration proceeding commenced abroad (see *M/V Scheep v. M/V S Araz* (2000). As such, an action *in rem* to enforce a claim for damages must have been commenced before an application to arrest a vessel (as security in a claim or arbitration abroad) can be entertained.

25 Usually, the writ *in rem* together with the accompanying documents and the application for arrest are filed simultaneously as required by Order 3, Rule 1 and Order 7, Rule 1 (1) of the AJPR 2011.

26 The court may further lay down other supplementary orders for the purpose of preserving the ship or of the rights of other persons interested in the ship.

ii Court orders for the sale of a vessel

Judicial sale of a vessel under arrest may be ordered by the court before or after judgment where the vessel has been under arrest for over six months and the defendant has failed to provide security for its release and where the vessel is depreciating in value.[27] Where a sale is ordered by the Court, a valuation of the ship is carried out after which an advert is made in two national newspapers. The sale is conducted by the Admiralty Marshal within 21 days of the newspaper publications. The proceeds are paid to the court[28]and the Admiralty Marshal files an account of sale and vouchers of the account. There are usually a few of such court-ordered sales within a year. In *The Leona II*[29] the Supreme Court criticised the direction of the trial judge to order the sale of the vessel (*The Leona II*) by private treaty rather than by public auction.

VI REGULATION

i Safety

The maintenance of safety in the shipping sector in Nigeria is under the direct purview of NIMASA, which is empowered by the NIMASA Act, MSA 2007 and other related legislation to, *inter alia*, regulate maritime safety, security, marine pollution and maritime labour.[30]

Section 20 of the NIMASA Act empowers NIMASA to establish the procedure for the implementation of international maritime conventions of the IMO, the ILO and other conventions on maritime safety and security to which the government of Nigeria is a party, especially by making regulations in respect of any such implemented convention.

Some of the conventions on maritime safety that have been implemented and their corresponding regulations (where applicable) are:

a SOLAS;
b the 1988 Protocol relating to SOLAS and Annexes I to V thereto;
c the Search and Rescue Convention 1979;
d the International Labour Organization Convention concerning the Protection against Accidents of Workers Employed in Loading or Unloading Ships (Dockers Convention); and
e the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988.

All the conventions were implemented pursuant to Section 215 of the MSA 2007.

27 In the first situation, the plaintiff may apply for the vessel's sale (Order 9 (6) (b) AJPR 2011), whereas, in the other, either party may apply for the sale (Order 16 (3) AJPR 2011).

28 The Admiralty Marshal shall be entitled to deduct 2 per cent of the sale value of the vessel to cover his or her expenses including bank charges – Order 16 Rule (4) (2) AJPR 2011.

29 Nigerian Shipping Cases Volume IX, p. 434.

30 Section 1(ii) of the NIMASA Act.

ii Port state control

Port state control is the right of a flag state to inspect foreign-flagged ships visiting its ports to ascertain their compliance with international safety requirements and seaworthiness. NIMASA is the authority tasked with carrying out this duty in Nigeria, with powers to detain ships that fail the test upon inspection. Recent figures suggest that actual inspection of ships under the nation's port state control is low.

Nigeria facilitated the development of the Abuja MoU. Nineteen states have signed the MoU, 11 of which have deposited an instrument of ratification in respect thereof at the secretariat of the body in Lagos.[31] The Abuja MoU had received criticism for not being active and effective,[32] but it has demonstrated a more proactive approach following the appointment of a new Secretary General in 2010.

iii Registration and classification

The Nigerian Ship Registry is maintained by NIMASA and, ordinarily, only Nigerian citizens or bodies corporate or partnerships subject to Nigerian law and having their principal place of business in Nigeria can register their interests in a vessel in Nigeria and have such vessel fly the Nigerian flag.[33] There is no provision for dual registration in respect of vessels as a vessel may only fly the flag of one country. Consequently, there is a requirement for vessels already registered under foreign flags to de-register their current ports or state registries in order to be registrable in Nigeria. However, the Ship Registry permits provisional registration of a vessel for six months in order to allow it to sail into Nigeria with the Nigerian flag before completing a full registration on arrival.

For the purposes of registration, the Ship Registry provides about six different types of registration:

a merchant ships;
b fishing vessels;
c ships under construction;
d ships on bareboat charters and other charters exceeding 12 months;
e licensed ships below 15 GT; and
f floating production, storage and offloading facilities and floating storage and offloading facilities.[34]

31 While most of the members states of the MoU are West African countries, it is worth noting that South Africa is also a member of the Abuja MoU.

32 See 'Bio tasks Usoro over Abuja MoU on port state control', published in *The Guardian* (Nigeria) of 17 March 2010, reproduced on the website of Overseas Agency Nigeria at www.oanagency.com/site/newsdetail.php?recordID=Bio%20tasks%20Usoro%20over%20Abuja%20MoU%20on%20port%20state%20control; and 'Why Nigeria must opt out of Abuja MoU', by *Ships and Ports*, www.shipsandports.org/commentary.php?id=18.

33 Sections 16 to 42 of the MSA 2007 contain provisions in respect of vessel registration under the Nigerian flag.

34 Section 17(1) of the MSA 2007.

It is equally important to note that the Ship Registry is also responsible for administering a Cabotage Register in respect of vessels eligible to participate in commercial coastal and inland shipping activities.

NIMASA states in its guidelines for ship registration that an applicant should, as part of the required documentation, provide a current certificate from an approved international classification society. In this regard, NIMASA has established collaborative links with leading classification societies by signing memoranda of understanding with them. They include IACS, the International Register of Shipping and the International Naval Surveys Bureau.

iv Environmental regulation

Pursuant to the implementation of several international conventions for the prevention of pollution from ships,[35] some regulations have been made by the Minister of Transportation in the exercise of his powers under the MSA aimed at regulating the marine environment. Accordingly, in 2012 pursuant to these conventions, a set of regulations were introduced that regulate such issues as anti-fouling systems, ballast water management, dangerous or noxious liquid substances in bulk, liability and compensation; oil pollution preparedness, response and cooperation, prevention of oil pollution; and prevention of pollution by garbage.

v Collisions, salvage and wrecks

The MSA contains various provisions in respect of collisions, salvage and wrecks. The MSA mandates the observance of the 'Collision Regulations',[36] which are significantly modelled after the Colregs and which provide the practical guides for ships' conduct, *inter alia*, in anticipation and prevention of, or in reaction to, a collision. It further provides for the rights of NIMASA-approved inspectors to inspect ships for the purpose of enforcing the Collision Regulations, as well as for the duty of masters of other ships and the occupants of ships with which they collide to report collisions.

The Act makes the owners of any ship that becomes a wreck responsible for removing it. This is, however, difficult to implement as most shipowners are usually insolvent at that stage. There is no legislation in respect of recycling of ships in Nigeria and it has been suggested that the best approach to ensure dedicated clearing of wrecks is for the relevant wreck removal agencies to promote the existence of recyclers with whom they can partner to remove and efficiently dispose of wrecks.

35 Section 335 of the MSA 2007 contains a list of such conventions, including MARPOL 73/78 and the Annexes thereto, the Intervention Convention, the London Dumping Convention, the OPRC Convention, the CLC Convention, and the LLMC Convention 1976 and LLMC Protocol 1996.

36 The latest version of the Collision Regulations was made by the Minister of Transportation in 2010.

The regime for salvage in force in Nigeria is the Salvage Convention 1989, and though no regulations in respect thereof have yet been made, the provisions of the convention have been made applicable pursuant to Part XXVII of the MSA 2007.[37]

vi Passengers' rights

The Athens Convention and its Protocol of 1990 were implemented into Nigerian law pursuant to Section 215 of the MSA 2007, but no direct rules or regulations stemming from the convention have been made. There is, however, very minimal organised international carriage of passengers by 'seagoing vessels' into or from Nigeria.

vii Seafarers' rights

A number of conventions on seafarers' rights[38] have been implemented pursuant to Section 215 of the MSA 2007. These include:

a rights with regard to their employment contracts[39] (and obligations of their employers)[40] including wages, leave benefits and discharge from service; and

b rights regarding general welfare, health and accommodation.[41]

Some Regulations in force regarding seafarers' rights pursuant to international conventions already implemented in Nigeria include:

a the Safe Manning, Hours of Work and Watchkeeping Regulations;

b the Health, Protection and Medical Care of Seafarers and Crew Accommodation Regulation;[42]

c the Placing of Seamen Convention of 1920;

d the STCW Convention (as amended); and

e International Labour Organization Convention (32 of 1932) on Protection Against Accidents of Workers Employed in Loading or Unloading Ships.

The rights of seafarers and masters to bring an action (including for the arrest of a ship) against a shipowner for claims for unpaid wages[43] are provided for in the AJA, as general maritime claims and maritime liens.[44]

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37 Section 387(1) of the MSA 2007.

38 The word used in the MSA is 'seaman', which is defined as: 'any person (except a master, pilot or a person temporarily employed on the ship while in port) employed or engaged in any capacity on board the ship.'

39 In respect of both seagoing and non-seagoing ships – Sections 95 and 96 of the MSA 2007.

40 Sections 109–112; and rights to repatriation – Section 116 of the MSA 2007.

41 Part X of the MSA 2007.

42 All made in 2010, pursuant to the powers conferred on the Minister of Transportation as provided in the MSA of the 2007.

43 Or 'an amount that a person as employer is under an obligation to pay to a person as employee, whether the obligation arose out of the contract of employment or by operation of law, including by operation of law of a foreign country'.

44 Section 2(3)(r) and Section 5(3) of the AJA, respectively.

In June 2013, Nigeria deposited an instrument of ratification for the Maritime Labour Convention 2006 at the ILO Secretariat in Geneva. A legal instrument backing its implementation is yet to be passed by the Nigerian Assembly.

VII OUTLOOK

The potential for the shipping industry in Nigeria remains high, although progress is slow in areas of building human and technical capacity. There is much discussion of the proposed construction of greenfield deep-sea ports with draughts in excess of 14 metres, which should reduce freight costs and enhance shipping operations in the country. The initiative is being supported by the Nigerian government, which is encouraging PPP arrangements in this regard as part of a plan to address the inadequacy of capacity in the existing Nigerian ports. The leading initiative in this regard is the development of the Lekki deep-sea port, which, earlier in the year, attracted commitment by the decision of CMA CGM DELMAS to acquire 25 per cent of its container terminal. The first phase of the project is expected to become operational by 2017.

It must be stressed that the much-needed intermodal supporting infrastructures such as improved road networks and rail facilities are imperative for the effectiveness of such initiatives. Furthermore, the number of such projects must be strategically located and their number closely monitored to avoid overcapacity and underutilisation, while their hub status and trans-shipment feasibility should be clearly projected.

The recent announcement by the federal government designating the Nigerian Shippers' Council as the regulator of the commercial activities at sea ports poses a number of questions given its erstwhile role as a 'protector' of cargo interests and the somewhat limited scope of its enabling Act. The awaited passage of two critical bills – the Transport Commission Bill and the Ports and Harbours Bill – continues to be a talking point in the industry as these Acts are expected to add value and introduce more order to the management of the shipping sector of the Nigerian economy.

The desire of the government to increase indigenous participation in shipping in Nigeria is reflected in two main pieces of legislation – the Coastal and Inland Shipping (Cabotage) Act and the Nigerian Oil and Gas Industry Content Development (Nigerian Content) Act – which aim to reserve coastal shipping and some performance in oil and gas contracts, including shipping, for Nigerians. It is envisaged that efficient implementation of both Acts will go a long way to enhancing job creation, skilled manpower and technical capacity in both the transport and energy industries in Nigeria.

Appendix 1

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