THE SHIPPING LAW REVIEW

FIFTH EDITION

Editors
George Eddings, Andrew Chamberlain
and Rebecca Warder

THE LAWREVIEWS

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This article was first published in June 2018
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
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Enquiries concerning editorial content should be directed
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ISBN 978-1-912228-36-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

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ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

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PREFACE

The fifth edition of this book aims to continue to provide those involved in handling shipping disputes with an overview of the key issues relevant to multiple jurisdictions. We have again invited 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.

As with the previous four editions, we begin with cross-jurisdictional chapters looking at the latest developments in important areas for the shipping industry: competition and regulatory law, sanctions, ocean logistics, piracy, shipbuilding, ports and terminals, marine insurance and environmental issues. We once again feature offshore shipping and look at the key changes in the revised SUPPLYTIME 2017 form, published since our fourth edition.

Each jurisdictional chapter gives an overview of the procedures for handling shipping disputes, 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 the authors 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, security or counter-security requirements and the potential for wrongful arrest claims are also included.

The authors review the vessel safety regimes in force in their country, along with port state control and the operation of both registration and classification locally. The applicable environmental legislation in each jurisdiction is explained, as are the local rules in respect of collisions, wreck removal, salvage and recycling. Passenger and seafarer rights are examined, and contributors set out the current position in their jurisdiction. The authors have then looked ahead and commented on what they believe are likely to be the most important developments in their jurisdiction during the coming year.

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 about 5 per cent of global trade overall. More than 90 per cent of the world's freight is still transported by sea. The law of shipping remains as interesting as the sector itself and the contributions to this book continue to reflect that.

The maritime sector has been taking stock after experiencing a bumpy ride during the past few years and, while the industry is looking forward to continued recovery, there is still uncertainty about the effects of trade tariffs and additional regulation. Under the current US administration, the sanctions picture has become ever more complex and uncertain.

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Environmental regulation continues to be a hot topic in shipping and the maritime industry has made headlines during the past year by making its first major commitment to cut emissions. The shipping sector has signed up to reduce air emissions by an impressive 50 per cent by the year 2050 as compared with 2008 emissions levels. This, and the stricter sulphur limit of 0.5 per cent m/m coming in from 2020, is generating increased interest in alternative fuels, alternative propulsion and green vessel technologies.

The United Kingdom's projected exit from the European Union is another key development. The UK is currently expected to leave the EU in 2019 but it is now likely that there will be transitional arrangements for withdrawal lasting until 2020. Some concerns have been expressed about the effects of Brexit on enforcement of maritime contracts. However, we expect the bulk of shipping contracts globally to continue to be governed by English law and that Brexit will not significantly affect enforceability. The vast majority of shipping contracts call for disputes to be resolved by London arbitration and London arbitration awards will continue to be enforceable internationally (both within and outside the European Union) under the New York Convention, as they are today. It is anticipated that reciprocal EU–UK enforcement of court judgments may also be agreed.

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

George Eddings, Andrew Chamberlain and Rebecca Warder
HFW
London
May 2018

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Chapter 32

NIGERIA

Adedoyin Afun[1]

I COMMERCIAL OVERVIEW OF THE SHIPPING INDUSTRY

Nigeria continues to be the pivot of West Africa's shipping activities, owing to its strategic location by the coastline. With an extensive natural maritime endowment base incorporating a coastline of more than 800km, an exclusive economic zone of more than 200 nautical miles, the Nigerian 'blue economy' is being harnessed, in light of declining oil and gas revenues, as one of the drivers for the country's economic development.

Nigeria is also blessed with a vast inland waterways resource estimated at nearly 3,000km and comprising more than 50 rivers, both large and small, that can support a vibrant intra-regional trade.[2] The country's population inspires large-scale importation of raw materials, luxury goods and other commodities, and large quantities of petroleum products owing to the lack of sufficient refining capacity in Nigeria. Crude oil and natural gas continue to be exported in large quantities. Consequently, demand in shipping services has been on the increase and the maritime industry, which plays an important part in the exploitation and distribution of Nigeria's oil and gas, conveniently takes second place as the principal contributor to the nation's economy after petroleum.

Commercial shipping activities largely revolve around six active ports[3] and six petroleum exportation terminals.[4] The 2006 port reforms brought about a remarkable increase in their cargo volume. Consequently, infrastructure and all other paraphernalia suitable for a standard port have been put in place, and continue to be upgraded, to meet the demands brought about by the increase in cargo volume.

Within the first eight months of 2017, a total of 4,223 vessels berthed at the various Nigerian ports.[5] This is in sharp decline compared to the period 2013–2016, when a total of 19,833 vessels berthed at Nigerian ports. The decline in the number of berthed vessels and tonnage registered can be attributed to the increase in the exchange rate, the introduction of new importation policies and a reduction in service boat operation because of the decline

1 Adedoyin Afun is a partner at Bloomfield Law Practice.

2 Abiodun, E (2018), 'Rescuing the Maritime Sector', THISDAYLIVE. Available at: https://www.thisdaylive.com/index.php/2018/03/09/rescuing-the-maritime-sector/ [accessed 5 April 2018].

3 Located in Lagos State are Apapa Port and Tin Can Island Port. Located in Rivers State are Port Harcourt Port and Onne Port. Located in Delta State and Cross River State are Warri Port and Calabar Port, respectively. Three other ports are under construction: Badagry, Lekki and Ibom.

4 Wikipedia, 'Petroleum Industry in Nigeria'. Available at: https://en.wikipedia.org/wiki/Petroleum_industry_in_Nigeria [accessed 10 April 2018].

5 Source: Nigerian Port Authority Port Statistics for 2017.

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in crude oil prices. At the end of 2017, the total value of Nigeria's merchandise trade was 9,562.7 million naira,[6] which is 8.5 per cent lower than the 2016 trade import value. The total value of exports in 2017[7] stood at 13,598.2 million naira.[8]

Compared to other oil-producing nations, vessel tonnage is low but in the past three years and pursuant to the implementation of several indigenous shipping development legislations, Nigerian-flagged vessels (mostly oil tankers, oil rigs and liftboats and offshore support vessels) have enjoyed significant growth, from 262 vessels with a total of slightly over 232,000 metric tons in 2015, to almost twice that in 2016, at 370 vessels with a total of almost 420,000 metric tons and slightly less in 2017, at 307 registered vessels with a total of 415,638.03 metric tons.[9]

II GENERAL OVERVIEW OF THE LEGISLATIVE FRAMEWORK

Although there is a flurry of maritime legislations in Nigeria, the principal body of substantive shipping laws is contained in the Merchant Shipping Act, 2007 (MSA), the Nigerian Maritime Administration and Safety Agency Act, 2007 (the NIMASA Act), the Coastal and Inland Shipping (Cabotage) Act No. 5, 2003 (the Cabotage Act) and a raft of regulations (a number of which put into force, or are used to apply, international instruments on the construction and safety of ships, navigation, pollution and crew matters) and guidelines published pursuant to the foregoing legislation.

In addition, discrete legislation governs areas such as ports, carriage of goods by sea, wreck and salvage, pollution, the environment and marine resources. This legislation includes the Nigeria Ports Authority Act, Cap. N126, Laws of the Federation of Nigeria (LFN), 2004, the Carriage of Goods by Sea Act, Cap. C2, LFN 2004 and the United Nations Convention on Carriage of Goods by Sea (Ratification and Enforcement) Act 2005.

Generally, the Constitution of the Federal Republic of Nigeria, Cap. C23, LFN 2004 (the Constitution) (as amended), the Admiralty Jurisdiction Act, Cap. A5 LFN 2004 (AJA) and the Admiralty Jurisdiction Procedure Rules 2011 (AJPR) provide the framework for admiralty jurisdiction and court practice.

III FORUM AND JURISDICTION

i Courts

Pursuant to Section 251(1)(g) of the Constitution and Sections 1 and 2 of the AJA, the Federal High Court has exclusive jurisdiction over shipping and admiralty matters.

Notwithstanding the foregoing, Section 254(c)(1) of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 conferred exclusive jurisdiction over all labour-related matters on the National Industrial Court, to the exclusion of all other courts of

6 Roughly US$31,347,975.74 – converted at the central exchange rate of 305.05 naira to US$1 as recorded by the Central Bank of Nigeria at https://www.cbn.gov.ng/rates/ExchRateByCurrency.asp on 10 April 2018.

7 'Nigeria's Merchandise Trade Declined Marginally QoQ but Increased YoY for Q4 2017' (2018). Available at: https://www.proshareng.com/news/Nigeria%20Economy/Nigeria%E2%80%99s-Merchandise-Trade-Declined-M/38717 [Accessed 5 April 2018].

8 Roughly US$44,576,954.59 – see footnote 6.

9 Nigeria's Maritime Industry Forecast: 2018–2019 as presented by the NIMASA.

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coordinate jurisdiction (i.e., the High Court of each of the 36 states and the Federal Capital Territory and the Federal High Court). As such, the National Industrial Court has exclusive jurisdiction to deal with all shipping-related labour claims, such as the traditional unpaid wages, which the AJA defines as a maritime lien.

Notably, Sections 20(a) to (h) of the AJA stipulate that the Federal High Court can exercise jurisdiction over admiralty matters, notwithstanding any exclusive jurisdictional clauses contained in any agreement related to such a matter, where the following circumstances exist:

a the place of performance, execution, delivery, act or default is or takes place in Nigeria;
b any of the parties resides or has resided in Nigeria;
c the payment under the agreement (implied or express) is made or is to be made in Nigeria;
d the plaintiff submits to the jurisdiction of the Nigerian court or the *rem* is within Nigerian jurisdiction;
e the government of a state of the federation is involved and the government or state submits to the jurisdiction of the Court;
f some financial consideration is to be derived from the contract in Nigeria; or
g in the opinion of the Court, the cause, matter or action is one that should be adjudicated upon in Nigeria.

Despite the foregoing, recent interpretations of Section 20 of the AJA suggest that any jurisdictional clause that seeks to oust a Nigerian court's jurisdiction in favour of a foreign court (and not an arbitration clause (Nigerian or foreign)) shall be considered null and void. However, only the jurisdictional aspects of the clause are affected, not the entire agreement. Section 10 of the AJA[10] clearly empowers the Federal High Court to recognise and enforce arbitration clauses in admiralty agreements.[11]

Section 18 of the AJA states that proceedings in a maritime claim or a claim on a maritime lien or other charge shall be commenced within any stipulated limitation period provided in the contract in respect of such claim. Where there is no stipulated limitation period in an agreement or law, proceedings must be commenced within three years of the cause of action arising.

The MSA prohibits the commencement of any action for payment by a salvor more than two years after completion of salvage.[12] Collision claims can also not be commenced more than two years after accrual of the cause of action.

10 Section 10 of the AJA codifies Nigeria's obligations under Article II(1) of the New York Convention, which provides that Nigeria and the other contracting states shall recognise an agreement in writing under which parties undertake to submit their disputes to arbitration. Article II(3) of the New York Convention provides that: 'The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.'

11 *Onward Enterprises Limited v. MV 'Matrix' & 2 Ors* (2010) 2 NWLR (Pt. 1179) 530, and *The Owners of The MV Lupex v. Nigerian Overseas Chartering and Shipping Limited* (2003) FWLR (Pt 270) 1428.

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

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ii Arbitration and ADR

In general, commercial arbitration in Nigeria is governed by the ACA. It primarily grants parties the freedom through arbitration agreements to determine the arbitral procedure to govern their dispute resolution. When parties do not agree on 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.[13] There are some other very active arbitral institutional bodies in Nigeria, with their own procedures, that entertain commercial disputes, including maritime and shipping disputes. Notable in this regard are the Chartered Institute of Arbitrators UK, Nigeria branch, The Lagos Court of Arbitration (which was established under the Lagos Court of Arbitration Law, No. 17, 2009) and the Lagos Regional Centre for International Arbitration (the formation of which is backed by federal legislation).[14]

Nigeria does not have any specific maritime arbitration procedure legislation. However, there is recourse to either the Maritime Arbitrators Association of Nigeria (MAAN), a non-governmental body comprising maritime and commercial law practitioners, master mariners, surveyors, insurance brokers and other maritime practitioners, or to experienced arbitrators, who are committed to providing specialised arbitration services for the settlement of shipping disputes. The MAAN has developed arbitration rules for large-scale (US$15,000 and above) and small-scale (below US$15,000) maritime claims.

There has been a progressive effort during the past 15 years 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 Court (LMDC). If parties fail to resolve their dispute through ADR, then the court would proceed to trial of the action. Matters resolved by mediation at the LMDC are entered as consent judgments of the Lagos State High Court and are enforceable.

iii Enforcement of foreign judgments and arbitral awards

The enforcement of foreign judgments in Nigeria is regulated by the following two statues:

a Reciprocal Enforcement of Foreign Judgments Ordinance, Cap 175, Laws of the Federation of Nigeria and Lagos, 1958 (REJ) (this Ordinance was enacted in 1922 as LN 8, 1922); and

b Foreign Judgment (Reciprocal Enforcement) Chapter C35, Laws of the Federation 2004 (FJA).[15]

Until recently, there was intense intellectual polemics among text writers, commentators and legal practitioners as to which of these two statutes regulates the enforcement of foreign judgments in Nigeria. While the debate continued, there was one common factor to both pieces of legislation – that is, the registration and enforcement of foreign judgments (including maritime judgments) be based on reciprocity.

The FJA provides for a one-year limitation period for the registration and enforcement of foreign judgments, and the REJ has a six-year limitation period.

13 Section 15 of the ACA.

14 The Regional Centre For International Commercial Arbitration Act Cap. R5 LFN 2004.

15 Originally enacted in 1960.

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The REJ, owing to its English origins, lists a number of Commonwealth countries in favour of which reciprocal status was granted for judgments of their superior courts. The FJA, on the other hand, empowers the Minister of Justice to make orders in respect of countries with which the Minister is assured would grant reciprocal enforcement to Nigerian judgments before the provisions of the FJA would be applicable to the judgment of such countries. However, no such order has been made to date by the Minister. As such, the FJA remains inoperative, even though it was enacted well after the REJ. The fact that the FJA did not repeal the REJ further compounds the legal quagmire.

Although there have been several court decisions suggesting that registration and enforcement of judgment should follow the provisions of the FJA, the Supreme Court has been consistent during the past 10 years that the REJ is the applicable law, for the time being, for the registration and enforcement of judgments from the United Kingdom and other named Commonwealth countries (pursuant to Section 5 FJA) until the relevant orders are made by the Minister of Justice pursuant to the FJA. The foregoing was recently echoed in *Bronwen Energy Trading Ltd v. Crescent Africa (Ghana) Ltd*,[16] in which the Supreme Court relied on earlier decisions.[17]

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 to reciprocate enforcement of Nigerian judgment, but also because of the conditions contained in the REJ that may prevent a duly obtained judgment in any jurisdiction from being registered and enforced in Nigeria.[18]

Order 52 Rules 16 and 17 of the Federal High Court (Civil Procedure Rules) 2009 also govern the recognition and enforcement of arbitral awards at the Federal High Court, which has exclusive jurisdiction over admiralty matters.

Nigeria is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention), which was included as a schedule to the Arbitration and Conciliation Act, Cap A8 Laws of the Federation of Nigeria 2004 (ACA). An arbitration 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, Section 54 applies to recognition and enforcement of awards between Nigeria and any other contracting state to the New York Convention, pursuant to conditions stipulated thereunder.

The ACA does not specify a limitation period for the recognition and enforcement of an award. As such the question as to when time begins to run for the purpose of commencing the enforcement of an arbitral award has always been the subject of much debate. The foregoing stems from the conception of enforcement proceedings as an action instituted for the assertion of a right. If it is considered as such, then the six-year limitation period

16 (2018) LPELR-43796(CA).

17 See *Macaulay v. RZB Austria* (2003) ALL NLR 393, *Marine & General Assurance Company Plc v. Overseas Union Insurance* (2006) 4 NWLR (Pt. 971) 622 and *Grosvenor Casinos Ltd v. Halaoui* (2009) 10 NWLR (PT 1149) 309.

18 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 not subject to appeal in another country or that the judgment is not contrary to public policy in Nigeria.

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contained in the Limitation Act 1966 and the limitation laws of the different states (and the Federal Capital Territory, Abuja) for the institution of an action in a Nigerian court is therefore applicable.

In *Murmansk State Steamship Line v. Kano Oil Millers Limited*,[19] *City Engineering Nigeria Limited v. Federal Housing Authority*[20] and *Tulip (Nig.) Ltd v. Noleggioe Transport Maritime SAS*,[21] the Supreme Court decided that the period of limitation runs from the date of the accrual of the original cause of action in the arbitral agreement, being the date on which the claimant acquires the right to institute an arbitral proceeding, and not from the date of the arbitral award.

The decision of the Supreme Court in *City Engineering v. Federal Housing Authority* is most unsatisfactory for the law does not command impossibility. Time cannot start to run before the making of an award. Second, an arbitration agreement constitutes two distinct contracts, namely the contract to submit a dispute to arbitration when one does occur, and second, the contract or agreement to comply with the terms of the award when made. It is therefore expected that the English position,[22] which the Supreme Court was urged to adopt in *City Engineering*, would be followed, namely that the making of an arbitral award gives rise to a new cause of action as soon as the unsuccessful party fails to comply with the terms of the award, and not from the date of accrual of the original cause of action giving rise to the submission.

Notwithstanding the preceding paragraph, an applicant wishing to enforce an arbitral award in Nigeria must also ensure that the arbitration proceedings are swiftly concluded so as not to be caught up by the applicable limitation period. As an alternative, as advised by Elias, Chief Justice of Nigeria (as he then was) in the *Murmansk* case, it may be prudent for an aggrieved party to institute an action in court following a breach of the contract containing the arbitration agreement. Upon an application by the other party, the matter may be stayed pending the outcome of arbitration.

IV SHIPPING CONTRACTS

i Shipbuilding

Nigeria does not undertake a significant amount of shipbuilding. Most newbuilds are ordered from abroad but a few Nigerian shipyards build or assemble craft (barges, tugboats and riverboats) below 5,000 tonnes for use in inland waterways, cabotage operations and the lucrative support services to the oil and gas industry. The size and sophistication of the products of these shipyards are growing steadily.

There is no statutory regime governing shipbuilding, and the rights and obligations of the parties are circumscribed by the terms of the contract and the principles of English common law of contract. The structure of most shipbuilding contracts mirrors the standard provisions as adopted elsewhere – that is, the shipyard undertakes to construct the vessel to specification and to deliver and pass title following completion of sea trials coupled

19 (1974) All N.L.R 89.

20 (1997) 9 NWLR (Pt 520) 224.

21 (2011) 4 NWLR (Pt 1237) 254.

22 As stated by Otton J in *Agromet Motoimport Ltd v. Maulden Engineering Co. (Beds) Ltd* (1985) 2 All ER 436.

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with post-delivery warranties. The purchaser, on the other hand, undertakes to pay for the construction of the vessel in instalments against the completion of specified milestones and to accept delivery and title.

ii Contract of carriage

Ship and cargo owners with an interest in Nigeria may be confronted by a unique question in their quest for due diligence: in the event of damage or loss to cargo, which liability regime applies? The Hague Rules 1924 and the Hamburg Rules 1978 are concurrently in force in Nigeria. The Hague Rules are one of the statutes inherited from the time of British rule and they apply pursuant to the provisions of the Carriage of Goods by Sea Act 2004 (COGSA). Conversely, the Hamburg Rules were domesticated in Nigeria as a National Assembly act (as required by Section 12 of the Constitution) via the UN Convention on the Carriage of Goods by Sea (Ratification and Enforcement) Act 2005.

The COGSA 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. Consequently, 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, have been upheld.

The UN Convention on the Carriage of Goods by Sea (Ratification and Enforcement) Act 2005, which introduced the Hamburg Rules as a schedule, failed to expressly repeal and denounce the Hague Rules, as required by Article 15 of the Hague Rules. It is therefore arguable that the Hague Rules and the Hamburg Rules currently apply in Nigeria.

Notwithstanding the foregoing, it is the author's view that the Hamburg Rules, by virtue of the UN Convention on the Carriage of Goods by Sea (Ratification and Enforcement) Act 2005, applies in Nigeria by force of law to all carriage of goods by sea (inwards and outwards) to the exclusion of any other international convention, including the Hague Rules.

Nigeria is not a party to the Hague-Visby Rules, but it signed the Rotterdam Rules and would need to make same an act of the National Assembly for the Rotterdam Rules to apply in Nigeria once the act comes into force.

iii Cargo claims

Cargo disputes may arise as a result of loss or damage during carriage or in port during discharge. The right to sue with regard to cargo claims was originally contained in the Bill of Lading Act 1855 (the 1855 Act), being a pre-1900 United Kingdom statute of general application in Nigeria. By virtue of the 1855 Act, only the consignor, consignee and endorsee have privity and right to sue, often referred to as *locus standi*.[23]

The essential features of the 1855 Act were imported into the Merchant Shipping Act 2004 (MSA 2004), in Section 375. Regrettably, when the MSA 2004 was repealed by the MSA, Section 375 of the MSA 2004 was not preserved. As such, there is now a *lacuna* regarding applicable legislation detailing the right of suit principle in Nigeria, the cases that provide judicial precedent notwithstanding (see footnote 23). At best, it remains applicable as a common law principle of contract in Nigeria.

23 This principle is well illustrated in the cases of *Fasasai Adesanya v. Leigh Hoegh and Co* (1968) 1 All NLR p. 325 and *Nigerbrass Shipping Line Limited v. Aluminium Extrusion Industries* (1994) 4 NWLR Pt. 341, 733.

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There are some notable exceptions to these rules as have been recognised, including the *Brandt v. Liverpool*[24] doctrine, whereby the holder of the bill of lading 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; or
c presents the bill of lading.

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 *Pacers Multi-Dynamic Ltd v. MV Dancing Sisters & Anor*.[25] However, where the bill of lading is endorsed to the person named as the 'notify party', the Supreme Court held in *Basinco Motors Limited v. Woermann-Line and Anor*[26] that the action would be maintainable because property in the goods would have passed to the notify party, whose position changes to that of an endorsee.[27]

iv Limitation of liability

Under Nigerian law, not all claims against a shipowner are susceptible to limitation of liability. Nigeria, as a signatory to the 1976 Convention on Limitation of Liability for Maritime Claims (LLMC) (which replaced the 1957 International Convention Relating to the Limitation of Owners of Seagoing Ships) and the 1996 Protocol (the Protocol) thereto,[28] domesticated the LLMC and the Protocol in its laws through the provisions of Section 335(1)(f) of the MSA.

The LLMC and its Protocol formed the basis of the Limitation of Liability for Maritime Claims as stated in Sections 351 to 359 of the MSA, which set out the circumstances in which shipowners (including the owners, charterers, managers and operators of a ship), salvors and their insurers may limit their liability for maritime claims, as well as the computation for that limitation.

Sections 352(1)(a) to (g) of the MSA states the types of claims that are subject to limitation, while Sections 353(a) to (e) list 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 following underlined provision of Section 356(1) of MSA creates room for discussion as to whether or not there is a *lacuna* in the determination of the general limits of liability:

> *The limits of liability for claims other than those mentioned in this Act, arising on any distinct occasion, shall be calculated as follows:*

One interpretation of this would be that: 'the maritime claims subject to limitation under Section 352 of MSA would not be subject to the limits stated in Section 356(1). If so, how

24 [1924] 1 KB 575.
25 2012) LPELR-7848(SC).
26 (2009) 13 NWLR (Pt 1157) p. 149.
27 L Chidi Ilogu SAN, *Foundation of Carriage of Goods by Sea – The Nigerian Perspective* (2016) at pp. 199 to 206.
28 Which came into force on 1 December 1986 and 13 May 2004, respectively.

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would the limit of such claims be calculated?' On the other hand, the above provision of the MSA could mean that the general limits of liability for claims, other than claims for which specific limitations has been provided for in the MSA (such as passenger claims under Section 357), shall be calculated as provided.

The above provision of the MSA is clearly a case of inelegant drafting as the words 'other than those mentioned in this Act' create room for ambiguity as to what specific cases the limitation of liability provisions is applicable. The author aligns with the first interpretation. Pending judicial interpretation of the above provision of the MSA, a revision of the MSA is being agitated to clear this ambiguity as well as other salient issues highlighted herein.

The entry into force of the amendment to the limit of liability in the Protocol on 8 June 2015[29] (Protocol Amendment 2015) presupposes an increase in liability for the relevant maritime claims. This may not be the case in Nigeria as it is arguable that the Protocol Amendment 2015 does not automatically apply in Nigeria, pursuant to Section 335(1)(f) of the MSA, as the Constitution requires every convention to be domesticated via a law of the National Assembly before it can have force of law in Nigeria. The matter is further compounded by the fact that the MSA states expressly, in Sections 356 to 359, the limits provided for in the Protocol.

It is therefore imperative that the MSA be amended to accommodate amendments to the Protocol (such as the Protocol Amendment 2015) and how such amendments would be incorporated into the express thresholds of limitation of liability as set out in the MSA to enable Nigerians to benefit from these developments in line with international best practice.

Order 15 Rule 1(4) of the AJPR provides that a limitation of liability proceedings shall be commenced through the filing of an originating summons at the registry of the Federal High Court. An originating summons is expected to be accompanied by the following processes: (1) an *affidavit* setting out the facts relied upon; (2) copies of all the exhibits to be relied upon; and (3) a written address.

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 set 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 to allow anyone with a maritime claim against the vessel or such other parties named above to apply to set aside, vary the court's determination or lodge its interest.

V REMEDIES

i Ship arrest

The AJA and the AJPR govern admiralty matters. A party seeking to arrest a ship in Nigeria must satisfy the court that its claim qualifies as a 'maritime claim' as defined in Section 2 of the AJA. This generally means that it must be a proprietary maritime claim or a general maritime claim.

29 Thirty-six months after it was adopted by the Legal Committee of the IMO, when the Committee met for its 99th session in London.

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A proprietary maritime claim[30] includes a claim relating to the possession of a ship, title to or ownership of a ship or a share in a ship, mortgage of or a share in a ship, mortgage of a ship's freight or claims between co-owners of a ship relating to the possession, ownership, operation or earning of a ship. A claim for the satisfaction or enforcement of a judgment given by a court (including a court of a foreign country) against a ship or other properties in an admiralty proceeding *in rem* is also a proprietary maritime claim.

Section 2(3) of the AJA states the claims that fall under a general maritime claim. These include, but are not limited to, claims for damage done or received by a ship (whether by collision or otherwise), claims in respect of goods, materials or services (including stevedoring and lighterage services) supplied or to be supplied to a ship for its operation or maintenance, claims for loss of life, or for personal injury, sustained in consequence of a defect in a ship or in the apparel or equipment of a ship as well as arising out of an act or omission of the owners or characters of a ship.

The AJA stipulates that an action *in rem* can only be brought if there is a proprietary maritime claim or if, in the case of a general maritime claim, the action can be brought *in personam* against the proprietor of the vessel in question. Consequently, whenever there is a general maritime claim, an action *in rem* can only be brought before the court if, at the time of commencing the action, the person against whom an action *in personam* may have been brought (referred to as the 'relevant person') is the owner of the vessel in question, the owner of a sister vessel or the demise (bareboat) charterer of the vessel in question.[31]

In addition to the foregoing, an action *in rem* may be commenced against a ship if there is a maritime lien or other charge on that ship.[32]

An application for the arrest of a vessel is brought via an *ex parte* application (if the vessel is within Nigeria territorial waters[33] or expected to arrive there within three days, disclosing a strong *prima facie* case for the arrest order. This application must be supported by an *affidavit* deposed to by the applicant, its counsel or its agent.

The applicant is required to provide the following with the *ex parte* application:

a an undertaking to indemnify the ship against wrongful arrest; and

b an undertaking to indemnify the Admiralty Marshal in respect of any expenses incurred in effecting the arrest.

The applicant is also required to pay, fortnightly, the Admiralty Marshal's cost of 100,000 naira for maintaining the vessel under arrest.

ii Court orders for sale of a vessel

A court can order a ship under arrest in proceedings within its jurisdiction to be valued and sold on application by an interested party before or after final judgment.[34] The application can only be made if the vessel has been under arrest for six months and the owner has failed to provide security for her release and the vessel is depreciating in value. Where a sale is ordered

30 Section 2(2) of the AJA.

31 Section 5(4) of the AJA.

32 Section 5(3) of the AJA.

33 According to the Territorial Waters Act, Cap. T5, LFN 2004, 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.

34 Order 16, Rule 1 of the AJPR.

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by the court, a valuation of the ship is carried out, after which an advert is published in two national newspapers. The sale is conducted by the Admiralty Marshal within 21 days of the newspaper advertisements appearing. The proceeds of the sale are paid into court and the Admiralty Marshal files an account of sale and vouchers of the account.

VI REGULATION

i Safety

The Nigerian Maritime Administration and Safety Agency (NIMASA), pursuant to the NIMASA Act, the MSA, the Cabotage Act and other related legislation, is empowered, *inter alia*, to regulate maritime safety, security, marine pollution and maritime labour.

Section 20 of the NIMASA Act empowers the Agency 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 maritime safety conventions that have been implemented and their corresponding regulations (where applicable), pursuant to Section 215 of the MSA, are:

a the International Convention for the Safety of Life at Sea (SOLAS), 1974;

b the 1988 Protocol relating to SOLAS and Annexes I to V thereto;

c the Search and Rescue Convention 1979;

d the International Labour Organisation Convention concerning the Protection Against Accident of Workers Employed in Loading or Unloading Ships (the Dockers Convention); and

e the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation 1988.

ii Port state control

The NIMASA is the authority tasked with undertaking port state control (PSC) duties. Nigeria facilitated the development of the Abuja MOU on PSC; 16 states have signed the MOU, 11 of which have deposited an instrument of ratification with the Secretariat of the Abuja MOU. The MOU has been active, recently hosting its third Ministerial Conference and ninth Port State Control Committee Meeting with the aim of developing a unified system of PSC inspection procedure for the region.

Although vessel inspection under PSC is relatively low when compared with vessel traffic, Nigeria is one of the leading nations in Africa, having inspected more than 700 ships in 2014 and detained 63. Also, Nigeria is one of the countries with the highest positive performance indicators in the 2016–2017 Shipping Industry Flag State Performance Table prepared by the International Chamber of Shipping.

Continuous efforts are being made to train PSC monitors, inspectors, surveyors and other key officials. This is germane to Nigeria's quest to have port facilities that are on a par with those in the developed world. The idea of making Nigeria a hub in port operations cannot be removed from an effective PSC in the country and other member states.

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iii Registration and classification

The Nigerian Ship Registry (NSR) is domiciled with the 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 under the Nigerian flag. There is no provision for dual registration, as a vessel may only fly the flag of one country. Consequently, there is a requirement for vessels already registered under a foreign flag to deregister their current present port or state registries in order to be registrable in Nigeria. However, the NSR permits provisional registration of a vessel for six months to allow it sail into Nigeria with the Nigerian flag before completing a full registration on arrival.

The NSR is equally responsible for maintaining the Cabotage Register for vessels eligible to participate in the Nigerian cabotage trade.

As part of the requirements for Nigerian ship registration, an applicant is required to provide a current certificate from an approved international classification society. In this regard, the NIMASA has established collaborative links with the following leading classification societies by signing memoranda of understanding with them and has issued marine notices to this effect: the American Bureau of Shipping, Bureau Veritas, Det Norske Veritas, Lloyd's Register, the International Naval Survey Bureau and the International Register of Shipping.

iv Environmental regulation

The NIMASA's Marine Environment Management Department (MEMD) is statutorily responsible for ensuring a clean marine environment through the implementation of all relevant IMO Conventions. The MEMD draws its statutory powers from Part XXIII Section 335 of the MSA and Sections 22(2) and 23(9)(b) of the NIMASA Act.

The functions of the MEMD are generally derived from the IMO Conventions relating to the protection of the marine environment against pollution and any other related conventions adopted by the IMO from time to time. Broadly, the MEMD implements and enforces compliance to the IMO Conventions for protecting and preserving the marine environment and resources, including MARPOL 73/78, the London Dumping Convention 1972 and its 1996 Protocol 1996, the Ballast Water Management Convention 2004 and the Intervention Convention 1969.

v Collisions, salvage and wrecks

The MSA contains various provisions in respect of collisions, salvage and wrecks. The MSA mandates the observance of the Merchant Shipping (Collision) Rules 2010 (Collision Regulations), which are significantly modelled after the International Regulations for Preventing Collisions at Sea 1972 (the COLREGs) and provide practical guides for ships' conduct, *inter alia*, in anticipation and prevention of, or in reaction to, a collision. The Collision Regulations further provide for the rights of NIMASA-approved inspectors to inspect ships for the purpose of enforcing the Regulations, as well as for the duty of a ship master (to other ships and occupants of ships with which they collide) to report collisions.

Pursuant to Section 387 of the MSA, the International Convention on Salvage 1989 forms the basis of Nigeria's salvage regime set out in Part XXVII of the MSA. The MSA also provides for the Merchant Shipping (Wrecks and Salvage) Regulations 2010, which essentially set out the procedure for investigating wrecks and salvage.

Whereas the Cabotage Act provides that only vessels that are wholly owned and wholly manned by Nigerian citizens, as well as being built and registered in Nigeria, are entitled to engage in domestic coastal carriage of cargo and passengers within Nigerian waters, Section 8

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of the Cabotage Act permits foreign vessels engaged in salvage operations, as determined by the Minister of Transportation to be beyond the capacity of Nigerian owned and operated salvage vessels and companies, to operate in Nigerian water. The foregoing requirement for ministerial determination, however, shall not apply to any foreign vessel engaged in salvage operations for the purpose of rendering assistance to persons, vessels or aircraft in danger or distress in Nigerian waters.

According to the MSA, the responsibility for removal of any ship that becomes a wreck is placed on the shipowner.[35] However, this is difficult to implement as most shipowners are usually insolvent at that stage. The MSA further provides for the Receiver of Wrecks to take possession, raise, remove or destroy the whole or any part of the vessel. It is an offence for any person other than the Receiver of Wrecks (or the shipowner) to carry out any of the aforementioned without the written permission of the Receiver of Wrecks. Also, in a manner it thinks fit, the Receiver of Wrecks may sell any part so raised or removed and any property recovered in the exercise of its powers.

Despite the foregoing provisions, the Receiver of Wrecks, owing to the paucity of funds and administrative bottlenecks, has been unable to efficiently remove identified hazardous wrecks when shipowners have failed to do so. This is further compounded by several claims from alleged shipowners when the Receiver of Wrecks seeks to exercise its power of sale to raise the required funds or remove the wrecks after the shipowners have failed to remove them within the time limit set by the Receiver of Wrecks. It is expected that the Receiver of Wrecks and the NIMASA would put in place the framework for a mutually beneficial relationship with recyclers, with whom the Receiver of Wrecks can partner to remove and efficiently dispose of wrecks.

Nigeria is a signatory to the Nairobi International Convention on the Removal of Wrecks 2007 (the Nairobi WRC 2007). However, the Nairobi WRC 2007 does not have the force of law in Nigeria, as it is yet to be ratified and enacted as legislation or a law of the National Assembly, as required by Section 12 of the Constitution.

vi Passengers' rights

The Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974, and its Protocol of 1990, is applicable in Nigeria pursuant to Section 215 of the MSA. To date no regulations have been made pursuant to the Athens Convention and its Protocol.

Sections 340 and 341 of the MSA provide that passengers may claim for loss of life or injury and nothing shall deprive any person who has claimed against the right of defence or the right to limit liability where it exists; and where the proportion of damages recovered from a ship exceeds the proportion of its fault where two or more ships are involved, the ship from which the excess damages was recovered may recover the excess amount from the owners of the other ships involved to the extent of their faults. There is, however, very minimal organised international carriage of passengers by seagoing vessels into and from Nigeria.

Actions in relation to passenger claims under the MSA must be brought to court within two years of the date on which the loss or injury was caused.

35 See Sections 360 to 385 and 398 of the MSA.

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vii Seafarers' rights

Several conventions on seafarers' rights have been implemented pursuant to Section 215, MSA. These include:

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

b rights regarding general welfare, health and accommodation.

Some MSA regulations regarding seafarers' rights pursuant to international conventions have already been implemented in Nigeria. The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers 1978 (the STCW Convention) was domesticated through the rule-making authority of the Minister[36] by way of subsidiary legislation in the Merchant Shipping (Medical Examination of Seafarers) Regulations 2001 and the Merchant Shipping (Safe Manning, Hours of Watchkeeping) Regulations 2001.[37]

Other conventions domesticated by the MSA are the ILO Convention (No. 32 of 1932) on Protection Against Accident of Workers Employed in Loading or Unloading Ships (Dockers Convention Revised 1932) and the Placing of Seamen Convention, 1920.

In June 2013, Nigeria deposited an instrument of ratification for the Maritime Labour Convention 2006 (MLC) at the ILO Secretariat in Geneva. However, Nigeria is yet to domesticate the MLC, which was adopted by the International Labour Conference of the ILO in February 2006.

The AJA provides seafarers and masters with the right (as general maritime claims and maritime liens) to bring an action (including the arrest of a ship) against a shipowner for unpaid wages. However, the Federal High Court stated in a recent decision[38] that pursuant to Section 254(c)(1) of the Constitution of the Federal Republic of Nigeria (Third Alteration) 1999, the National Industrial Court is the appropriate court to deal with an action for unpaid crew wages.

VII OUTLOOK

Generally, the outlook for the Nigerian economy is good. The recent exit from recession is a positive indicator that Nigeria's economy is bound for growth during 2018.

Further to the Maritime Industry Forecast for 2018–2019 (as recently presented by the NIMASA), the Nigerian maritime industry is projected to grow by between 2.5 per cent and 5 per cent during 2018–2019; demand for maritime services in Nigeria is also expected to grow during this period. It is further expected that the total Nigerian fleet will grow by 4.08 per cent in 2018 and 4.41 per cent in 2019 (that is to say, the size of the oil tanker fleet

36 Section 408 of the MSA empowered the Minister to make regulations for the general carrying into effect of the Act.

37 Regulations 3 and 4 place duties on masters of Nigerian ships to ensure, so far as is reasonably practicable, that a seafarer on board a ship does not work more hours than is safe in relation to the safety of the ship and performance of the seafarer's duties. Section 5 places the duty on both masters and seafarers, so far as is reasonably practicable, to ensure that they are properly rested before commencing duty on a ship and that they obtain adequate rest during periods when off-duty.

38 Suit FHC/L/CS/1807/17: *Assuranceforeningen Skuld v. MT Clover Pride (Unreported)* – Ruling of Idris J delivered on 28 March 2018. The ruling was appealed but same was subsequently withdrawn and the suit discontinued. Pending consideration of this issue by the Court of Appeal, this remains the position of the law in Nigeria.

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will decrease by 2.23 per cent in 2018 and increase by 1.7 per cent in 2019; the size of the non-oil tanker fleet is to increase by 8.15 per cent in 2018 and 8.72 per cent in 2019; and oil rigs are to increase by 27.67 per cent in 2018 and zero per cent in 2019).

The following five Bills, which would positively affect the Nigerian maritime industry, are currently going through legislative processes at the National Assembly: the Anti-Piracy Bill, the Bill for the Establishment of the Maritime Development Bank, the Inland Fisheries Amendment Bill, the Deep Offshore and Inland Basin Production Sharing Contract Amendment Bill and the Cabotage Act Amendment Bill 2017.

Another noteworthy area is the development of new ports to reduce congestion at existing ports and meet global shipping trends. These Greenfield Projects comprise the following:

a Construction of the Lekki Deep Sea Port, originally scheduled to be completed in 2019, was recently given the green light by the President of the Federal Republic of Nigeria, who pledged to give the necessary support to the project.

b The Badagry Deep Sea Port is scheduled to be completed in 2018 by a consortium comprising APM Terminals, Orlean Invest, Oando, Terminal Investment Ltd and Macquarie.

c The Ibom Deep Sea Ports, driven by the Federal Ministry of Transportation, Akwa Ibom State and the Nigeria Ports Authority through a PPP arrangement, which is intended to be a major transshipment port to accommodate Panamax vessels (i.e., vessels built to standard specifications to fit through the locks of the Panama Canal).

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Appendix 1

ABOUT THE AUTHORS

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Adedoyin is a partner and chair of Bloomfield Law Practice's acclaimed shipping and oil services practice group. He holds an LLB (Hons) from Nigeria's premier university, University of Ibadan, an LLM (international commercial and maritime law) from Swansea University, Wales, and he is dually qualified to practise in Nigeria and England and Wales.

Adedoyin has advised extensively on the structure and implementation of complex, multi-million-dollar transactions and matters involving cross-border joint ventures (to take advantage of the Nigerian Oil and Gas Industry Content Development Act and the Nigerian Cabotage Act), ship and aircraft finance and lease, registration of ship and aircraft mortgages and interests, port concessions, corporate restructuring, maritime claims and casualties – litigation, arbitration and mediation, regulatory compliance and other wider-ranging issues within the Nigerian aviation, logistics, shipping and oil services industries.

He has authored and presented papers on maritime law and practice in local and international publications and forumsa. He has also, over the years, been recognised in the shipping and transport rankings of international directories such as *The Legal 500*.

Adedoyin also has considerable experience in asset management and private equity, corporate finance, commercial litigation and arbitration, project finance and general corporate and commercial law.

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ISBN 978-1-912228-36-2

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