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RESEARCH ARTICLE

MARITIME CLAIMS SUBJECT TO LIABILITY LIMITATION IN NIGERIA: THE LEGAL FRAMEWORK

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ABSTRACT

This article examines the maritime claims that are subject to liability limitation as provided for in both the Nigerian Merchant Shipping Act, 2007 and the repealed Merchant Shipping Act 1963. It identifies some distinctions inherent in the application of the two Acts in respect of limitable claims. It concludes by stating that the legal provision allowing ship owners and their representatives to limit liability for loss or injury suffered by cargo owners due to delay in the delivery of goods under a contract of carriage should be abolished as the law is not in the best interest of Nigeria and its cargo owners.

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INTRODUCTION

Liability limitation for maritime claims is part of the Nigerian laws.[1] Liability limitation is a doctrine that allows those who are parties to marine adventure with particular reference to shipowners and their representatives to limit the amount of compensation they can pay to the victims of loss or damage caused by or on board their ship.[2] Section 352 of the Nigerian Merchant Shipping Act (MSA) 2007 makes provision for the maritime claims that are subject to limitation while section 353 provides for the claims exempted from limitation of liability. The MSA 2007 was tailored to suit the liability provision of the international convention for Limitation of Liability for Maritime Claims (LLMC) 1976 with its Protocol of 1996. This Convention was directly incorporated into the Nigerian shipping laws by section 335(f) MSA 2007. It is to be noted that there appears to be paucity of case law authorities in Nigeria on the interpretation of most of the maritime claims that are subject to liability limitation under section 352 MSA 2007. However, in the course of analysing the provision of this section, attention would be paid to how the claims had been interpreted by foreign courts in different jurisdictions with similar provision where there is no decided authority on the subject point in Nigeria.

[1] This is provided for in section 351 Merchant Shipping Act 2007 of Nigeria.
[2] GottardGauci, 'Limitation of Liability in Maritime Law: An Anachronism?', (1995) Maritime Policy, Vol. 19, No1, at 65-74.

Claims subject to limitation

It is not every claim of an aggrieved party against a shipowner that is subject to limitation of liability in Nigeria. Section 352 MSA 2007 has specifically spelt out the claims in respect of which a shipowner can exercise his right to limit liability.

The section provides thus:

352(1) Subjects to section 354 and 355 of this Act, the following claims, whatever the basis of liability may be, shall be subject to limitation of liability:

(a) Claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation) occurring on board or in direct connection with operation of the ship or with salvage operations, and consequential loss resulting there from;
(b) Claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;
(c) Claims in respect of other loss resulting from infringement of rights, other than contractual rights occurring in direct connection, with the operation of the ship or salvage operation;
(d) Claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship.

(e) Claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this part of this Act, and further loss caused by such measures or claims in respect of floating platforms constructed for the purposes of exploring or exploiting the natural resources at the sea-bed or the subsoil thereof;
(f) Claims in respect of the raising of or the removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned, including anything that is or has been on board such ship.

2.Claims set out in subsection (1) of this section shall be subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise:

However, claims set out under paragraph (d)(e) and(f) of subsection (1) of this section shall not be subject to limitation of liability, to the extent that they relate to remuneration under a contract with the person liable.

Analysis of limitable claims

Claims whatever the basis of liability may be

Section 352(1) MSA 2007 provides to the effect that subject to excluded claims, which are specified in sections 353[3] and 355[4] and when there are reasons for barring limitation of liability as provided for in section 354, limitation of liability shall apply to all claims specified in sub-sections (a) to (f) of the section, whatever the basis of the liability may be for breach of contract, debt or damages or in tort. Furthermore, section 352(2) emphasizes that claims set out in sub-section (1) shall be subject to limitation 'even if brought by way of recourse, or indemnity under a contract or otherwise'. This section seems to have altered the previous position under the Nigerian repealed 1962 Merchant Shipping Act (MSA) where limitation was only applicable to claims for which the ship owner was only liable in damage and not in claims for a debt or for an indemnity under contract.[5]

Claims in respect of loss of life or personal injury occurring on board or in direct connection with the operation of the ship or with salvage operation (S. 352(1)(a))

Under the repealed 1962 MSA, the right to limit liability was available in respect of injury or damage caused to a person or property on board, or if they were not on board, only if such injury or damage was caused by a person on board or by a person not on board in the course of specific activities which are laid down in section 363(a) (b) MSA 1962. Therefore, limitation of liability was for:

Acts or omissions done by a person on board or in the navigation or management of the ship, or in the loading, carriage or discharge of its cargo, or in the embarkation of her passengers, or through any other act or omission of any person on board the ship.[6]

This provision, which was similar to the provision of Article I of International Convention Relating to the Limitation of the Liability of Owners of Sea Going Ships 1957, resulted in the much criticised decision in The *Tojo Maru*[7] where the House of Lords held that the salvors were not entitled to limit their liability since the negligent act of the diver was not an act done either in the 'management' of or 'on board' the tug.[8]

Section 352(1) (a) MSA 2007, appears to deal with this problem by replacing it with a more broad definition of claims which are subject to limitation. This it did by expanding the list to events occurring:

…on board or in direct connection with the operation of the ship, or with salvage operations, and consequential loss resulting therefrom.

This provision has some similarity with Article 2(1)(a) LLMC 1976. Identifying the extent to which the right to limit was extended by this provision was a subject of litigation in *CMA CGM S.S. v Classica Shipping Co. Ltd*,[9] where the court held that the ordinary meaning of Article 2(1)(a)[10] LLMC 1976 does not 'extend the right to limit to a claim for damage to the vessel by reference to the tonnage of which limitation is to be calculated'.

A similar decision was reached in The *Aegean Sea*,[11] where the court held that loss of the ship was not the loss of:

property… occurring in direct connection with the operation of the ship where the claim is in respect of the ship brought by a group of persons in the category of shipowners since it is the operation of the very ship which must cause the loss of property, the ship cannot be the object of the wrong.[12]

Thomas J, further stated that the phrase:

"operation of the ship" encompasses all that goes to the operations of the ship including the selection of a port and the ascertainment of its safety and suitability for the vessel and the provision ofwhat might be necessary for the vessel to use it safely such as chart and tugs.[13]

Furthermore, in *The Caspian Basin,*[14]the meaning of the phrase 'in connection with the operation of the ship' was expanded by Rix J, when he held:

"In direct connection with the operation of the ship" is the way in which the Convention expresses the necessary linkage between loss or damage to property on the one hand and the ship in respect of which the claim to limit is made on the other. It is submitted that where there is a claim in respect of cargo lost in consequence of a ship, for example, being ordered to an

[3] The claims excluded from limitation under section 353 MSA 2007 include: claims for salvage or contribution in general damage, claims for oil pollution damage within the meaning of the International Convention on Civil Liability for Oil Pollution damage, claims subject to International Convention or National legislation prohibiting limitation of liability for damage, etc.
[4] This is where the claim relates to counter claims.
[5]See MSA 1962, ss. 362 and 363.
[6]MSA 1962, s.363(c).
[7](1971)I Lloyd's Rep. 341.
[8]Patrick Griggs, et al, *Limitation of Liability for Maritime Claims 6th ed.. (London, Singapore, 2005)at 19.*
[9](2004)1 Lloyd's Rep. 460.
[10]Similar to MSA 2007, section 352(1)(a).
[11](1998)2 Lloyd's Rep. 39.
[12]See Griggs, *et al*, (n8) at 19
[13]The *Aegean Sea*. (1998) 2Lloyd's Rep.39.
[14](1997) 2 Lloyd's Rep 507 at 522. (1998) 2 Lloyd's Rep. 461 at 473.

unsafe port, section 352(1)(a) would be activated since such an order would have been carried out in direct connection with the operation of the ship.

Nonetheless, payment of pollution claims for property damage and property clean-up would fall within section 352(1)(a) as being incurred in direct connection with the operation of the ship. This may arise as a result of a decision to order the ship to an unsafe port or by virtue of the way in which she was navigated.

Therefore,

…so long as there is that necessary linkage between any of the heads of loss or damage which are itemized in Article 2(1)(a)[15] and the ship against which the claim is made, it would appear that the right to limit liability for such claim is established.[16]

Claim in respect of loss of cargo or passenger's luggage (s. 352(1) (b) MSA 2007)

The apparent innovation introduced by this subsection is the extension of a right of limitation to shipowners seeking to limit liability for loss suffered by cargo owners due to delay in delivery of the goods under the contract of carriage of passengers and their luggage. It appears that the effect of this subsection on the Nigerian cargo owners might not have been well thought out considering the peculiarity of Nigeria in shipping business. This provision may have a negative impact on Nigeria as it is primarily a cargo owning nation. Making this section as part of the Nigerian laws might have been the fall out of the transplantation of the LLMC 1976 with its Protocol of 1996 to the MSA 2007.[17]

The question is whether there was any need for this unbridled transplant considering the disadvantaged position in shipping business in Nigeria. Reacting to section 363 of the repealed 1962 MSA which gave shipowners the right to limit liability in similar way as section 351 MSA 2007, Wilson had this to say:

It is evident that s. 363 of MSA has been specially designed to protect shipowners and by extension, shipping business. Unfortunately, s.363 was lifted from the English MSA of 1894 without regard to Nigerian's peculiar circumstance as a non-ship owning nation. As a result, s.363 inures to the benefit of foreign ship owners. There is need for legislative intervention to update this law.[18]

The author is of the opinion that the right given to shipowners to limit liability for loss suffered by cargo owners due to delay in the delivery of goods under a contract of carriage should be reviewed so as not to place unnecessary burden on an innocent cargo owner.

Claims for infringed rights other than contractual rights (352 (1) (c) MSA 2007)

Section 352(1)(c) MSA 2007 extends limitation of liability to claims in respect of loss resulting from infringement of rights which occur in direct connection with the operation of the ship or salvage operations. The proviso here is that such loss must not arise from infringement of contractual rights. Thus, in interpreting similar provision under Article 2 LLMC 1976, the following were held to qualify for inclusion into this provision: right of access into a port by other ships, or the rights of the port itself, if the port is obstructed by a stranded ship which prevents a right of passage or use of the port facilities;[19]

claims for loss of profit made by fishing boat owners and others, which can properly be described as resulting from the infringement of rights other than contractual rights;[20] andright of passage enjoyed by a railway company over a bridge spanning a river.[21]

However, the right of the shipowner to own freight under a charter party was held to be a claim for infringement of contractual rights and therefore not within the scope of Article 2(1)(c)[22] of the 1976 Limitation Convention.[23]

Claims for removal or rendering harmless of the cargo of the ship (s. 352(1) (d) MSA 2007)

By virtue of this section, limitation is expressly available to a shipowner in respect of certain claims relating to the removal, destruction or rendering harmless of cargo except where such claims relate to remuneration under a contract with the person liable as provided for in section 352(2) MSA 2007.

Claims in respect of measures taken in order to avert or minimize loss (s. 352(1)(e) MSA 2007)

Griggs, commenting on a similar provision under LLMC 1976, stated that the original text of this subsection as submitted to the 1976 Conference[24] by the Drafting Sub-Committee read as follows:

(f) claims in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with this Convention and further loss caused by such measures.

Griggs submits that the effect of this 'original draft' was to allow the shipowner (the person liable) to limit his liability in respect of a particular category of loss. This sub-section also allowed him to limit his liability in respect of claims made against him by third parties for the expenses incurred in taking measures to avert or minimize that loss.[25] This right is also extended to claims for further loss 'caused in the course of taking those measures to avert or minimize the loss'.[26]

An example of this can be found in a situation where 'there is a threat of chemical pollution following a stranding' and measures are taken by 'third parties to minimize the damage

[15]This is similar to section 352(1)(a) MSA 2007.
[16]Griggs, et al, (n8).
[17]See section 335 MSA, 2007 which allows the application of the Limitation of Liability for Maritime Claims Convention 1976 with its Protocol of 1996 as part of Nigerian shipping laws.
[18]Inam Wilson, 'Scope of Limitation of Shipowners's Liability Under Section 363 MSA,' The Maritime Newsletter, Volume 2, at 155.
[19]AlekaMandaraka Sheppard, *Modern Maritime Law and Risk Management* (London;informa, 2009) at 882
[20]*ibid.*
[21]Griggs, et al, (n8) at 22. Citing *Gypsum Carriers Inc. v The Queen* (1978) 78 D.L.R 175, and (1978) 4 Current Law para. 706.
[22] Similar to MSA 2007, Section 352(1)(c).
[23] The *Aegean Sea* (1998) 2 Lloyd's Rep. 39.
[24]This was the Conference under which the LLMC 1976 was approved. This provision, that is, Article 2(1)(f) 1976 Convention is similar to MSA 2007, section 352(1)(e).
[25]Griggs, et al, (n8) at 24.
[26]*ibid.*

caused thereby'. The 'subsequent claim against the shipowner (the person liable) to recover the cost of taking such measures will be subject to limitation'. Thus, if in the 'course of taking those measures further loss is caused, claims arising will also be subject to limitation'.[27]

Griggs further submitted that:

Examination of the Official Records of the 1976 Conference suggest that the Delegates' principal concern regarding the subsection as originally drafted was that a contractor brought in by a shipowner (the person liable) to effect measures to avert or minimize the loss, could find himself faced with a plea of limitation when submitting his account. This problem was overcome by inserting the rider in Article 2(2)[28] to the effect that the person limiting cannot limit against his own contractor.[29]

He further observed that:

…of further significance is the introduction by Conference delegates in line 1 of sub section(f) of the words "… of a person other than the person liable…" The introduction of these extra words appears to emphasize the fact that the right to limit arises solely in relation to a claim made against a shipowner (the person liable) to recover the cost of steps taken by a third party to prevent or minimize a loss.[30]

It has been held by court in *The Breydon Merchant*[31] that a loss 'for which the person liable may limit liability' is a:

claim made by a cargo-owner whose cargo was in peril of loss and measures were taken by a third party to minimize such loss of the cargo on board for which the shipowner would be liable and able to limit liability. The costs of those measures when paid in full by the cargo-owner to the salvor can be claimed against the shipowner who can limit his liability under this sub-paragraph. If further damage was caused to the cargo in the course of taking such measures to avert or minimize loss, a claim for such further loss will be subject to limitation under this head.

It may be observed that the combined effect of section 352(1)(e) when read in conjunction with section 352(2) of MSA 2007 may be as follows:

a. the loss in respect of which the measures to avert or minimize are taken must be one in respect of which the right to limit liability arises;
b. the claim must be in respect of either (i) expenses incurred by persons other than the shipowner (the person liable) to avert or minimize loss or (ii) further loss caused by the taking of such measures;
c. where the claim is in respect of measures taken by a third party by virtue of a contract with the shipowner (the person liable) such claim is not subject to limitation in view of the provision of section 352(2).

Claims in respect of costs incurred for wreck removal, etc (section 352(1)(f) MSA 2007)

By virtue of section 352(1)(f) MSA 2007, limitation of liability for a shipowner is expressly provided in respect of certain claims in relation to the removal, destruction or rendering harmless of cargo except where such claims relate to remuneration under a contract with the person liable in line with section 352(2).

However, it is not every claim of the aggrieved party against a shipowner that is a subject of limitation. Section 352 and 353 MSA 2007 respectively, listed the limitable claims and the claims exempted from limitation.

Conclusion

Liability limitation for shipowners in respect of maritime claims is part of the Nigerian shipping laws. The article observed that providing legal protection for shipowners for loss suffered by cargo owners due to delay in the delivery of goods under a contract of carriage might not be in the best interest of Nigeria and its cargo owners. It concludes by calling for a review of the law to avoid placing unnecessary burden on an innocent cargo owner.

[27] *ibid.*
[28] Similar to MSA 2007, section 352(2).
[29] Griggs, (n8) at 25.
[30] *ibid.*
[31] (1992) 1 Lloyd's Rep 373.