

FEDERAL HIGH COURT DETERMINES THAT DRILLING RIGS ARE VESSELS AND SUBJECT TO THE PROVISIONS OF THE CABOTAGE ACT



The Federal High Court (the “FHC” or the “Court”), in the case of ***Seadrill Mobile Units Nigeria Limited v The Honourable Minister for Transportation & 2 Others***¹ (the “Seadrill Case”), has held that Rigs fall within the scope of the definition of vessels under the *Coastal and Inland Shipping (Cabotage) Act, 2003* (the “**Cabotage Act**”) and drilling operations constitute coastal trade and cabotage, as defined under the Cabotage Act. Based on this judgment, the provisions of the Cabotage Act will now be applicable to Rigs and offshore drilling operations carried on within Nigerian territorial waters.

A Rig is not specifically listed as a Vessel eligible for registration under the Cabotage Act². However, the Schedule of fees for Waivers, as contained in the Guidelines on the Implementation of the Cabotage Act (the “**Cabotage Guidelines**”)³, lists Rigs as part of the relevant cabotage vessels. Thus, the Nigerian Maritime Administration and Safety Agency (“**NIMASA**”) asserts that Drilling Rigs should be subject to the Cabotage Guidelines. This has been fiercely resisted by upstream operators in Nigeria who contend that Rigs cannot be regarded as vessels, and to the extent that a Rig is not specifically listed as a Vessel eligible for cabotage registration in the Cabotage Act, the inclusion of same in the Cabotage Guidelines is wrongful and untenable.

¹ Suit No. FHC/L/CS/607/2016. Judgment in this matter was delivered on June 14, 2019.

² In this regard, Section 22(5) of the Cabotage Act provides that vessels which are eligible for registration include ‘passenger vessels, crew boats, bunkering vessels, fishing trawlers, barges, offshore service vessels, tugs, anchor handling tugs and supply vessels, floating petroleum storage, dredgers, tankers, carriers, and any other craft or vessel used for carriage on, through or underwater of persons, property or any substance whatsoever.’

³ The Guidelines, first issued in 2003 and subsequently revised in 2007, was issued by the Minister of Transport pursuant to his powers under Section 46 of the Cabotage Act.

Thus, in the 2008 case of *Noble Drilling (Nigeria) Limited v NIMASA & The Minister of Transportation*,⁴ (the “Noble Drilling Case”) where these issues came up for determination, the FHC held that a Rig cannot be regarded as a Vessel considering that it is incapable of marine navigation as required in the definition of a Vessel under the Cabotage Act. However, the decision of the Federal High Court was overturned on appeal, howbeit on a technical ground, without consideration of the substantive issues⁵.

Similar issues in the Noble Drilling Case were considered in the Seadrill Case where the FHC essentially determined the following issues:

- Whether drilling operations fall within the definition of ‘coastal trade’ and ‘cabotage’ under Section 2 of the Cabotage Act; and
- Whether on a proper interpretation of the Cabotage Act, particularly Sections 2, 5, 22(5), drilling rigs fall within the definition of ‘vessel’ under the Cabotage Act.

On the first issue, the Court held that where drilling operations are carried out offshore, such activities will fall within the definition of ‘coastal trade’ and ‘cabotage’ under paragraph (d) of section 2 of the Cabotage Act.⁶

Regarding whether Drilling Rigs fall within the definition of a Vessel under the Cabotage Act, the Court held that the use of the word ‘include’ in the list of vessels eligible for cabotage registration, as contained in Section 22(5) of the Cabotage Act, implies that “*similar crafts within the category listed can be allowed in*” and therefore Rigs can be included in the list of Vessels under the Cabotage Act. The Court was particularly swayed by the fact that one of the vessels of the Plaintiff is a drill ship which it regarded as “*a vessel with a drilling rig*” and which is “*capable of navigating in and within the waters of Nigeria carrying out drilling operations*”.

The implication of this judgment is that oil rigs operating on Nigerian waters will now be subject to the provisions of the Cabotage Act. In this regard, some of the critical requirements include:

- i. Specific registration of Rigs for cabotage trade at NIMASA;
- ii. Compliance with the cabotage requirements for Rigs to be wholly owned and wholly manned by Nigerian citizens, as well as built and registered in Nigeria;
- iii. Procurement of waivers of the relevant cabotage requirements highlighted in (ii) above where same cannot be satisfied by the relevant operator; and
- iv. Payment of 2% of the contract sum performed by Rigs engaged in coastal trade.

⁴ Suit No. FHC/L/CS/78/2008.

⁵ Unfortunately, the Court of Appeal did not consider the substantive issues, but instead made a pronouncement that the trial court had no jurisdiction to hear the matter.

⁶ Section 2(d) of the Cabotage Act provides that ‘coastal trade’ or ‘cabotage’ means the ‘*engaging, by vessel, in any other marine transportation activity of a commercial nature in Nigerian waters and, the carriage of any goods or substances whether or not of commercial nature within the waters of Nigeria.*’

Thus, this judgment has significant administrative and cost implications for offshore drilling operations in Nigeria, notwithstanding that there is a strong likelihood that the Plaintiffs may seek to appeal the decision of the Court.

However, we are aware of another decision subsequently delivered by the Court of Appeal in the case of ***Transocean Support Services Limited & 3 Others v NIMASA and Ministry of Transport***⁷, which differs from the judgment in the Seadrill case, and where it was held that Drilling Rigs do not fall within the scope of definition of a Vessel under the Cabotage Act. While the Court of Appeal is yet to give full details of the judgment, the decision of the Court of Appeal will take precedence over the judgment in the Seadrill Case. This position is based on the doctrine of *stare decisis*, whereby the judgment or decision of an appellate or superior court takes precedence over that of a lower court. In effect, NIMASA will still be unable to enforce the provisions of the Cabotage Act and Cabotage Guidelines in relation to Drilling Rigs. However, it is likely that NIMASA will appeal this decision in a bid to ensure that it applies the provisions of the Cabotage Act on Drilling Rigs.

Further, we are aware of a Bill currently before the National Assembly for the amendment of the Cabotage Act; to specifically include Drilling Rigs in the definition of a Vessel. Where this Bill is passed and signed into law, it will finally lay this long contentious issue to rest as Drilling Rigs will thenceforth be regarded as Cabotage Vessels. It is therefore imperative that operators are mindful of these developments which significantly impact on drilling operations in Nigeria.

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⁷ CA/L/503/2016.