



BANWO & IGHODALO

## DRILLING RIGS ARE NOT VESSELS: COURT OF APPEAL PRONOUNCES



The contention on the applicability of the *Coastal and Inland Shipping (Cabotage) Act, 2003* (the “**Cabotage Act**”) to Drilling Rigs, particularly on the question of whether a Drilling Rig can be construed as a vessel within the definition in the Cabotage Act, appears not to be close to a final resolution.

On Friday, June 14, 2019, the Federal High Court (“FHC”), in the case of ***Seadrill Mobile Units Nigeria Limited v The Honourable Minister for Transportation & 2 Others***<sup>1</sup> (the “**Seadrill Case**”), held that Drilling Rigs fall within the scope of the definition of vessels under the Cabotage Act, and that drilling operations constitute coastal trade, as defined under the Cabotage Act. However, ten (10) days later, the Court of Appeal in the case of ***Transocean Support Services Nigeria Limited & 3 Ors. v NIMASA and Minister of Transport***<sup>2</sup> (the “**Transocean Case**”), overruled the decision of the FHC in the Seadrill Case.

In the Transocean Case, the Appellants contended that (a) Drilling Rigs are not vessels within the purview of the definition of vessels under the Cabotage Act, (b) the Minister of Transport had acted *ultra vires* the provisions of the Cabotage Act by including Drilling Rigs as vessels in the Guidelines on the Implementation of the Cabotage Act (the “**Cabotage Guidelines**”)<sup>3</sup>, and (c) NIMASA’s demand for payment of 2% surcharge from the contractual earnings of the use of the Drilling Rigs were accordingly

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

<sup>2</sup> CA/L/503/2016.

<sup>3</sup> 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.



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void.<sup>4</sup> The Appellants further contended that by inserting the word 'Rig' in paragraph 9.1.1.(C) of the Cabotage Guidelines, the Minister effectively amended the provisions of section 22(5) of the Cabotage Act, which did not include 'Rigs' in the list of vessels to be registered for the purpose of payment of 2% cabotage surcharge under the Cabotage Act.

In determining whether a Drilling Rig falls within the definition of 'vessel' under the Cabotage Act<sup>5</sup>, the Court of Appeal held that it must be clearly shown that such Drilling Rig is '*designed, used or capable of being used solely or partly for marine navigation<sup>6</sup> for the carriage of persons or property on, through and under water*' as required in the definition of a vessel under the Cabotage Act. In this regard, the Court of Appeal held that Drilling Rigs are not used for marine navigation and therefore not deployed for coastal trade as contemplated under the Cabotage Act.

Further, the Court of Appeal held that considering that a Rig was not expressly listed as one of the vessels eligible for registration under the Cabotage Act, the attempt by the Minister of Transport to list Rigs in the Cabotage Guidelines is improper. It emphasized that the essence of a Guideline is to give effect to the principal legislation and not to expand the provision of the substantive statute. It therefore held that the Minister acted *ultra vires* by prescribing, under the Cabotage Guidelines, that Drilling Rigs are vessels and liable to payment of the 2% cabotage surcharge. Further thereto, this decision takes precedence over the FHC's decision in the Seadrill Case.

However, we note that a Bill is currently before the National Assembly for the amendment of the Cabotage Act to specifically include Drilling Rigs in the definition of a Vessel, and also include drilling operations in the definition of cabotage trade. We believe that the passage of this Bill will usher in a new dawn, as the debate pertaining to whether or not Drilling Rigs are vessels will finally be resolved.

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<sup>4</sup> Clause 43(2) of the Cabotage Act provides a 2% surcharge will be levied on the contract sum of any vessel engaged in coastal trade. This is further reinforced by Clause 10 of the Cabotage Guidelines which provides that the 2% surcharge is based on gross earnings on contracts performed by all vessels engaged in domestic coastal trade.

<sup>5</sup> The Court of Appeal distinguished this from the definition of a vessel under the Admiralty Jurisdiction Act which specifies that vessels include those which are used or constructed for use in navigation by water, however it is propelled, or moved.

<sup>6</sup> The emphasis is ours.

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