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NIGERIAN COURTS CONTINUE TO DEVELOP THE LAW IN RELATION TO CABOTAGE

The Federal High Court in the case of ***NOBLE DRILLING (NIGERIA) LIMITED V THE NIGERIAN MARITIME ADMINISTRATION AND SAFETY AGENCY ("NIMASA") & THE MINISTER OF TRANSPORTATION***[1] provides clarity on Sections 2, 5 and 22(5) of the Coastal and Inland Shipping (Cabotage) Act, Cap. C51, Laws of the Federation of Nigeria, 2004 ("**Cabotage Act**")[2].

Prior to this decision, NIMASA's position was that the Cabotage regime applied to every commercial activity on, in or under Nigerian territorial waters and as a result, required all operators of all drilling rigs operating in Nigerian territorial waters to register with NIMASA.

The facts of the case are as follows:

The Plaintiff, Noble Drilling (Nigeria) Limited, an offshore drilling contractor operating in the Nigerian oil and gas industry, was of the opinion that its activities within Nigerian territorial waters (drilling operations) did not amount to *"coastal trade"* or *"cabotage"* as defined under the Cabotage Act. The Plaintiff sought a determination from the court on the questions of whether drilling operations fall within the definition of the *"coastal trade"* or *"cabotage"* under Section 2 of the Cabotage Act; whether, upon a proper interpretation of the Cabotage Act, drillings rigs fall within the definition of the *"vessel"*; and whether the Minister of Transportation acted ultra vires his powers under the Cabotage Act to make regulations by including *"Rigs"* under the classification of vessels to be subject to waiver fees in the Guidelines on Implementation of Coastal and Inland Shipping (Cabotage) Act 2003; revised and issued in April 2007 (the Guidelines).

The Defendants on the other hand contended inter alia that the definition of the word *"ship"* or *"vessel"* includes a drilling rig and so the use of a drilling rig in the coastal trade or cabotage is as defined in Section 2 of the Cabotage Act. They also contended that since drilling rigs carry oil, mud and other substances from the sea bed to the surface, they are vessels within the contemplation of Section 2(a) and 2(d) of the Cabotage Act.

The decision of the court was greatly influenced by the definition given to the word *"vessel"* in the Cabotage Act. Under Section 2 of the Cabotage Act, a vessel is said to include:

> *"any description of vessel, ship, boat, hovercraft or craft, including air cushion vehicles and dynamically supported craft, designed, used or capable of being used solely or partly for marine navigation and used for the carriage on, through or under water of persons or property without regard to method or lack of propulsion;"*

In this case, the court stated that the Defendant failed to show that a drilling rig is *"designed, used or capable of being used solely or partly for marine navigation for the carriage of persons or property through, on and under the water*" and so a drilling rig could not be a vessel.

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[1] Suit No. FHC/L/CS/78/2008

[2] Cited as the Coastal and Inland Shipping (Cabotage) Act, 2003.

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Furthermore, the court was quick to point out that drilling rigs were not expressly mentioned as one of the vessels eligible for registration under Section 22(5) of the Cabotage Act and that the phrase *"marine navigation"* is crucial to the definition of a vessel under Section 2 of the Cabotage Act.

In reaching it conclusion, the learned judge went on to state that the process of navigation was a horizontal movement and so a drilling rig that exist solely to move crude oil from the oil well to the surface of the sea cannot be termed a vessel within the purview of the Cabotage Act as its operation amounts to a vertical movement of goods (crude oil).

In addition, the court held that the listing of rigs under the caption *"Foreign vessels"* in clause 9.1.1 of the Guidelines issued by the Minister of Transportation in April 2007 was wrongful on the ground that a drilling rig did not fall within the definition of a *"vessel"* under Section 2 of the Cabotage Act. The court however held that the Minister of Transportation did not act outside his powers to make regulations under Section 46 of the Cabotage Act with regards to the provisions on *"Rigs"* in the Guidelines.

COMMENTS

The court was able to put to rest growing concerns in the oil and gas industry on the applicability of the Cabotage regime to drilling rigs. It is our opinion that the words of the Cabotage Act are clear enough to be given their literal meaning. Cabotage essentially involves the movement of goods and passengers from one place in Nigeria to any other place in Nigeria. Clearly, a rig is not listed as one of the vessels that are to be registered under the Cabotage Act, neither is it involved in the transportation of goods or passengers from one point in Nigeria to the other.

Although this decision is currently the subject of an appeal to the Court of Appeal by NIMASA, it is our opinion that this judgement of the Federal High Court would be upheld by the Court of Appeal. In the least the Federal High Court decision has addressed the commercial strains NIMASA's approach has put on the industry.

On a related note, this judgement queries NIMASA's requirement for Floating Production Storage and Offloading (FPSO)[3] units to be registered under the Cabotage Act. Although FPSOs are capable of navigation, they are not engaged in any form of navigation during operations. Of significant interest to stakeholders in the Nigerian oil and gas and shipping sectors would be a clarification on the status of FPSOs with respect to Cabotage registration in light of the decision in *Noble Drilling.*

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[3] FPSOs are usually converted oil tankers or the purpose built vessels, designed to receive oil or gas produced from nearby platforms or subsea template, process the oil or gas and store it until the oil or gas can be offloaded onto a tanker or transported through a pipeline.