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THE SHIPWRECK ISSUE

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IN THIS EDITION



**THE LEGAL ISSUES ARISING OUT OF
WRECKS & THEIR REMOVAL**



**SEIZURE OF CARGO: ACTUAL TOTAL
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THE LEGAL ISSUES ARISING OUT OF WRECKS & THEIR REMOVAL

INTRODUCTION

The wreck of a ship may be predicted, or even occur unexpectedly but one thing is certain, wrecks will happen. Where these wrecks occur, they often pose navigational as well as environmental hazards with consequent need for their urgent removal. Nigeria has had her fair share of wreck litter and in response, the Nigerian Maritime Safety and Administration Agency (NIMASA) on 7th April, 2017 directed that all abandoned ships be removed from Nigerian territorial waters.

THE LEGAL REGIME FOR SHIPWRECKS IN NIGERIA

Nigerian law does recognize these structures as well as the dangers they pose to navigational safety and the marine environment. The primary legal instruments governing wrecks in Nigeria are:

- i. The Merchant Shipping Act, 2007
- ii. The Nigerian Maritime Administration and Safety Agency Act 2007
- iii. The Nairobi International Convention on the Removal of Wrecks 2007 (although, not domesticated).

Although not as extensive as the MSA in its wreck provisions, the NIMASA Act does mandate the agency in S.22 to "receive and remove wrecks" and further in s.44 to make regulations pertaining to removal. So then, what does the law understand a shipwreck to mean?

So then, what does the law understand a shipwreck to mean? Section 360 of the MSA defines it to mean;

*"(a) a sunken or stranded ship, or any part thereof, including anything that is on board such a ship or which is stranded, sunken or in danger at sea and lost at sea from a ship; or
(b) a ship that is about, or that may reasonably be expected to become, a wreck by reason of-
(i) collision, stranding or any other incident of navigation; or
(ii) any other occurrence on board the ship or external to it, resulting in material damage, or imminent threat of material damage, to the ship."*

The act goes further to define a "hazard" to mean where a shipwreck poses a danger to navigational safety or where the wreck in question threatens the marine environment. "Removal" under the MSA is defined to mean "any form of prevention, mitigation or elimination of hazard proportionate to the hazard". Now that we have a general understanding of which laws govern shipwrecks in Nigeria and the basic terminology, we will proceed to discuss the topic of removal and more importantly, the rights and responsibilities of the parties involved, all within the context of the recently issued NIMASA directive.

WRECK REMOVAL: RIGHTS & RESPONSIBILITIES

The very existence of a wreck and its removal leads to the intertwining of different legal interests. Typically, affected persons will include, the shipowner, the Receiver of the Wreck and inhabitants of the area where the wreck was found. In this section, we take a bite at understanding the rights and responsibilities of these persons.

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#didiyouknow

On 7th April, 2017, in a directive issued by its Director General, the Nigerian Maritime Administration and Safety Agency (NIMASA) instructed all owners of abandoned ships to remove these abandoned vessels from Nigerian Territorial Waters.

1.0. THE SHIPOWNER

Primarily, it is his responsibility to remove the Wreck. However, for reasons best known to a shipowner, removal may not be immediate or prompt. While the MSA does establish NIMASA as a Receiver of Wrecks, it is imperative to note that the Agency is not to immediately remove a wreck upon discovery. Instead, the MSA in section 367 provides that the Receiver is to "set a reasonable deadline" within which the owner is to remove the wreck. Furthermore, the shipowner is to be notified in writing of the deadline and the notice is to further inform that should he (the shipowner) fail to remove the wreck, the receiver will do so at the Shipowner's expense. Where a shipowner chooses to remove the wreck as acknowledged by section 366, he may do so himself or hire the services of a private salvor. As such, where a receiver fails to inform the shipowner, it will not matter that the hazard is severe (as the Act also requires the Receiver to still notify the shipowner of his intention to act immediately when the hazard is so severe), the Receiver will have acted against the Law.

2.0. THE RECEIVER

NIMASA is the official Receiver of Wrecks in Nigeria. As Receiver, the Agency bears the responsibility for wreck removal where, the shipowner has not done so (after of course, being notified). His duties include determining whether a wreck is hazardous, marking hazardous wrecks, removing these hazardous wrecks and setting the deadline for the removal (where a shipowner elects to remove the wreck). Where a Receiver performs his statutory duty of removing the wreck, ordinarily, he should be reimbursed by the shipowner. However, there are instances where the shipowner may simply refuse to reimburse the Receiver or where the wreck itself is not claimed by anyone. In the first instance, all is not lost for the Receiver as a claim for wreck removal creates a maritime lien over the vessel in question and a sister ship. In essence, until remuneration has occurred, the Receiver's lien in respect of the wreck removal remains, inextinguishable. In the case of the latter, where the wreck remains unclaimed and there is no one to pursue, the MSA in section 379 is clear in stating that as long as the Receiver has remained in possession of the Wreck for a year, he is permitted to sell the wreck. It is also important to note that the Receiver still plays a vital role in laying down conditions of the removal operation where the shipowner elects to remove the wreck himself (or use a salvor). The MSA notes that where this occurs, the receiver is to take into consideration the threat to navigational safety and threat to the marine environment in laying these conditions.

3.0. THIRD PARTY RIGHTS

Prior to its removal, a wreck will have been lying ashore a coastline and understandably, this may lead to several rights of action against the vessel for different reasons e.g. depletion of the marine environment or just being an eyesore. It is interesting to note that the MSA is silent on the rights of action of such persons. However, Article 12 of the Nairobi International Convention notes that the liability of the shipowner to such persons is not extinguished by the muteness of the MSA on their rights of action. Instead, it is advisable that such persons seek remedy under the various legal instruments under which they can successfully hold the shipowner liable, or even in Tort!

4.0. CONCLUSION

The issues raised in this article are relatively wide and can be the topic of a thesis that is if the word limit is not exhausted! However, taking into consideration the impact of these structures on our environment and coupled with the legal issues that arise in relation to its existence and removal, there is a need for a discourse to be centred on the law governing shipwrecks. The law relating to shipwrecks is rather technical and we understand that you may need further guidance on this issue. To get more information on Wrecks, their removal, compliance issues and more, please get in touch with a member of the team!

A&A NEWSBITES

A & A WILL BE AT THE OTL 2017 EXPO

This year, Akabogu & Associates will be at the OTL EXPO 2017 Exhibition! We will be running a series of informative mini legal clinics which delegates will find very useful. You should stop by, you'll be sure to learn a thing or two! The conference runs from 22nd - 25th October, 2017

The annual OTL Africa Downstream Week is the continent's leading business forum for market insights, emerging opportunities, products' showcase and recognition of excellence in the African downstream petroleum value-chain.

For more information, please visit www.otlafrica.com



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So follow us for updates on our events, conversations on developments in the maritime and corporate world and to know what we've been up to!

REGISTER TO ATTEND THE A & A FREE BRUNCH SEMINAR ON "MARINE INSURANCE: RECOVERIES, SUBROGATION & COMPULSORY COVER"

Registration is ongoing for another A & A Free Brunch Seminar on Marine Insurance!

As part of our ongoing dedication towards capacity building in this sector, we have organized another FREE Brunch Seminar scheduled to hold on 27th June, 2017 in our office premises. The seminar will be of particular benefit to brokers, insurance companies, financial institutions, importers and manufacturers!

To register, simply visit:

<http://akabogulaw.com/marine-insurance-seminar2017/>

or call us on

+234-(0) 704 329 3271



JULY TEASER

THE PETROLEUM (GOVERNANCE & INSTITUTIONAL FRAMEWORK) BILL

On Thursday 25th May 2017, the Nigerian Senate completed the passage of the Petroleum Industry (Governance & Institutional Framework) Bill. The Bill is one of the many bills which have been proposed to the Senate over the past decade for reforming Nigeria's Oil and Gas Sector.

The Bill, if passed into law is set to overhaul the status quo in the sector; it scraps the popular Nigerian National Petroleum Corporation (NNPC), Petroleum Products Pricing and Regulatory Authority (PPPRA), the Department of Petroleum Resources (DPR) and many more agencies. The Bill also proposes the establishment of new Agencies such as the National Petroleum Company (NPC), the National Petroleum Assets Management Commission (NPAMC) and more.

Many questions surround this Bill and its prospective passage into law. Will the passage into law induce more effectiveness in this sector? Does the Bill tackle the many technical challenges that may pose a barrier to an effective oil and gas sector? Are there provisions that aim to safeguard Nigeria's marine environment from spillage and pollution?

Next month, we will conduct a thorough review of the Bill in which we will attempt to answer some of these questions. Interested in joining in on the conversation? Please tweet at us (@akabogulaw) and make sure you subscribe to get a copy of the July edition of our newsletter.



CONSTRUCTIVE & ACTUAL TOTAL LOSS UNDER INSURANCE POLICY

MASEFIELD V AMLIN CORPORATE MEMBER [2011] EWCA CIV 24

Insurance is key to mitigating loss, particularly in the maritime sector. Every day, goods are shipped across the globe and insurers are tasked with ensuring that when these goods are lost, the insured is paid. What happens where a vessel and its cargo are seized by pirates? Does this constitute an Actual Total Loss or Constructive Total Loss? This question was answered by the European Court in the case summary below. Enjoy!

The "BUNGA MELATI DUA" a chemical/palm oil tanker was seized by some Somali pirates off the Gulf of Aden sometime in 2008 during a voyage from Malaysia to Rotterdam. The cargo on board the vessel had been insured under an open cover contract which covered loss by piracy and by theft. Shortly after the seizure, negotiations opened between the owners of the vessel and the Pirates and during the course of the negotiations, the Claimant (who was the owner of two parcels of bio-diesel shipped on board the vessel) served a Notice of Abandonment to the Defendant, the insurer. The insurer declined the Notice and eventually, the owner of the Vessel paid the Pirates the ransom demanded. The vessel was released and continued its voyage to Rotterdam where the cargo was eventually discharged.

During proceedings arising out of the Notice of Abandonment, the Claimant submitted that the capture of the vessel and seizure of the cargo constituted an Actual Total Loss (ATL) of the cargo as the Claimant was "irretrievably deprived" of the cargo. The claimant further submitted that there was also a Constructive Total Loss (CTL) of the cargo as the vessel and cargo had been reasonably abandoned on account of its actual total loss appearing to be unavoidable.

Delivering judgment, Lord Justice Rix was of the opinion that; "... piratical seizure in the circumstances of this case, where there was not only a chance but a strong likelihood, that payment of a ransom of a comparatively small sum, relative to the value of the vessel and her cargo, would secure recovery of both, was not an actual total loss." It was further held that it was not an irretrievable deprivation of property, but rather a wait and see situation.

Interested in this topical issue in Marine Insurance and the trends in this sector? Then please register to attend the upcoming seminar or contact us for further enquiries on this niche concept!

Keywords

ACTUAL TOTAL LOSS: A loss that occurs when the insured property is totally destroyed or is damaged in such a way that it can be neither recovered nor repaired for further use, or the insured is irretrievably deprived of it

CONSTRUCTIVE TOTAL LOSS: Insured property that has been abandoned because its actual total loss appears to be unavoidable, or because it could not be preserved or repaired without an expenditure which would exceed its value

#didyounknow

According to Forbes, the total cost of piracy worldwide is somewhere north of \$1 billion a year.

Before the piracy boom, marine insurers like Lloyd's had no reason to levy premiums to cover war risk (under which piracy falls), kidnapping and ransom. Today, shipowners are forking over some \$400 million a year to cover themselves against a roughly 1% chance that their vessel will be attacked



A & A ENGAGEMENTS



Speakers and panelists at the event

A & A at the CPI Oil & Gas Law Forum

We were at the Centre for Petroleum Information's Oil & Gas Law Forum on Friday, 19th May 2017. Co-ordinated by Senior Partner, Mr Emeka Akabogu, the discourse was centered on the recently passed Petroleum Industry Bill and the role of the Nigerian legislature in Nigeria's Hydrocarbon sector. Attended by a cross section of legal minds and experts in this field, the session proved to be a truly engaging and informative one!

For more information on how to get involved with the Oil & Gas Law Forum, please get in touch with us!

A & A at the Nigerian Maritime Law Association Meeting

On Thursday, 25th May 2017, we were at the meeting of the Nigerian Maritime Law Association. Among many matters raised was the issue of young lawyers' participation. Senior Partner, Mr Emeka Akabogu, who is also the Secretary of the Association urged young Lawyers in attendance to take interest in the many activities of the Association, noting the importance of the sector and its regulations to the development of the Country's economy.

For more information on how to get involved in the NMLA, please get in touch with a member of the team!



See you in July!

We hope that you have enjoyed this month's edition. Here at Akabogu & Associates, we work tirelessly to ensure that our subscribers are kept informed of developments in the Maritime and Corporate world. We encourage our subscribers to invite their colleagues to subscribe to our newsletter. If you haven't yet subscribed, then please on the "Subscribe Now" link in your email to do so!

Also, be sure to follow us on our social media handles!