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# Beneficiaries of maritime liability limitation in Nigeria

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**Abstract**
Limitation of liability for maritime claims is part of the Nigerian shipping laws. Currently, section 351 of the Nigerian Merchant Shipping Act 2007 has made provision for the application of this principle including those who are to benefit from its application. The beneficiaries include the shipowners, salvors and insurers of liability. The write-up concludes by calling for the amendment of this law to enable victims of loss caused by shipowners to have direct action against the liability insurer. This would reduce the negative effect of the 'pay to be paid' principle of insurance claim.

**Keywords:** charterer, maritime claims, shipowner, salvor

## 1. Introduction

The limitation of liability legal framework in Nigeria owes much of its substance to the United Kingdom (UK) legislation [1]. One of the examples of British legislation on limitation of liability for maritime claims that was incorporated into the Nigerian shipping laws was the United Kingdom Shipping Act 1894 [2]. The repealed Nigerian Merchant Shipping Act of 1962 which made provision for liability limitation for shipowners was a true replica of section 503 of the United Kingdom Merchant Shipping Act 1894 [3].

According to Mbanefo [4], section 503 of the United Kingdom Merchant Shipping Act 1894, which Nigeria inherited played an important role in the formation of the 1957 International Convention on limitation of liability [5].

Although Nigeria did not formally ratify the 1957 Limitation Convention, it however, incorporated the provisions of this Convention into its repealed Merchant Shipping Act (MSA) 1962. This point was fortified by the provision of section 381 MSA 1962, which defined 'Convention' as referring to the 1957 Convention. The MSA 1962 has been repealed by the Nigerian Merchant Shipping Act, (MSA) 2007.

The current Nigerian Merchant Shipping Act 2007 drew its life from the Limitation of Liability for Maritime Claims Convention (LLMC) 1976, with its Protocol of 1996 [6].

### Analyses of persons entitled to limit liability for maritime claims in Nigeria?

Persons entitled to limit liability for maritime claims in Nigeria are provided for in section 351 MSA 2007. Section 351 states that:

1. In this part of this Act, the shipowners and salvors as defined in sub-section (2) of this section may limit their liability as provided in this part of this Act.
2. The term:-
   a. 'Shipowner' means the owner, charterer, manager and operator of a ship; and
   b. 'Salvor' means any person rendering services for salvage operations and salvage operations shall include operations referred to in section 387 of this Act.
2. If any claims set out in section 352 of this Act are made against any person for whose act, neglect or default the shipowner or salvor is responsible, such person shall be entitled to avail himself of the limitation of liability provided for in this part of the Act.
3. In this part of this Act the liability of a shipowner shall include liability in an action brought against the vessel herself.
4. An insurer of liability for claims subject to limitation in accordance with the rules of this part of this Act shall be entitled to the benefits of this part of this Act to the same extent as the assured himself.

It is to be stated here that in the course of analysing these provisions, attention would be paid to how these provisions of the law had been interpreted by foreign courts in different jurisdictions with similar provisions where there is no decided authority on the subject point in Nigeria.

### Who is a shipowner?

Under the original version of section 503 of the United Kingdom Merchant Shipping Act 1894, it was only the owners of the ship or the registered or beneficial owners that were allowed to limit liability. However, by Article 6 of the 1957 Convention [7], the meaning of 'shipowner' was extended to include:

charterer, manager and operator of the ship, and to the master, members of the crew and other servants of the owner, charterer, manager or operator acting in the course of their employment, in the same way as they apply to an owner himself.

Griggs [8], commenting on Article 6 of the 1957 Convention stated that the extension of the class of persons who was entitled to limit liability was to overcome the problem which was encountered in the case of the *Himalaya* [9] where attempts were made by a claimant to circumvent the effect of limitation of liability by bringing a claim against some persons other than the owner, for example, the master of the vessel.

On a closer look at the definition of 'shipowner' in section 351(2) (a) MSA 2007 and section 370 of the repealed MSA

1962, it would appear that certain classes of persons who were entitled to limit liability under the 1962 MSA, such as persons merely in possession but not operating the vessel 'for example a ship repairer or ship builder or mortgagee, are no longer able to limit' [10]. This is because by eliminating the words 'any person interested in or in possession of the ship', in section 351(2)(a), which were provided for under the repealed 1962 MSA, it is clear that the right to limit is not given to a 'mortgagee, unless the mortgagee upon default by the owner takes over the management and operation of the ship' [11]. Also, the right is not given to other persons who merely 'hold possession of the ship, such as a ship-repairer, at a given time' [12].

However, it is submitted that if the ship-repairer or ship builder or mortgagee can show that any of the class of persons who is given the right to limit under section 351(1)(a) was 'responsible' for his 'act, neglect or default', so as to bring him within section 351(3), he can be allowed to limit liability [13].

**Manager**

As to the position of 'manager', Griggs submits that: If the word 'manager' in Article 1(2) [14] is restricted to one who is involved in the operation of the ship, it seems likely that a crewing agent would not be covered. Because a crewing agent is an independent contractor, he is not one "for whose act neglect or default" the shipowner is vicariously liable [15].

This means that the word 'manager*'* 'does not include the crewing agent but a manager who is involved in the technical management of the ship, or in the ship's operation [16].'

**Charterer**

A charterer is within the definition of 'shipowner' as provided for in section 351(2) (a) MSA 2007. Thus, a charterer is entitled to limit liability when acting in the capacity of a shipowner. But the question has been whether a charterer can limit liability in respect of claims brought against him by the shipowner when not acting in the capacity of a shipowner. An answer to this poser was given in the decided case of *The Aegean Sea* [17]. This matter was in respect of a charter, where the owners of the vessel, the *Aegean Sea*, let her out to Repsol Oil International Limited (ROIL) for the carriage of crude oil to 'one or two safe port(s) European Mediterranean'. ROIL was a trading company and was wholly-owned by the state of Spain and which operated refineries in Spain. Whilst proceeding to berth at *Lacoruna*, to discharge her cargo, the vessel grounded on to rocks, broke in two and exploded. The vessel and most of her cargo were lost, and there was large scale pollution of the environment and damage to private property. Claims were brought against the shipowners and they sought to recover from ROIL these sums together with the value of the vessel, the bunkers on board and freight.

The basis of the claim against ROIL was that ROIL had nominated an unsafe port or alternatively that the loss was sustained as a result of complying with ROIL's orders as charterers and that the shipowners were entitled to an implied indemnity. The charterers denied the port was unsafe and further contended that in the event that they were found liable to the owners, they were entitled as charterers of, *The Aegean Sea*, to limit their liability under the provisions of the Convention on Limitation of Liability for Maritime Claims 1976 (the 1976 Convention). The court took as preliminary issues the questions of whether ROIL, as charterers were entitled to limit and whether the shipowners' claims were within the scope of Article 2 of the 1976 Convention [18].

Thomas J. (as he then was) in the court of first instance, observed that the Convention identified two categories of persons entitled to limit liability. These were the shipowners and the salvor. He further stated that the distinction was introduced into the 1976 Convention in order to 'overcome the effect of the earlier decision of the court in *The Tojo Maru* and thereby ensure that a salvor could limit whether or not a shipowner and whether or not acting in that capacity'. However, he stated that no such distinction was made for a charterer, which suggested to the judge that a charterer should be entitled to limit when acting in the capacity of a shipowner, for example when issuing bills of lading. The court also referred to Article 9 of the 1976 [19] Convention which provides for aggregation of claims against all those within Article 1(2) [20] if they arose on one distinct occasion, and Article 11 [21] which provides for one fund to be constituted on behalf of the shipowner and the other entities identified in Article 1(2). It was the conclusion of the court that the 1976 Convention did not provide (and was not intended to provide) an entitlement to charterers to limit for these types of claims brought against them by shipowners. This decision was also adopted by David Steel J. (in the court of first instance) in *CMA CGM SA v. Classica Shipping Co. Ltd. (The CMA Djakarta)* [22]. Therefore the principle of law established is that the charterer is only entitled to limit liability when acting as a shipowner and cannot limit liability in respect of claims brought against him by a shipowner.

**The Salvor**

It is to be mentioned in passing that this is a significant innovation introduced by section 351(1) and (2)(b) MSA 2007 and extending to any person for whose act, neglect or default a salvor is responsible [23]. This is a direct incorporation of Articles 1(c)(3)(4) of the LLMC 1976 into the Nigerian MSA 2007.

Griggs, commenting on Articles 1(c)(3)(4) of the LLMC 1976, stated that 'this extension was made in response to the pressure from international salvage interests following the decision of the House of Lords in *The Tojo Maru* [24]. The court's decision in this case was that a salvor was not entitled to limit his liability in respect of damage caused by the negligent act of a diver who, although assisting in the salvage, was working away from the salvor's vessel at the time the damage occurred. The House of Lords held that the diver's negligent act was not an act done 'in the management of the salvor's tug nor an act done on board that tug' [25]. Therefore, there was need for this provision of the law to protect salvors in the course of the discharge of their duty.

**Any person for whose act, neglect or default the shipowner or salvor is responsible.**

Section 351(3) MSA 2007 extends the right to limit liability to 'any person for whose act neglect or default the shipowner or salvor is responsible.'

This provision, it is submitted, has the capacity to create a

potential problem of interpretation as to the extent of persons for whose acts or neglect the shipowner is responsible. Mandaraka-Sheppard, commenting on a similar provision under the LLMC 1976, suggested that the provision was mainly concerned with granting an 'independent right of limitation to those people for whose act, neglect or default the shipowner, or charterer, or manager, or operator, or salvor will be vicariously liable'[26]. But this does not solve the problem. This is because it is not clear what is meant by the word 'responsible' as it may be subject to both restricted and broad interpretations. According to Griggs, using a restricted interpretation, the word could mean that 'a stevedore must show that he is a "servant" of the shipowner before he can establish an independent right to limit' [27]. However, this interpretation will go against the already established legal principle in *White Rose* which established otherwise [28]. But giving a broad interpretation, it may only be necessary for the 'stevedore to show that the shipowner was "responsible" for him being involved' [29]. But in the context of claims for damage to cargo, Article III, rule I, of the Hague-Visby Rules places an obligation on the shipowner to exercise due diligence to make the ship seaworthy. Thus, in *The Muncaster Castle* [30], the House of Lords held that 'as far as this obligation is concerned,' the shipowner is liable if the vessel was 'unseaworthy as a result of the acts or omissions of independent contractors whom he has engaged'. Therefore, it would seem to follow that an independent contractor through whose act, neglect or default a ship is rendered unseaworthy, if he is sued by the owners of the damaged cargo, can limit his liability under section 351(3) MSA 2007.

This argument is fortified when one looks at the provision of Article 10(1) of the Hamburg Rules [31].

**Article 10(i) provides**

The carrier is responsible in relation to the carriage performed by the actual carrier, for the acts and omissions of the actual carrier and of his servants and agents acting within the scope of their employment.

However, Mandaraka-Sheppard submits that although the meaning of the word 'responsible' as used in Article 1(4) LLMC 1976 [32], may be difficult to know, what constitutes acceptable principles 'are enshrined in Arts 31 and 32 of the Vienna Convention on Law of Treaties [33]. Thus, the duty of the court under these circumstances, is to ascertain the ordinary meaning of the 'words' used, not only in their context, 'but also in the light of the evident object and purpose of the Convention [34]. This may be done through the application of the principle of reviewing *Travauxpreparatoires* and the circumstances under which the law was made [35].

**Insurer of Liability**

This is another innovation introduced by the MSA 2007, under its section 351(5). It states that an insurer of liability is entitled to the benefits of limitation of liability to the same extent as the assured himself. This would appear to apply where there is a direct suit maintained against an insurer by those who 'sustained damage to, or suffered loss of property, or those who suffered personal injury, or the dependent, of those whose life was lost on board, or in connection with the operation of the ship, or with salvage operations [36].

According to Mandaraka-Sheppard, there are two pre conditions that must be fulfilled before a third party can claim against the insurer. The first is that the third party must obtain a judgment or arbitration award on liability against the assured and become judgment creditor. This is because he cannot sue the insurer unless the assured's liability to him had first been established because the assured cannot claim indemnity from his insurer, if such liability had not been established [37].

This was also the position of court in *Post Office v. Norwich Union First Insurance Co* [38] where Lord Denning MR. stated:

I think the right to sue for these moneys does not arise until the liability is established and the amount ascertained. How is this to be done? If there is an unascertained claim for damages in tort, it cannot be proved in the bankruptcy, nor in the liquidation of the company. But, nevertheless, the injured person can bring an action against the wrong doer. In the case of a company, he must get the leave of the court. No doubt, leave would automatically be given. The insurance company can fight that action in the name of the wrong doer. In that way, liability can be established and the loss ascertained. Then the injured person can go against the insurance company.

Mandaraka-Sheppard further stated that the second condition that needs to be fulfilled by a third party in pursuit of claim against the insurer of liability is to obtain a winding up order since the assured (defendant) is insolvent and cannot satisfy the judgment debt [39].

In the United Kingdom for instance, for a winding-up order to be obtained, when the company is foreign, the claimant must establish jurisdiction in the United Kingdom [40]. This may be in form of the company having assets within the jurisdiction. The assets could include insurance proceeds payable in England under the protection and indemnity cover (P & I) [41]. But the issue that needs to be addressed is as to whether in the case of P & I clauses that are registered out of the United Kingdom, if the insurance proceeds would be seen as an asset for the purposes of winding up proceedings if the responsible party was paying out of the United Kingdom.

Mandaraka-Sheppard submits that what should be of greater moment should be that once the two preconditions (judgment on liability and a winding up order) are satisfied, 'the judgment creditor "steps" into the shoes of the assured and takes over the assured's rights against the insurer under the contract in respect of the liability incurred to the creditor' [42].

However, the challenge associated with the insurer of liability being entitled to the benefits of limitation of liability to the same extent as the assured himself [43] is not totally solved by the above submission by Mandaraka-Sheppard. This is because the P&I insurance rules usually require that for an indemnity to be paid to the assured, the assured must have first paid the third party. This rule is known as the 'pay to be paid' rule [44]. The essence of this rule is to prohibit the third party creditor from stepping into the shoes of the assured, since the reason why the third party needs to claim from the assured's insurer is that the assured had not paid him [45].

The implication of this is great especially in cases of loss of life or personal injury where the victims may be left without any legal remedy other than gratuitous payments [46]. It is proposed that this aspect of the law should be amended by

allowing a third party victim to maintain a direct action against a liability insurer for payment of compensation for injury or loss caused to him.

**Conclusion**

Limitation of liability for maritime claims is part of the Nigerian shipping laws. Section 351 MSA 2007 has made provision for those authorised to limit liability for maritime claims. These are the shipowners which definition include the owners of ships, charterers, managers and operators of ships. Further included in the right to limit liability are the salvors or the insurers of liability or persons for whose act, neglect or default the shipowners or salvors are responsible.

It is proposed that the law be amended to allow a victim of the negative action or in action of a shipowner to maintain a direct legal proceedings against an insurer of liability as solution to 'pay to the paid' principle of insurance claim.

**References**


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2. Section 503 of the UK Merchant Shipping Act 1894 dealt with the issue of limitation of liability for maritime claims in the UK while section 363 of the repealed Nigerian Merchant Shipping Act made similar provision, 1962.
3. John Hare, 'Limitation of liability: A Nigeria Perspective 8th Maritime Seminar for Judges (Nigeria Shippers Council) at, 2006. 21-26.
4. Louis N. Mbanefo, op. cit (n1) at, 192.
5. The full title of this Convention is the International Convention Relating to the Limitation of Liability of Owners of Sea going Ships 1957.
6. See section 335 MSA 2007 which allows for the application of the LLMC 1976 with its Protocol of 1996 in Nigeria.
7. Which Nigeria incorporated into its Merchant Shipping Act 1962 under sections 361-369?
8. Patrick Griggs, *et al*, Limitation of Liability for Maritime Claims, 4thedn. (London, Singapore, 2005).
9. (1954) 2 Lloyd's Rep. 267.
10. See MSA (a) and MSA 1962, s. 370, 2007, ss. 351(2).
11. Aleka Mandaraka-Sheppard, Modern Maritime Law and Risk Management (London: Informa, 2009) at 868, commenting on a similar provision under the 1957 Convention.
12. Ibid.
13. See Mason v. Uxbridge Boat Centre) 2 Lloyd's Rep. 592; where the judge followed the precedent of the House of Lords in The Ruapehlu AC 523 (H.L) which decided in favour of a dockworker acting as a ship-repairer under the previous statute of limitation. 1980-1927.
14. Article 1(2) LLMC 1976 has a provision similar to section 351(2) (a) MSA, 2007.
15. Griggs, *et al*, op. cit. (n8) at 9.
16. Aleka Mandaraka-Sheppard, op. cit. (n11) at 868.
17. The Aegean Sea Traders Corporation v. Repost Petroleo S A *et al*. F (The Aegean Sea)
18. 2 Lloyd's Rep 39, 1998.
19. This provision is in pari materia with section 352 MSA, 2007.
20. This is equivalent to section 359 MSA, 2007.
21. This is Equivalent to section 351(2) (a) MSA, 2007.
22. This is not incorporated into the MSA but rather provided for by section 9 Admiralty Jurisdiction Act 1991of Nigeria, 2007.
23. 2 Lloyd's Rep, 1998, 39.
24. MSA 2007, s 351(3).
25. 41, at, 1971, 12.
26. Griggs, op. cit. (n8).
27. Aleka Mandaraka-Sheppard, op. cit. (n11).
28. Griggs, et at, op.cit (n8) at 872
29. (1969), Lloyd's Rep. 52. See also McDermicl v. Nash Dredging & Reclamation Co. Ltd. (1980) 2 Lloyd's Rep 24.
30. Griggs, *et al*, op. cit. (8) at 872.
31. AC 807 HL; (1961) 1 Lloyd's Rep, 1961, 57.
32. This has been domesticated in Nigeria under The Carriage of Goods (Enforcement and Ratification) Act, 2005.
33. Equivalent to MSA 2007, s.351 (3).
34. Aleka Mandaraka-Sheppard, op. cit. (n11) at 872.
35. Ibid.
36. CAM Classica Shipping Co. Ltd. 1 Lloyd's Rep, 2004. 460.
37. Aleka Mandaraka-Sheppard op. cit n11, 873.
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40. Aleka Mandaraka-Sheppard op.cit (n11) at, 874.
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42. Aleka Mandaraka-Sheppard, op.cit (n11) at 875.
43. MSA. 2007; 351(5).
44. The Fanti and the Pandre Island 2 Lloyd's Rep 191 (HL), 1990.
45. Aleka Mandaraka-Sheppard op.cit (n11) at, 875.
46. Ibid.