LANDMARK JUDGMENT - OIL DRILLING RIG IS NOT A VESSEL UNDER THE CABOTAGE ACT

On 24 June 2019, the Court of Appeal delivered judgment in the case of **Transocean Support Services Nigeria Ltd and 3 others v NIMASA and Minister of Transport (CA/L/503/2016)** clarifying the law on whether a rig is a vessel under the Coastal and Inland Shipping (Cabotage) Act 2003. In a unanimous decision, the Court of Appeal (Garba Lawal, Obaseki-Adejumo and Kolawole JJCA) held that an oil drilling rig was not a vessel and was not engaged in coastal trading (cobotage) within the meaning of sections 2 and 5 of the Cabotage Act. It also held that a drilling rig was not one of the vessels requiring registration pursuant to section 22(5)(m) of the Cabotage Act and consequently that the listing of drilling rigs in paragraph 9.1.1C of the Cabotage Guidelines 2007 as one of the "foreign vessels" eligible for registration and thus liable to pay 2% cabotage surcharge was unlawful and invalid. Transocean was represented by Prof Fidelis Oditah QC, SAN.

Before the judgment, there was confusion regarding the applicability of the Cabotage Act to drilling rigs (especially jackup rigs and drill ships) and the liability of drilling services providers to contribute 2% of the nominal amount of drilling contracts performed by them into the Cabotage Vessel Financing Fund pursuant to sections 42 and 43 of the Cabotage Act.

The confusion appears to have arisen in 2007 when the Minister of Transportation purported to issue a guideline for the implementation of the Cabotage Act ("Cabotage Guidelines 2007") in which he listed drilling rigs in paragraph 9.1.1C of the Cabotage Guidelines 2007 as one of the "foreign vessels" eligible for registration and thus liable to pay 2% cabotage surcharge.

Pursuant to Cabotage Guidelines 2007, Nigerian Maritime Administration and Safety Agency ("NIMASA") appointed debt collection agents whom NIMASA directed to issue cabotage surcharge demands to companies involved in drilling operations in Nigeria. A number of drilling companies challenged the demand notices issued by NIMASA's debt collectors by issuing legal proceedings against NIMASA. For example, in **Noble Drilling v NIMASA**,[1] Abutu J held that drilling rigs were not vessels for the purpose of the Cabotage Act, were not engaged in cabotage and were not among the vessels listed in section 22(5) of the Cabotage Act, but his decision was reversed by the Court of Appeal[2] on procedural grounds, namely that Noble Drilling had not complied with the requirement to seek and obtain leave for issuance and service of process out of jurisdiction. In **Seadrill Mobile Units Nigeria Limited v Minister of Transport**,[3] Babs Kuewumi J took the opposite view. He held that drilling rigs were vessels under the Cabotage Act, were engaged in cabotage and were caught by section 22(5)(m) of the Cabotage Act.

---

[1] Suit No. FHC/L/CS/78/2008.
[2] Nigeria Maritime Administration & Safety Agency &Anor v Noble Drilling Nigeria Limited (CA/L/864/2009) delivered on 5th day of December, 2013 reported as (2013) LPELR-22029(CA).
[3] Suit No:FHC/L/CS/607/2016 delivered on 14 June 2019.

In the **Transocean** case, at first instance, Justice Rita Ajumogobia did not address the merits and therefore did not answer the questions whether drilling rigs were vessels, whether they were engaged in coastal trade, and whether they were listed in section 22(5) of the Cabotage Act. Instead she dismissed the proceedings on the basis that they were not issued within 3 months of receipt of the NIMASA debt collector's demand notices and consequently were statute barred pursuant to section 2 of the Public Officers Protection Acxt (POPA). In a unanimous decision, the Court of Appeal reversed her decision and, pursuant to section 16 of the Court of Appeal Act (which gave it power to hear the case as if it were sitting as a first instance court), accepted Transocean's invitation to decide the merits. As stated above, the Court of Appeal decided on the merits that drilling rigs were not vessels under the Cabotage Act and were not engaged in coastal trade while carrying out drilling operations.

The decision of the Court of Appeal in the **Transocean** case has clarified a very important aspect of Nigerian maritime law. The Court of Appeal accepted Transocean's arguments that drilling rigs were not vesseals under the Cabotage Act, that the definition of "ship" under the Admiralty Jurisdiction Act as including rigs did not assist in the construction of "vessel" under the Cabotage Act as the objects of both legislation differed, that drilling rigs were not engaged in coastal trade and were not listed in section 22(5) of the Cabotage Act among the vessels requiring registration. Consequently, the extension of the Cabotage Act to drilling rigs by the Transport Minister's Cabotage Guidelines was an unlawful and invalid exercise of delegated legislative power, paragraph 9.1.1C of the Guidelines exceeded the power to make rules for the implementation of the Cabotage Act and was void. These contentions were accepted by the Court of Appeal.

Obaseki-Adejumo JCA, who delivered the lead judgment, stated as follows:

> "It is therefore abundantly clear that only vessels engaged in coastal trade are liable to pay into the Fund the 2% of the contract sum performed by such vessel. I dare ask! Is a drilling rig, like the one owed and/ or operated by the Appellants a vessel within the definition under the Cabotage Act? Without any modicum of doubt, by the definition under the Act, a vessel must be designed, used or capable of being used solely or partly for marine navigation and used for the carriage of persons or property on, through or under water without regard to method or lack of propulsion. Unless a drilling rig falls within this definition and/ or is expressly stated to be among the machineries contained in section 22(5)(a) -(m), same cannot be deemed to be a vessel eligible for registration under Section 22(1) of the Cabotage Act and liable to pay a surcharge of 2% of the contract sum performed by such vessel engaged in coastal trade.
>
> A fortiori, for a Drilling Rig to be classified as a vessel under the Cabotage Act, it must be shown that such Drilling Rig is designed, used or capable of being

used solely or partly for marine navigation for the carriage of persons or property on, through and under water. This has not been done in this case.

As a matter of fact, Petropedia, defines Drilling Rig to be:

> "a piece of equipment that is used to create holes or wellbores in the earth surface. Rigs are massive structures that house all the drilling equipment on board."

Drilling rigs are used to locate and extract water, oil, gas or any other product from the earth. They can be used onshore or offshore and are configured to match the product and environment in which they operate. They are not used for marine navigation and ipso facto not used for coastal trade as envisaged under section 2 of the Cabotage Act which prescribes that coastal trades involves carriage of passengers and goods by vessel.

Under the Cabotage Act, a rig is not listed as one of the vessels that are to be registered and it is also not involved in the transportation of goods or passengers from one point in Nigeria to the other. I am therefore not persuaded by the argument canvassed by the 1st Respondent's counsel that drilling rigs are vessels within the meaning of section 22(5)(m) of the Cabotage Act. To my mind, drilling rig cannot therefore be deemed to be a vessel for the purpose of section 22 of the Cabotage Act and liable to the 2% surcharge under Section 43 of the Act.

As I have found that drilling rigs do not fall within the definition of vessels under the Act, and in particular, section 22(5)(m) of the Cabotage Act, it follows that the attempt by the Minister of Transport to list Rigs under the head of "Foreign Vessels" in Paragraph 9.1 of the Cabotage Guidelines, so as to make them liable to pay 2% surcharge, is not proper. The essence of the Guideline as a subsidiary legislation is to give effect to the principal legislation and not to deviate from same; it cannot expand or curtail the provision of the substantive statute."

For good measure, the Court of Appeal also held that the limitation period contained in the POPA did not apply to the making of the Cabotage Guidelines, with the result that the Guidelines could be challenged outside the 3 month time limit for challenging administrative acts of public officers.

This case is important because it is the first appellate decision on the vexed question whether drilling rigs are vessels and/or engaged in coastal trade under the Cabotage Act when performing drilling operations. Operators of drilling rigs should heave a sigh of relief from the strong arm tactics of NIMASA and its debt collection agencies which, on occasion, have included boarding drilling rigs and disrupting drilling operations.