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Comparing Liability Limitation Law for Shipowners in Nigeria with Air Transport Subsector Law

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ABSTRACT
Shipowners and their representatives are allowed by law to limit liability for damage caused by their ship. One of the reasons advanced for this doctrine is that going to sea is a risky adventure and those who dare engage in it should be encouraged. This doctrine does not have a general application to every business endeavour even if the level of risk exposure is similar to that of going to sea. This Article reviews the legal framework for the application of this doctrine in Nigeria and compares it with that of the aviation subsector. The laws discussed, including the conventions, are: sections 351 and 352 of the Merchant Shipping Act 2007, the Warsaw Convention 1999; the Montreal Convention 1999 and the Civil Aviation Act 2006. It concludes by stating that the Merchant Shipping Act 2007 which gives a shipowner an advantage over and above an airline operator who is faced with similar risk exposure in terms of doing business, is discriminatory. It recommends for an overall consistency across all the parts of transport sector.
Keywords: shipowner, liability limitation, restituo integrum, discrimination, air transport.

INTRODUCTION

Limitation of liability is a doctrine by which a shipowner is allowed to limit his liability for damage caused by his ship. This is a basic right peculiar to shipowners and their representatives as an encouragement to carry on their business.[1] This is because going to sea is a risky adventure that needs to be encouraged by limiting the liability of those who dare to engage in it.[2]

Limitation of liability is a protective doctrine which has no general application to every business endeavour even if the level of risk exposure is similar to that of going to sea.[3] Lord Denning states that limitation of liability is not a matter of justice but a rule of public policy which has its origin in history and its justification in convenience.[4] The right of a shipowner to limit liability is a creation of statute.[5] Section 351 of the Nigerian Merchant Shipping Act ('MSA') 2007, permits a shipowner or his representatives to limit liability in respect of claims for damages or injury or loss of life caused by his ship. This write up takes a second look at the limitation of liability for shipowners under section 351 MSA 2007 with a view to re-examining this principle in the light of other business or transport sectors which may have a similar risk exposure but do not enjoy liability limitation for their operators. In doing this, an instance will be made with regard to air transportation which apparently is exposed to a large range of operational risks, just like going to the sea, but scarcely enjoys the same level of limitation available to shipowners.

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[1]Christopher Hill, *Lloyd's Shipping Guides* (2003) 6th ed. (London, Hongkong) at 394.
[2]Ibid.
[3]See *Allied Trading Company Ltd v China Ocean Shipping Company* (NSC) III at 617. See also *Rastio Nigeria Ltd v SGS* (NSC) Vol. III at 286.
[4]*The Bramley Moore* (1963) 2 Lloyd's Rep. 429 at 432.
[5]Deji Sasegbon, *Nigerian* Companies and *Allied Matters Law and Practice*, Vol. 5 Shipping Laws (the DSC Law series, Number 2 at 1369.

Limitation of liability for shipowners in Nigeria

As stated above, the current law in Nigeria which avails the shipowner of the right to limit liability for maritime claims is section 351 MSA 2007.

Specifically, section 351-(3) MSA 2007, gives a shipowner or his representative the power to limit liability. The claims which are subject to limitation of liability by a shipowner 'whatever the basis of liability maybe' are listed in section 352 MSA 2007. These are:

a) claims in respect of loss of life or personal injury or loss or damage to property (including damage to harbour works, basins and waterways and also navigation) occurring on board or in direct connection with the operation of the ship or with salvage operations and consequential loss resulting therefrom;[6]
b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;[7]
c) claims in respect of other loss resulting from infragement of rights other than contractual rights, occurring in direct connection with the operations of the ship or salvage operations;[8]
d) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;[9]
e) claims of a person other than the person liable in respect of measures taken in order to avert or minimize loss for which the person liable may limit his liability in accordance with the Act. Others include loss caused by such measures, claims in respect of floating platforms constructed for the purpose of exploiting the natural resources of the sea-bed or the sub-soil thereof;[10]
(g) (sic)(f) claims in respect of the raising, removal, destruction or the rendering harmless of a ship which is sunk, wrecked, stranded or abandoned including anything that is or has been on board such ship.[11]

This section further provides that all these claims as stipulated in section 352-(1) are subject to limitation even if they are brought by 'way of recourse or for indemnity under a contract or otherwise' except where they relate to 'remuneration under a contract with the person liable'.

It is noteworthy that the concept of limitation of liability goes against the general principle of liability, that is, *restitutio in integrum*, which is founded on the principle of fair compensation in that the aggrieved party is entitled to such compensation as would put him in as good a position as if he had suffered no damage.[12] Thus, in *Rastico Nigeria Ltd. v SGS,*[13] an inspector of goods was held fully responsible for loss which was suffered by the plaintiff due to a negligent pre-inspection of tomato paste. Furthermore, in *Allied Trading Company Ltd. v China Ocean Shipping Company*,[14] the court held that the law governing liability is based on the principle of *restitutio in integrum*, in which the aggrieved party is entitled to such compensation as would put him in as good a position as if the goods were not lost.

[6]MSA s. 352-(1)-(a).
[7]MSA s. 352-(1)-(b).
[8]MSA s. 352-(1)-(c).
[9]MSA s. 352-(1)-(d).
[10]MSA s. 352-(1)-(e).
[11]MSA s. 352-(1)-(f). There appears to be a draftsman's error in this sub-section. Instead of sub-section (f) to come after sub-section (e), subsection (g), was reflected. The author herein chose to reflect sub – section (f) instead of (g) as erroneously put by the draftsman in this section.
[12]*WAEC v Koroye* (1997) II NSC 61 at 64.
[13]Supra.
[14]Supra.

It is to be re-emphasized that one of the philosophies which underscored the initial application of liability limitation was said to be that doing business in the sea was risky.[15] It was also an important endeavour and shipowners were at a risk of losing more than they had invested, if they were held personally liable to their customers in case of ship sinking.[16]

Furthermore, it was stated that shipowners did not have control over their ships. Thus, no matter how careful they were in choosing the master and crew, it was not possible to control the ship or the crew due to lack of communication. This was because when the 'ship leaves the shore the destiny of the ship and cargo was in the hands of the master and crew who were not under the control of the shipowner'.[17]

However, these reasons for limitation of liability have long been challenged in that technology and vessel management have evolved tremendously since after the evolution of limitation of liability. This is because satellite communication, global positioning system technology, reliable power plants and the modern construction of ships have minimized the damages associated with sea transportation.[18] Therefore, limitation of liability is said to be unjust,[19] discriminatory[20] and has outlived its usefulness. This is because if a pharmaceutical manufacturer cannot limit his liability on claims from victims of the manufactured drugs, it calls to question why a shipowner should be allowed to limit his liability. Furthermore, why should there be a different set of laws for two business endeavours which have a similar risk exposure, in the allocation of liabilities? Why should the victims of accidents occurring as a result of factory explosions leading to serious damage or injury claim full compensation when victims of similar accidents, where a ship is involved are statutorily forced to limit the compensation payable to them? Why should a shipowner be allowed to limit his liability where a ship capsizes in the sea and when an aircraft plunges into the same sea the operator is not entitled to the same level of limitation of liability?

A graphical picture of the privilege which shipowners enjoy through the concept of limitation of liability which other businesses or transport sectors are discriminated against was aptly captured by Wilson in a hypothetical case. According to Wilson, assuming:

> a vessel (hereafter called "MV Mavis") is chartered by an oil company (hereafter called "OCL") to support their marine operations. On a certain day MV Mavis in the course of her employment navigated through OCL's oil fields. MV Mavis was at the material time manned by a crew of 3- the Master, the Chief Mate and a Quarter Master. In the course of the voyage, the Master took time off to have a nap, having been awake all night working.
>
> The Quarter Master also excused himself leaving only the Chief Mate on the bridge to man the vessel. The Chief Mate on his part, put the vessel on autopilot and occupied himself at the chart table with some clerical work.
>
> Not long after, some "sixth sense" alerted the Chief Mate that something was wrong and when he looked up, MV Mavis was swinging at great speed towards one of OCL's platform/ oil well jacket. MV Mavis collided head on with the platform causing severe damage. OCL spent $665, 208:00-USD to remove the damaged oil well jacket and to clean and secure the well to avoid further casualty. OCL estimates that it spent $7 Million-USD to repair the damaged jacket and to redrill the lost well.

[15]See *The Bramley Moore* op. cit (n 4) at 432.
[16] D. Damas, *Willful Misconduct in International Law* (2001) Springer – Verlag Berlin Heidelbess, Accessed: 16/8/2017.
[17]Ibid.
[18]A. Gauci, 'Limitation of Liability in Maritime Law: an Anachronism?' (1995), Marine Policy. Vol.19, No 1 at 75.
[19]W.W. Eyer 'Limitation of Liability: New Directions for an old Doctrine', standford Law Review, Vol. 16, No. 2.
[20]EOA Idowu, comments on 'Limitation of Liability: A Nigerian Perspective' (2004) 7th Maritime Seminar for Judges, (Nigerian Shippers Council) at 28-9.

> The owners of MV Mavis now seek to limit their liability. They say MV Mavis tonnage is 1070[21] and so their liability is limited to ₦50,850:00 (i.e. 1070 x 47.50) only and no more. This falls far short of the amount of money already spent by OCL to contain and re-activate the damaged well.[22]

From this hypothetical case, it can be seen that the low level of compensation to the victims of the damaged property can be grievous when compared with their other colleagues in other business endeavours who are entitled to full compensation for their loss in line with the principle of *restituo in integrum.*

It is of note that although this hypothetical case was based on the limitation of liability figure under the Merchant Shipping Act ('MSA') 1962, the same principle applies with regard to MSA 2007, only that there is an increase in the limitation figure,[23] which in any event, does not give adequate compensation for loss sustained by a victim of shipowner's use of his ship. The law as presently constituted is skewed in favour of the shipowner in that no matter how big the damage is, the victim is never allowed to receive a just compensation beyond the limitation figure. This is a privilege that is exclusive to the shipowners and their representatives in maritime claims.

The low level of liability attributable to the shipowner puts him in a very enviable advantage when viewed against the fact that very rarely does a shipowner find himself in a position where he cannot limit his liability and even in such a situation his liability is rather minimal compared to the loss the victims suffered.[24] Thus in *The Allegra,* where the vessel collided with two other ships belonging to the defendants, the defendant detained *The Allegra,* making a claim of $10 million-USD as damages. The owners applied to court to limit their liability to the sum not exceeding ₦274,070.16 based on the provision of section 363 MSA 1962.[25] The court stated that the offered amount of ₦274,070.16 by the shipowners for a damage estimate of $10 million-USD, was even bigger than what the shipowner were supposed to pay, but having offered to pay so much, the court constituted a limitation fund to that amount. In the judgement of the court the defendants even offered more than what the limitation law had required them to pay. This is the extent the limitation law has gone to protect the shipowners to the detriment of other business ventures with similar risk exposures like the air transport operation.

This brings us to have look at limitation of liability as it relates to air transportation.

Limitation of liability: air transport versus sea transport

It is a basic knowledge that air transport involves extensive risk. This is because most of the times, the aircraft and its passengers and cargo are exposed to immense damage and risk while airborne. This could be as a result of bad weather condition, equipment malfunctioning, human factors, and so forth. These are similar risks to which ships sailing in the high seas are exposed. Therefore, discriminating against air transportation in terms of the level of liability leaves much to be desired and raises more questions than answers.

Nonetheless, there is need at this point to look at the laws which guide the operation of aviation business in Nigeria and the level of liability available to an airline operator. The regulating laws include the Warsaw Convention of 1929, the Montreal Convention of 1999 and the Civil Aviation Act of 2006.

[21] Note that liability is based on the tonnage of the ship. Compensation is based on the tonnage of the ship multiplied by the limited sum and the limit for a tonnage under the 1962 MSA was N47.50 per ton.

[22] Inam Wilson, 'Low Level of Liability of Shipowners in Liability Proceedings', the Maritime Newsletter, Vol. 2, at 151.

[23] See section 356 MSA 2007.

[24] Ibid. See *Heliegracht* (supra). See also the *Allegra* (supra).

[25] Section 363 MSA 1962 provides for limitation of liability just the way section 351 MSA 2007 gives authority to shipowners to limit liability.

The Warsaw Convention 1929

The Warsaw Convention was made applicable to Nigeria by the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953.[26] Under this Convention, the liability for an air operator is fault based. This means that the carrier or operator could escape liability by proving that he or his servants and agents had taken all necessary measures to avoid the damage,[27] or otherwise, the carrier could be liable to pay damages fixed by the Convention. The Convention fixed a maximum sum of 125,000 Gold Francs in the case of an injury to the passenger. However, the claimant could only recover more than this sum if he discharged the burden of proving 'willful misconduct' on the part of the carrier, his servant or agents.[28]

It would be noted that this law is no longer part of the existing law in Nigeria contrary to the holding of court in *Ibidapo v Lufthansa.*[29] This decision was given before the commencement of the Civil Aviation Act 2006. Section 77-(1) Civil Aviation Act ('CAA') 2006, negatived the application of the Warsaw Convention through the repealing of the Carriage by Air (Colonies, Protectorates and Trust Territories) Order 1953.[30]

Section 7-(1) of CAA 2006 provides thus:

> Subject to the provisions of subsection (2) of this section, the following enactments are hereby repealed:
> (a) Carriage by Air (Colonies, Territories and other Trust Territories) Colonial Order 1953;
> (b) Civil Aviation Act, cap 51 LFN 1990;
> (c) Civil Aviation (Amendment) Act 1999;
> (d) Nigerian Civil Aviation Authority (Establishment) Act 1999.

One of the criticisms against the Warsaw Convention was its low level of compensation provision for victims of air mishap and the limitation of liability granted to carriers. Thus, in the United States which was a State Party to the Convention and not being satisfied with the limit of liability granted to airline operators had to cause the Department of Transport to facilitate:

> communications among the U.S and foreign carriers, under the auspices of the IATA[31] and ATA[32] developed private voluntary agreement under which carrier would waive the passenger liability limit of the Warsaw Convention and its related instruments… Thus in February 1977, the Department of Transportation approved a set of two IATA and one ATA inter- carrier agreements, all of which at a minimum waived the Warsaw liability limit in their entirety.[33]

[26]Vol. XI, Laws of the Federation of Nigeria 1958.

[27]I.A Mustapha, 'The Legal Regime of International Contract of Carriage of Passengers by Air' (2012) I No. 2,BUSLJ, at 74-84.

[28] See Articles 22(1) and 25 of the Warsaw Convention 1929.

[29] (1997) 4 NWLR (pt 498) 124. See also *Harka Air Services Ltd v Emeka Kaezor* (2006) 1 NWLR at 165.

[30]Vol. XI LFN 1958. This was the law that allowed for the application of the Warsaw Convention in Nigeria.

[31]The International Air Transport Association (IATA) 1997. Some Nigerian Airlines are part of this Agreement. For instance, the *Overland Airways* became a member of IATA in July 2016. See http://axowThisdaylive.com. Accessed 5/5/2017.

Also, *Allied Air Nigeria* became a member of IATA in May 2016. See alliedairng.com. Accessed 5/5/17.

[32] Air Transport Association (ATA) 1997.

[33]I.A Mustapha, 'The Legal Regime of International Contract of Carriage of Passengers by Air' (2012) No.2 BUSLJ at 74-84.

The Montreal Convention 1999[34]

It is of note that while section 77-(1) Civil Aviation Act 2006, repealed the Carriage by Air (Colonies, Protectorates and Trust Territories)Order 1953, section 48-(1) of the same Act allowed for the application of the Montreal Convention in the international carriage arena. It provides thus:

> The provisions contained in the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Montreal on 28 May 1999 set out in the Second Schedule of this Act, and as amended from time to time, shall from the commencement of this Act have the force of law and apply to international carriage by air to which those rules apply irrespective of the nationality of the aircraft performing the carriage, and shall, subject to the provision of this Act govern the rights and liabilities of carriers, passengers, consigners, consignees and other persons.

It is to be observed that just as the Warsaw Convention was made applicable to non-international carriage/flights in Nigeria by virtue of the Carriage by Air (Non-International Carriage) (Colonies, Protectorates and Trust Territories) Order 1953, the Montreal Convention is made applicable to non-international carriage by air within Nigeria by virtue of section 48(2) of the Civil Aviation Act 2006.[35]

The Montreal Convention has been ratified by 31 states including Nigeria. It became effective on November 4, 2003.[36] One of the highlights of the Montreal Convention was the upward review of liability limits for deaths and personal injury cases. It made the carrier's liability in the absence of the passenger's negligence an absolute liability.[37] It further removed all arbitrary limits on recovery for passenger death or injury and also imposed strict liability for the first 100,000 SDR of proven damage in the event of passenger death or injury.[38]The international conventions particularly the Warsaw Convention and the Montreal Convention, were all domesticated in Nigeria and made applicable to both international and non-international air carriage.[39]

The Civil Aviation Act, 2006.

It would be recalled that the Montreal Convention was incorporated into the Nigeria law by virtue of section 48 of the Civil Aviation Act 2006, and from the date of commencement of the Act, the Montreal Convention became the basis for establishing airline liability for both the international and non-international carriages and flights in Nigeria.[40]

Thus, in line with the Montreal Convention which repealed the Warsaw Convention liability regime, the CAA 2006, repealed the Carriage by Air (Colonies, Territories and Other Trust Territories Colonial) Order 1953.[41]

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[34]Formally the Convention for the Unification of Certain Rules Relating to International Carriage by Air. Also referred to as the Agreement Relating to Liability Limitation of the Warsaw Convention and Hague Protocol.

[35]E. Akintude, 'Aviation Law: Remedies for Delayed, Damaged or lost Baggage / Compensation for Death or Injury of Airline Passengers in Nigeria', Illumination Legal Framework, Accessed 4/5/17.

[36]George Etomi & Partners, 'Death on Board an Aircraft': Legal Considerations' (May 20, 2010). www.geplaw.com Accessed 31/5/17.

[37]Ibid.

[38] I.A. Mustapha, 'The Legal Regime of International Contract of Carriage of Passengers by Air' (2012) I No. 2 BUSLJ at 74-84.

[39]E. Akintunde, op. cit (n 35) at 36. See also S. 481 (1) and (2) CAA 2006; see *Emirate Airlines v Tochukwu Aforka* et al, (2014) LPELR-22686 (CA).

[40]Ibid.

[41]See section 77-(1) CAA 2006.

In place of the liability regime of the repealed law and in accord with the provision of the Montreal Convention, the CAA 2006 introduced a two-tiered liability regime in cases of death or injury to a person on board an aircraft.[42] Thus, in Nigeria:

(1) where the claims of the victim do not exceed 100,000-USD, the carrier shall not be able to exclude or limit liability.[43]

This means that the air carrier is held strictly liable for the first 100,000-USD of proven damages for each passenger and cannot avoid liability for this amount, even if the carrier can prove that the harm was not caused by his negligence.[44]

(2) in the event that the claims exceed 100,000-USD, the liability of the air carrier is unlimited except where there is evidence that the death or injury was not caused by the negligence or wrongful act or omission of the carrier or its agent or was solely due to the negligence or other wrongful act or omission of a third party.[45]

Furthermore, in a bid to lessen the burden of the dependants of a victim of air mishap, the Act provides that in the case of an aircraft accident resulting in the death or injury of a passenger, the carrier shall make an advance payment of at least 30,000-USD within 30 days of the accident. However, this advance payment is not a recognition of liability and may be offset against any damage awarded and subsequently paid by the carrier.[46]
It is of note that the airline's liability to its passenger or customer would arise in the following ways:

a) injury sustained on board an aircraft, or
b) death arising in the course of a journey; or
c) damage or loss of goods;
d) delayed or denied boarding; or
e) interactions in the course of preparation for or actual conduct of flying operations.[47]

From the foregoing, where the liability of a shipowner under the MSA 2007 is compared with the liability of an airline operator or carrier under the CAA 2006, it can be deduced that the limitation laws are more favourable to a shipowner than it is to an airline operator. This is because while the airline operator is held strictly liable at the first instance where the liability does not exceed $100,000-USD, the shipowner does not bear such a burden.
Furthermore, it can be observed that even where the limitation cap is to be broken, the process is made more difficult and complex for a claimant to satisfy under the MSA 2007,[48] than an airline operator under the CAA 2006.[49]

[42]E. Akintunde, op .cit (n 35) at 36.
[43] Ibid.
[44] I.A. Mustapha, op. cit (n 38) at 82.
[45]Ibid. see section 48 CAA 2006.
[46]See CAA 2006, s. 48(3). See also Article 28 of the Montreal Convention 1999.
[47]See *Harka Air Services (Nig) Ltd v Keazor Esq* (2011) 6KLR (pt 298) 1771 at 1786, para A. per Adekeye JSC.
[48]MSA 2007 s.354, where the aggrieved party is expected to prove that his loss or damage was as a result of the personal act or omission of the shipowner or his servants or agents acting within the scope of their employment and committed with the intent to cause such damage or recklessly and with knowledge that such loss would probably result.

It is the contention of this author that the MSA 2007, which gives a shipowner an advantage over and above an airline operator who is faced with a similar risk exposure is discriminatory and leaves much to be desired.

CONCLUSION

This write up reviewed the right of a shipowner in Nigeria to limit liability for maritime claims as provided for in sections 351 and 352 MSA 2007. Shipowners were compared with other business operators who are exposed to similar risks, but do not enjoy the same level of advantage and privileges available to shipowners. The fate of the airline operators was highlighted. The various sources of laws guiding airline operations in Nigeria were discussed. The laws included the Warsaw Convention of 1929, the Montreal Convention of 1999 and the Civil Aviation Act of 2006.

The author contends that the MSA 2007 which gives a shipowner an advantage over and above an airline operator who is faced with a similar risk exposure in terms of doing business is discriminatory and leaves much to be desired. The author recommends for an overall consistency across all the parts of the transport law.

[49]See C.AA, 2006, s.48.