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MODULE 1

Unit 1 Admiralty Jurisdiction

Unit 2 Ship Mortgage and Lien

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UNIT 1 ADMIRALTY JURISDICTION

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1.0 INTRODUCTION

"Admiralty" is defined as "The system of jurisprudence that has grown out of the practice of admiralty courts" (Black's law dictionary, 8th Edition Page 50).

Jurisdiction is the authority which a court possesses to decide matters submitted before it for its decision. Courts are generally conferred with jurisdiction either by the constitution of the land or an enabling statute.

The jurisdiction of a court may be limited or unlimited. The limitation may be either by the amount or value of the property in litigation or as to the type of subject-matter it can handle. Courts are creatures of statutes, and it is the statute that created a particular court that will clothe with jurisdiction. Admiralty Jurisdiction of a court is therefore the authority which a court has to decide on any admiralty matter submitted before it for adjudication.

The only court that exercises admiralty jurisdiction in Nigeria is the Federal High Court (Section 7 Federal High Court Act, LFN 2004. Before going further on the admiralty jurisdiction of the Federal High Court, there is a need for a thorough understanding of the history of the admiralty jurisdiction in Nigeria.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- Account for the scope and historical development of admiralty jurisdiction
- Differentiate between action in rem and action in personam
- Identify the classes of claims within the admiralty jurisdiction of the Federal High Court

3.0 MAIN CONTENT

3.1 HISTORICAL BACKGROUND

Admiralty jurisdiction in Nigeria can be said to have actively commenced in 1890. The Supreme Court Act of 1876 did not vest any of the courts with admiralty jurisdiction. Section 11 of the Supreme Court Act specifically excluded the exercise of such jurisdiction. The provision of section 11 of the Act is hereby reproduced below:

> "The Supreme Court shall be a superior court of record, and in addition to any other jurisdiction conferred by this or any other ordinance of the colonial legislature, shall within the limit and subject as in this ordinance mentioned, possess and exercise all the jurisdiction powers and authorities, excepting the jurisdiction and powers of the High Court of Admiralty, which are vested in or capable of being exercised by Her Majesty's High Court of Justice in England, as constituted by the Supreme court of Judicature Acts 1873 and 1875".

The Court of Admiralty Act, 1890 which came into force on 25th July 1890 was passed by the British Imperial Parliament. By virtue of section 2 (2) of the Act, the jurisdiction of colonial Courts of Admiralty was made to "be over the like places, places, persons, matters and things as the admiralty jurisdiction of the high court in England and shall have the same regard as that court in International law and the country of nations". Section 3 of that Act further conferred admiralty jurisdiction on every court of law having unlimited original jurisdiction in civil cases in the colonies. By virtue of the section 3, the Supreme Court which hitherto lacked jurisdiction became vested with jurisdiction.

Section 12 of Court of Admiralty Act 1890 empowered the Queen-in –council to direct that the provision of the colonial Courts of Admiralty Act shall apply to any court established by the Queen for the exercise of jurisdiction in any colony. In exercising this power, the Nigerian protectorate Admiralty Jurisdiction Order of 1928 was made. This order gave the Supreme Court of the colony of Lagos (i.e High Court) jurisdiction over admiralty matters, and by 1933, the jurisdiction of the Supreme Court of the colony of Lagos had gradually extended throughout the whole protectorate. (Supreme Court (Amendment) Ordinance No. 43 of 1933)

It should be noted however that the Supreme Court for the colony of Lagos had existed since 1863 but exercise no jurisdiction over admiralty matters until 1928.

The Supreme Court (Amendment) Ordinance No. 43 of 1933 was repealed in 1943 by the Supreme Court Act 1943, and a new Supreme Court (i.e High Court) was established for the colony and protectorate of Nigeria. The admiralty jurisdiction conferred on the court by the Nigerian protectorate Admiralty Jurisdiction Order of 1928, was retained in section 24 of the Supreme Court Act of 1943 England admiralty law.

In 1954, when Nigeria adopted a federal system of government, the Federal Supreme Court was created, as well as High Court for Lagos and each of the three regions of the federation. Under this new federal system, none of the regional High courts, the High Court of Lagos, or the Federal Supreme Court was vested with admiralty jurisdiction.

In 1956, the original admiralty Jurisdiction of the former Supreme Court (i.e High Court) became vested in the Federal Supreme Court.

But upon attainment of independence in 1960, a new Federal Supreme Court was created by virtue of Federal Supreme Court Act No. 12 of 1960. Section 17 of this act conferred admiralty jurisdiction upon the new Court in the same manner as the Acts of 1943 and 1955. This remained the position until 1963 when the original jurisdiction of the Federal Supreme Court in admiralty cases was repealed by the Admiralty Jurisdiction Act No.34 of 1962. This Act made it possible at the same time for the Lagos and Regional High Courts to exercise original jurisdiction in admiralty cases.

In 1973, the Federal Revenue Court (now the Federal High Court) was established by virtue of the Federal Revenue Court Act 1973. Section 7(1)(d) vested with the court with power to exercise admiralty jurisdiction in the country.

Between 1973 and 1983, there was controversy as to whether high courts can also exercise jurisdiction along with the Federal Revenue Court on admiralty matters. This is because section 230 of the Constitution of the Federal Republic of Nigeria 1979 preserved the jurisdiction of the Federal High Court in respect of admiralty matters, while section 236 of the same constitution also gave the State High Court unlimited jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, obligation or claim is in issue.

This struggle for jurisdiction was witnessed in the decisions of Savannah Bank of Nigeria Limited v Pan Atlantic Shipping & Transport Agencies Limited (1987) 1 NWLR Pt 49, Page 212, Jamal Steel Structures Co. Ltd v African Continental bank Ltd (1973) 1 All NLR (Part 2) 208, American International Insurance Co. v Ceekay Traders limited (2001) FWLR (Part 47) 1163, Bronik Motors Ltd v Wema Bank Ltd (1983) 6 SC 158.

The struggle between the Federal High Court and the State High Courts on jurisdiction in and over admiralty matters was put to rest following the enactment of Federal High Court (Amendment) Act No. 60 of 1991 and the Constitution (Suspension and Modification) Act No. 107 of 1993. Section 2 of the Act amended Section 7 of the Federal High Act of 1973 and substituted the list of matters upon which the Federal High Court can exercise jurisdiction to the exclusion of other courts.

Professor Olawoyin explained that the second schedule to the Act No. 107 titled "Modifications of Provisions of the Constitution of the Federal Republic of Nigeria 1979 not suspended by section 1", introduced a new section 230 of the then 1979 Constitution which automatically vested the Federal High Court with the admiralty jurisdiction to the exclusion of any other court.

Furthermore, the Admiralty Jurisdiction Decree No. 59 of 1991 (now Admiralty Jurisdiction Act, Cap A5, LFN 2004) was promulgated, and that repealed the Admiralty Jurisdiction Decree of 1962 under which the state high courts were given jurisdiction over admiralty matters thus finally putting to rest the controversy on jurisdiction in admiralty matters. As such, the only court capable of exercising admiralty jurisdiction in Nigeria today is now the Federal High Court.

3.2 THE SCOPE OF JURISDICTION OF THE FEDERAL HIGH COURT UNDER THE ADMIRALTY JURISDICTION ACT, CAP A5, LFN 2004.

Section 1 of the Act states all the causes of action over which the Federal High Court can exercise jurisdiction. By virtue of section 1(i)(b) of the Act, the Federal High Court has this same admiralty jurisdiction that existed in any court in Nigeria prior to the commencement of the Act. Although section 1(i)(b) of the Act did not expressly divest those other courts of their jurisdiction in admiralty matters, but Section 19 of the Act expressly vests exclusive jurisdiction in admiralty causes or matters, whether civil or criminal in Federal High Court.

Section 3 of the provides that the admiralty jurisdiction of the Federal High Court shall apply to all ships irrespective of the places of domicile or residence of the owners, and to all maritime claims wherever arising. While section 4 provides that any reference to a claim in respect of an aircraft includes a claim that can be made under any of the Conventions in force to which Nigeria is a party.

3.3 TYPES OF ACTIONS IN MARITIME CLAIMS

Two types of actions are recognized under the Admiralty Jurisdiction Act 2004, and they are action in rem and action in personam. An action in rem is an action against a res or property which is usually the ship itself. It may in certain circumstances be commenced against a freight or cargo or proceeds of sale.

An action in personam is a form of proceeding in maritime claims brought against persons who are usually the owners of a ship. An action in personam as distinct from an action in rem is one directed at the person, usually the owners, charterers or operators of a ship.

One important distinction between an actions in rem and personam is that in the case of the latter, they are enforceable in person against the assets of the defendant sued regardless of the nature of the claim. But in the case of the former, a judgment in the proceedings cannot impose any personal liability on a shipowner who has not appeared to defend the action, or attach any of his other ships. (**M.V Zack Metal Co. vs International Navigation Corporation (1975) A.M.C. 720).**

3.4 CLASSES OF CLAIMS WITHIN THE ADMIRALTY JURISDICTION OF THE FEDERAL HIGH COURT

MARITIME CLAIMS

The Admiralty Jurisdiction Act 2004 classifies maritime claims into proprietary maritime claims and general maritime claims. The Act also draws a distinction between maritime claims enforceable in rem and those enforceable in personam. Maritime liens and statutory liens are distinguished as well.

Proprietary Maritime Claim

A proprietary maritime claim within the context of section 2(2)(a)-(d) of the Admiralty Jurisdiction Act 2004, relates to:-

(i) the possession of a ship; or
(ii) title to or ownership of a ship or of a share in a ship; or
(iii) a mortgage of a ship or of a share in a ship;
(iv) a mortgage of a ship's freight;
(v) a claim of between co-owners of a ship relating to the possession, ownership, operation, or earning of a ship;
(vi) claim for the satisfaction or enforcement of a judgment given by the court or any court (including a court of a foreign country) against a ship or other property in proceedings in rem; and
(vii) a claim for interest in respect of the above claims

A general maritime claim by virtue of section 2(3)(a)-(u) of the Admiralty Jurisdiction Act 2004 relates to a claim if it involves:

(i) collision claims;
(ii) damage to a ship;
(iii) loss of life or personal injury caused by a ship;
(iv) loss of or damage to goods carried by a ship;
(v) claims arising from agreements for carriage of goods or persons by a ship or for the use or hire of a ship;
(vi) salvage claims;
(vii) general average claims;
(viii) pilotage;
(ix) towage of a ship or water-borne aircraft;

(x) goods supplied or to be supplied to a ship;
(xi) claims in respect of the construction of a ship;
(xii) claims for alteration, repair or equipping of a ship;
(xiii) claims for port charges or dues;
(xiv) a claim arising out of bottomry;
(xv) claim for disbursement on account of a ship;
(xvi) claims for insurance premiums due on a ship or its cargo
(xvii) claims for wages of crewmen;
(xviii) claims for forfeiture or condemnation of a ship or goods carried thereon;
(xix) claims for enforcement of arbitral awards in proprietary maritime claims; and
(xx) claims for interest in any proprietary maritime claim.

1. **MARITIME LIEN**

Maritime lien is a privileged charge on a ship or maritime property. It does not depend on agreement rather it accrues from the moment the event which gives rise to a cause of action arises. A maritime lien travels with the res into whosever is in possession. It may come even in cases where the res may have been purchased without notice of the lien. It is a proprietary interest which attaches to the res or property from the time the claim first arise and clings to it without regard to the person who may have possession, and not withstanding of any transfer of the general rights in the property. It is principally a claim against the ship as opposed to the claim against the ship owner. This is because, the ship has caused harm, loss, or damage to others or their property and must herself make good that or damage.

Maritime lien is inchoate in nature and is devoid of any legal consequence unless and until it is carried into effect by legal process, by an action in rem. A claimant who wants to succeed in his claim must bring an action in rem against the ship.

However, an action in rem does not lie against Government ship or property, and where such has been commenced on the reasonable belief that the ship was not a Government ship, the court may order that the proceeding be treated as though it was an action in personam.(See section 24(2) of Admiralty Jurisdiction Act 2004).

The following inventory claims are classified under section 66 of Merchant Shipping Act No. 27 of 2007 as maritime lien:

(i) wages and other sums due to the master, officers and other members of the ship's complement in respect of their employment on the ship;
(ii) disbursements of the master on account of the ship;
(iii) claims in respect of loss of life or personal injury occurring whether on land or on water in direct connection with the operation of the ship;
(iv) claims for salvage, wreck removal and contribution in general average;
(v) claims for ports, canal and other waterways, dues and pilotage dues.

Section 5(3) of the Admiralty Jurisdiction Act 2004 also lists the following claims as maritime lien:

(i) claims relating to salvage including life, cargo or wreck found on land;
(ii) claims for damages caused by a ship;
(iii) claims by the master or crew member of a ship for wages; and
(iv) claims by the master in respect of disbursement on account of a ship.

2. **STATUTORY LIENS**

These are the kind of liens that arise from the statute rather from common law system. They rank equally among themselves but lower than the traditional maritime lien. Section 2(3) of the Admiralty Jurisdiction Act 2004 provides the complete list of such maritime lien.

The difference between Maritime and Statutory Liens is significant in many respects. First, claims arising from the enforcement of maritime liens always and automatically give rise to actions in **rem** against the ship, but no such right is conferred for the enforcement of action arising from statutory liens. Unlike maritime lien, statutory liens cannot be enforced after a change of ownership of the ship except if an action was instituted before the change.

TYPES OF ACTIONS IN MARITIME CLAIMS

Under the Admiralty Jurisdiction Act 2004, two types of actions are recognized and they are action in rem and action in personam. An action in rem is an action against a res or property which is usually the ship itself. It may in certain circumstances be commenced against a freight or cargo or proceeds of sale.

An action in personam is a form of proceeding in maritime claims brought against persons who are usually the owners of a ship. An action in personam as distinct from an action in rem is one directed at the person, usually the owners, charterers or operators of a ship.

One important distinction between an actions in rem and personam is that in the case of the latter, they are enforceable in person against the assets of the defendant sued regardless of the nature of the claim. But in the case of the former, a judgment in the proceedings cannot impose any personal liability on a shipowner who has not appeared to defend the action, or attach any of his other ships. (**M.V Zack Metal Co. vs International Navigation Corporation (1975) A.M.C. 720).**

Furthermore, a judgment obtained in an action in **rem** does not preclude the claimant from bringing a subsequent claim in **personam** against the owner of the vessel in the same claim where the proceeds of sale of the **res** are insufficient to cover the damages awarded in the **rem** action. Where a judgment is obtained in an action in personam, no subsequent action can be brought in rem. (**Nelson v Crouch (1863) L.J.C.P 46 at 48)**

4.0 CONCLUSION

The Admiralty Jurisdiction Act 2004 has broadened the scope of the jurisdiction of the Federal High Court which was restricted before 1991. No other court in Nigeria now shares jurisdiction with the Federal High Court in Admiralty matters. The Act has extended the admiralty jurisdiction of the Federal High Court to include any banking or letter of credit transaction involving the importation or exportation of goods to and from Nigerian a ship or aircraft, whether the importation is carried out or not and notwithstanding that the transaction is between a bank and its customer. The classification of claims as set out in the Admiralty Jurisdiction Act 2004 determines the nature of remedy available to a claimant.

5.0 SUMMARY

The scope and the development of the admiralty jurisdiction in Nigeria could be traced to England. Following the enactment of Admiralty Jurisdiction Act in 1991, the struggle between the federal high court and the state high courts on jurisdiction in and over admiralty matters was put to rest

6.0 TUTOR-MARKED ASSIGNMENT

1. With reference to the relevant statutory provisions and judicial cases, discuss the history and development of admiralty jurisdiction in Nigeria development.

2 With the aid of relevant statutory provisions, discuss the scope and extent of admiralty jurisdiction of the Federal High Court.

3. What classes of claims fall within the Admiralty Jurisdiction of The Federal High Court.

7.0 REFERENCES/FURTHER READINGS

Aleka Mandaraka-Sheppard (1949), Modern Admiralty Law. Cavendish Publishing Ltd.

Christopher Hill, Maritime Law, 3rd Edition. Cavendish Publishing Ltd

Professor Olawoyin: Nigerian Commercial Law Edited By Professor Oluwole Akanki

UNIT 2 SHIP MORTGAGE AND LIENS

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1.0 INTRODUCTION

Entrepreneurs who invest in the business of shipping usually seek the assistance of financial institutions for finance to start up. Sometimes, financial institutions advance loan to the entrepreneurs for the purchase of ships, and this is usually by way of mortgage on the ship. It is the ships themselves which serve as security for any loan until the repayment is done.

The financial institution which advances the loan is known as the "mortgagee" the owner of the ship who obtain the loan is the "mortgagor", and the ship remains the mortgaged asset.

In granting the loan under a loan agreement, the ship mortgages usually seek the following protective measures, that is, insurance cover and collateral securities. The loan agreement contain covenants regulating the conduct of the borrower, the mortgagor gives the mortgagee a preferential security interest in the ship, insurance to protect the interest of the mortgage on the ship, assignment of the insurance proceeds of the ship in the event of loss, and the assignment the earnings of the ship.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- Discuss the creation of statutory mortgage of ship under the Merchant Shipping Act 2007.
- Differentiate between a ship mortgage and other types of security
- Discuss the enforcement of maritime lien under the Merchant Shipping Act 2007
- State the rights and obligations of parties under a statutory mortgage of a ship

3.0 MAIN CONTENT

3.1 DEFINITION OF SHIP MORTGAGE

A legal mortgage is a transfer of interest or property in a ship to the lender (mortgagee) by the borrower (mortgagor) as a security for loan with an understanding that the vessel shall be redeemed, and the constructive transfer to the lender cancelled on repayment of the amount due. It is a creation of a charge or encumbrance in favour of the lender by the person wishing to borrow.

Although a ship is mortgage, the mortgagor or owner is free to continue operating the vessel provided he does not act in such a manner as to put the ship at risk as security, and thereby prejudicing the mortgagee's position.

At common law, the mortgagor absolutely conveyed a mortgaged ship to the mortgagee, and on repayment of the mortgage debt and interest in accordance with the term of the agreement, the mortgagee would reconvey the vessel to the mortgagor. However, this method was discontinued since 1825.

There are two broad categories of mortgages, and they are statutory and equitable mortgage.

3.2 CREATION OF STATUTORY MORTGAGE OF A SHIP

A statutory mortgage is created in Nigeria under the Merchant Shipping Act 2007. Section 53(1) of the Act provides that "A ship registered in Nigeria, or a share in the ship may be made a security for a loan or other valuable consideration, and there shall be a proper written instrument creating the security.

The written instrument is generally known to be a Deed of Mortgage. In order to protect the security, the mortgage must be registered with appropriate regulatory bodies (e.g Nigerian Maritime Administration and Safety Agency (NIMASA) and Corporate Affairs Commission (CAC)).

The Mortgagor is obliged before executing any Deed of Mortgage to disclose in writing to the Mortgagee the existence of any maritime lien, prior mortgage, or other liability in respect of the ship to be mortgaged and of which the Mortgagor is aware. Where the Mortgagor fails to disclose, the Mortgagee may treat the Mortgage debt immediately due and payable. (Section 54(1) and (2) of the Merchant Shipping Act 2007).

Statutory mortgage creates a superior security and ranks in priority over all creditors of the ship with respect to prior or subsequent unregistered mortgages. Priority is determined according to the date on which each mortgage is recorded in the register and not according to the date of the mortgage is executed. (Section 56(1) of the Merchant Shipping Act 2007).

Furthermore, where there are multiple registered mortgagees of the same ship, a subsequent mortgagee shall not, except with the order of a court of competent jurisdiction, sell the ship or share without the consent of every prior registered mortgagee(s). (Section 57(2) of the Merchant Shipping Act 2007).

3.3 CREATION OF EQUITABLE MORTGAGE OF A SHIP

An equitable mortgage can be created by general words or mere deposit of the title documents. See Swiss Bank Corp v Lloyds Bank Ltd (1982) A.C. 584.

Also, when a ship is under construction, an equitable mortgage can be created by the deposit of a builder's certificate relating to the ship. The effect of the equitable mortgage is to give the equitable mortgage a preferential right over the thing charged. It is however subject to the overriding interest of existing legal mortgages and maritime lien holders.

3.4 SHIP MORTGAGE DISTIGUISHED FROM OTHER TYPES OF SECURITY

Charge

A mortgage under the Merchant Shipping Act 2007 is different from a charge on a property. A charge in equity is seen as an appropriation of a property as security for a debt. Being equitable, the chargee can realize his security by judicial process either by appointment of a receiver or count sale. A charge on a ship is not registrable under the Merchant Shipping Act 2007

A charge may be fixed on a specific asset of a debtor, which cannot be disposed of without the consent of the chargee or payment of the debt. It may be floating which crystallize and becomes fixed or the event of any default. One distinguishing feature between a charge and mortgage is that while a mortgagee has the right to take possession a chargee does not have such a right.

Maritime Lien

A ship mortgage is different from a maritime lien. A maritime lien does not vest title in the vessel or the lien holder, whereas the mortgage vests title on the mortgagee.

A lien holder does not have a right sale in the event of default without due process of law whereas a mortgagee has a right of sale. Furthermore, while mortgage transactions are registrable in most ship registries, lien interest are not.

Pledge

A ship mortgage is different from a pledge. A pledgee need to be in possession of a mortgaged property for the creation of the interest. while a mortgage may enter into possession when his security is impaired.

3.5 REGISTRATION

There is no legal obligation to register a mortgage, but it is necessary to register in order to give proper legal effect to the mortgage. Where a mortgage on a ship is produced to the Registrar at the ship's port of registry, the Registrar shall record the mortgage in the register. (See section 53(2) of the Merchant Shipping Act 2007).

Any mortgagee who fails to register a mortgage cannot claim any benefit under the Merchant Shipping Act 2007. However, obtaining of priority has been identified as the most important advantage of registration in the date of registration of the mortgage that governs the ranking of a one mortgage against another mortgage. (See section 56(1) of the Merchant Shipping Act 2007).

Registration also protects the mortgagee against all later secured creditors of the shipowner against all unregistered mortgages. Failure to register a mortgage does not render the transaction void, but precedence is given to later registered encumbrance.

Registration gives a mortgage priority over:

(i) Earlier unregistered mortgages, whether or not the mortgage men knowledge of them;

(ii) Later registered or unregistered mortgages

(iii) Unregistered debentures of earlier creation even though the mortgage know of them

(iv) Additional advances subsequently made under a prior registered mortgage.

A mortgagee of a registered mortgage does not however have priority over:

(i) Mortgages Registered earlier;
(ii) Maritime liens, whether earlier or later;
(iii) Any claim in connection with which the vessel had already been arrested at the time when the mortgage been entered into.
(iv) Any mortgage entered into under a certificate of mortgage where notice of the certificate of mortgage appeared on the register at the time when the mortgage entered into his mortgage
(v) Any possessory lien of a ship repairer and obligations. See Fletcher v City Marine (1968) 2 Lloyds Report 520

3.6 MORTGAGOR'S RIGHTS AND OBLIGATIONS

The rights and obligations of the parties are governed by the term of their contract. The following covenants constitute the mortgagor's obligation.

An Obligation To Insure

The mortgagor has an obligation to insure the vessel against the physical loss of or damage to the mortgaged ship, third party liability for collision, general average contributions and other losses. The mortgagor must regularly pay all premium and comply with insurance warranties.

The reason why the mortgagor must insure is simply because; it is the mortgagor who is declared to have an insurable interest in the full value of the property. Where the mortgagor fails in discharging this obligation, the mortgagee can insure the ship and charge the costs on to the mortgage debt, provided that right of the mortgage to insure is expressly stated in either the mortgage deed or the collateral deed. See Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand Ltd).

An Obligation To Maintain The Ship In Good Condition And Repair

Being in possession of the ship, The Mortgagor has an obligation to maintain the ship in good condition. The purpose of this covenant is to ensure that the security is not devalued by the deterioration of the ship. The mortgagor has the obligation to ensure that the mortgaged ship does not breach any of the provisions of the International Safety Management Code (ISMC) which may lead to its detention. The mortgagor must keep always in class by following class recommendation for repairs.

An Obligation To Discharge Claims Or Lien

The mortgagor has an obligation to discharge all debts and liabilities which can be enforced against the security by arrest. If the ship is arrested, the mortgagor must provides security and procure it release.

An Obligation Of Legal Trading

A ship which is used for illegal trading such as illegal importation of fire arms and ammunitions, hard drugs, bunkering may be arrested or confiscated. The mortgagor should not engage in any of the illegal deals mentioned.

An Obligation To Notify The Mortgagee

The mortgagor has an obligation to notify the mortgagee on the movement of the ship. This is the ensure that the ship does not sail either in war zones, whence the security will be exposed to a higher risk or in jurisdictions in which the law may be unfavorable to the priority enjoyed by the mortgage over other maritime claims.

An Obligation Not To Sell Or Grant A Charge On The Ship

The mortgage has an obligation not to sell, or grant a mortgage or change the ship to any person without first discharging the debt to the mortgage.

An Obligation As To Charterparties

The mortgager may need to inform the mortgagee before engaging the ship in a long term charter party in case the terms of the charter party prevents the mortgage from exercising his rights in care of default by the mortgager.

Right To Redeem

The mortgagor has an equitable right to redeem the ship upon repayment of the loan and the accrued interest. The court will not allow any clog or fetter on the mortgagor’s right of redemption. See Fletcher and Campbell v City Marine Finance Ltd (Supra).

However, the court will not intervene if on the face of the contract, it is discovered that the parties had agreed how to deal with the ship, notwithstanding there is an unlawful exercise of power of sale without notice See The Maule (1997)1 WLR 528

3.7 MORTGAGEE'S RIGHT AND OBLIGATIONS

By virtue of section 57(1) and (2) of the Merchant Shipping Act 2007, the mortgagee is not by reason of the mortgage, regarded as the owner of the ship. But if the situation arise for a mortgagee to realize his security he has owner-type rights conferred on him, but only such rights as and necessary for the enforcement of the security.

Right of Repayments

The mortgagee has the right to receive repayments of the principal together with interest at the time stipulated in the mortgage deed the collateral deed as agreed. The very important clause usually and expressly stipulated in the deed is that should the mortgagor fail to repay the sums at the agreed times the mortgagee is free to seize the sum owing to him.

Where there is a default in the mortgage deed by the mortgagor, for instance, if the Mortgagor defaults in payment, endangers the security in any way, or if the vessel is burdened by maritime lien for an unreasonably longtime, the mortgage becomes enforceable.

The right to take possession

The mortgagee has no right to take possession of the ship unless there is a default or a threat to his security, or express contractual provisions, he will be liable to the mortgagor for costs and substantial damages. See The Manor (1907) CA 339

The mortgagee can either be in actual possession, or constructive possession that is, the seizure of the ship through his accredited representative.

Actual possession involves physical seizure of the ship through the accredited representatives of the mortgagee who may go on board. Constructive possession involves giving of notice of the intention of the mortgagee to take possession to the mortgagors, charters, underwriters and other persons known to be in the sled in the ship. Constructive possession usually takes place when the ship is not within the jurisdiction and it is impossible for the mortgagee to take actual possession.

Right to Freight

The mortgagee of a ship by taking possession before the freight is completely earned, obtains a legal right to receive the freight. He has a priority over every equitable charge of which he has no notice, and it makes no difference that any subsequent incumbrance was the first to give notice to the charterers of his charge on the freight. See Liverpool Marine Credit Co v Wilson (1872) LR 7ch 507

Power of Sale

The power of sale of the mortgagee is statutory and contractual. Under the Merchant Shipping Act 2007, with the consent of the minister every registered mortgagee shall have power absolutely to dispose of the mortgaged vessel or share in respect of which he is registered, and to give effectual receipts for the purchase money, but where there are more person than one registered an mortgager of the same ship or share, a subsequent mortgagee shall not except under the order of a Court of competent jurisdiction, sell the ship or share without the consent of every mortgagee. See section 57(2) of Merchant Shipping Act 2007.

However, in exercising his power of sale, the mortgagee is not a trustee of the power of sale for the mortgagor, but the mortgagee must act bonafide for the purposes of realizing his security and must take reasonable precautions to secure a proper price. See Cuckmere Brick Co. Ltd v Mutual Finance Ltd (1971) Ch 949. Farrar v Farrar Limited (1888) 40 Ch.D 395.

Appointment of Receiver

In the face of a deed, the mortgagee can appoint a receiver to collect the income of the mortgaged ship, and pay all the necessary expenses until the realization of the security. If the deed does not provide for appointment of a receiver, the mortgagee can apply to court for such an appointment.

3.8 MARITIME LIENS AND ITS ENFORCEMENT

There are two types of liens in maritime namely maritime liens and statutory maritime liens. See Mercantile Bank of Nigeria v E.R Tucker & Others (The Bosnia) (1978) 1 NSC 428

Maritime lien is a privileged charge upon a vessel, aircraft or other maritime property in respect of services rendered to, or injury caused by that property. It attaches to the property the moment the cause of action arises and remains with the vessel irrespective of who is in actual possession. According to Christopher Hill, it is a right which arises from general maritime law and is based on the concept that the ship has itself caused harm, loss or damage to others, or to their property and must itself make good that loss or damage. In that case, the ship is the wrongdoer, not its owners, it is the instrumentality by which its owners or their accredited representatives do wrong.

Section 66 of the Merchant Shipping Act 2007 categorizes the following inventory of claims as maritime liens on the ship:

(a) Wages and other sum due to the master, officers and other members of the ship's compliment in respect of their employment;

(b) Disbursement of the master on account of the ship;

(c) Claims in respect of loss of life or personal injury occurring whether on land or water in direct connection with the operation of the ship;

(d) Claims for salvage, wreck removal and contributions in general averages;

(e) Claims for ports, canal and other water ways dues and pilotage dues.

Furthermore, Section 5(3) of the Admiralty Jurisdiction Act LFN 2004 lists claims for salvage, or damage done by ship or wages of the master or of a member of the crew of a ship or masters disbursement as constituting maritime liens.

According to Mfom Usoro, maritime lien is inchoate in nature and unlike a mortgage it creates no immediate right of property, it is devoid of any legal consequence unless and until it is carried into effect by legal process, by a proceeding in rem. It is further submitted that the claimant must of necessity, bring an action in rem against the ship to enforce his claim.

A maritime lien is different from the common law possessory lien. Under the possessory lien, the lienee has the right to retain possession of a chattel pending payment of an outstanding obligation for services rendered. Once possession is relinquished, the right to lien is lost.

A maritime lien is further distinguished from equitable lien which does not depend on possession of the thing, but can be lost by a sale of the thing to a bonafide purchase for value without notice.

By virtue of section 18 of the Admiralty Jurisdiction Act 2004, an action on a maritime claims or on a claim on maritime lien brought after 3 years after the cause of action arose will be statute barred except where a statute has specifically fixed a limitation period in relation to the particular

action. For example, maritime lien against a ship arising by collision is extinguished after a period of two years.

Section 72 of MSA 2007 specifies a limitation period of one year from the time of cause of action for the maritime liens itemized under Section 66 of the Act.

Further to the above, maritime liens can also be extinguished by the payment or satisfaction of the claim, the sale of the ship by a court of competent jurisdiction, laches, destruction and total loss of the ship.

In the absence of any contrary intention under the Act, section 67 of the Merchant Shipping Act 2007 gives maritime liens listed in section 66 of the Act priority over mortgage or any other rights

4.0 CONCLUSION

Although, a mortgagee may seek to secure the repayment of the advanced made under a ship mortgage, but the use of a ship as a security is not an ideal form of security, given for the opinion. This because certain privileged claims can rank against the ship in priority. Second, being a floating object, it may disappear from the jurisdiction of the courts thereby making her arrest and subsequent enforcement of the lien impossible. Third, the permanent exposure to partial damage or total destruction through the perils of the seas is another factor to be considered in a ship mortgage transaction.

Equitable mortgage is not a reliable security interest by way of rank of ship mortgage and other types of security.

Since a maritime lien travels with a ship wherever she goes, it is important for the Mortgagee to know the what type of lien has been created against the ship as this may jeopardize the security of the Mortgagee.

5.0 SUMMARY

Inspite of the shortcomings of ship mortgage, a registered mortgage still remains the viable means by which a Mortgagee can secure whatever loan advanced to a Mortgagor. In granting a loan under a ship mortgage, a mortgagee needs the services of a maritime expert to prepare a well structured agreement. Maritime lien is devoid of any legal consequence unless and until it is enforced by a proceeding in rem.

6.0 TUTOR-MARKED ASSIGNMENT

1. With reference to the relevant statutory provisions and judicial cases, discuss the rights and obligations of a Mortgagor under a ship mortgage.

2. The creation of a statutory mortgage under the Merchant Shipping Act 2007: A critical appraisal.

3. Critically appraise the enforcement of maritime lien under the Merchant Shipping Act 2007

7.0 REFERENCES/FURTHER READINGS

Aleka Mandaraka-Sheppard (1949), Modern Admiralty Law. Cavendish Publishing Ltd.

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UNIT 3 The Legal Regime of The Ship

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1.0 INTRODUCTION

A ship is a physical asset and as well as a legal entity in maritime law. It is recognized as a legal entity distinct from that of its owners. For a ship to be allowed to sail on the high seas freely, such ship

must possess a national character. Ships have the nationality of state whose flag they are entitled to fly, which is the symbol of the ship's nationality. Nationality of ships enables them to engage in trade, to enter ports and deal with authorities of other nations.

2.0 OBJECTIVES

At the end of this unit, you should be able to understand the legal regime of ship as it relates to the ownership, registration, sale and purchase, construction and maintenance of ships.

3.0 MAIN CONTENT

3.1 SHIP AS A PROPERTY

Ship is defined under section 444 of the MSA 2007 as a vessel of any type whatsoever not permanently attached to the seabed, including dynamically supported craft, submersibles of any other floating craft which shall include but not limited to Floating Production Storage and Offloading (FPSO) platform as well as Floating Storage and Offloading (FSO) platform. A ship is any structure, whether completed or in the course of completion, launched and intended for use in navigation and not propelled by oars or paddles.

The conditions for owning a registered Nigerian ship are specified in section 18 of the MSA 2007. It provides that a ship shall not be registered in Nigeria under this Act unless the ship is owned wholly by:
(a) Nigerian citizens;
(b) Bodies corporate and partnerships established under and subject to Nigerian laws, having their principal place of business in Nigeria;
(c) Such other persons as the Minister may, by regulations prescribed.

A beneficial owner of a ship is the person who is the legal owner, the equitable owner or the person who has full possession and control and has all the benefits and use of her which the legal or equitable owner would normally have. A registered owner is the person(s) or company in whose name the vessel is registered. The management owner is usually the person engaged in the management of a ship.

Section 17(2) of the MSA recognizes the joint ownership of ships. It specifically provides that A person shall not be entitled to be registered as owner of a fractional part of a share in a ship, but any number of persons not exceeding five may be registered as joint owners of a ship or of any share therein.

Furthermore, Joint owners shall be considered as constituting one person only as regards the persons entitled to be registered, and shall not be entitled to dispose in severalty of any interest in a ship, or in any share the interest in respect of which they are registered.

On the ownership of ships see M/V S Araz & Anor v Messrs N.V Scheep (Nigerian Shipping Cases (NSC) Vol. 6, P. 116, Tigris Int. Corp v Ege Shipping & Ors (NSC) Vol. 6 P 285.

3.2 PURCHASE AND SALE OF SHIPS

Any person seeking to sell and pass valid title in a ship to a purchaser must be the legal registered owner of the ship. This is line with the latin maxim “nemo dat quod non habet”.

A certificate of registry issued pursuant to section 30 of the MSA 2007 in the name of the registered owner of the ship or its builder, is an evidence of title to a ship.

Section 77 of the MSA 2007 provides that where a ship or any share in a registered Nigerian ship is to be sold and transferred, it shall be by way of a Bill of Sale. The requirements for sale and purchase of Nigerian registered ship are set out in sections 77-81 of the MSA 2007.

Please note that the Minister of Transportation must consent to every sale and transfer of a registered Nigerian ship. See section 78-79 of the MSA 2007. The following requirements and processes must be complied with in order to perfect a sale of a Nigerian registered ship in line with section 78-79 of the MSA 2007:

(a) Application for statutory consent to sell or transfer by registered owner;
(b) Board Resolution of the owner's company
(c) Executed Bill of Sale
(d) Old certificate of Registry returned for cancellation (and re-issue where the vessel is to remain on Nigerian Register)
(e) Company particulars of new owners
(f) Application for approval of ship's name (in case of change of name)
(g) Declaration of ownership (by new owners and cancellation of seller's declaration of ownership).
(h) Official fees.

When court of competent jurisdiction, whether under MSA or otherwise, orders the sale of any ship or share in the ship, the order shall contain a declaration vesting in a person named in the order, the right to transfer that ship or share; and the person so named shall upon receiving the right to be entitled to transfer the ship or share in the same manner and to the same extent as if the person were the registered owner of the ship or share and every Registrar shall obey the requisition of a person so named as if that person were the registered owner. See section 81 of the MSA 2007.

3.3 REGISTRATION OF SHIPS

Articles 2 and 4 of the United Nations Convention on Registration of Ships 1986 provides that every ship must be registered under one national legislation or the other. In implementing this provisions of the convention relating to the compulsory registration of ships, section 19 of the MSA 2007 provides that whenever a ship is owned wholly by persons qualified to own a registered Nigerian ship, the ship shall be registered in Nigeria in the manner provided in the Act or in any other country in accordance with the laws of that country, unless the ship is exempted from registration under the Act.

The procedure for registration is set out in section 20-41 of the MSA 2007. The procedure is hereby summarized below:

a. An Application for registration of a ship in Nigeria to be made formally in writing to the Registrar at a port of registry in Nigeria. In the case of an individual be made by the person requiring to be registered as owner or by one or more of the persons so requiring, if more than one, or by his or their agent; and in the case of a corporation, by its agent.

b. The authority of an agent shall be testified by writing, if appointed by an individual, under the hands of the appointors, and if appointed by a corporation, under the common seal of the corporation.

c. Before proceeding with the registration of a ship, the Registrar shall be furnished with the following information and documentation such as:

    I. the full names, addresses and occupations of the purchaser or purchasers of the ship;

    II. evidence of ability or experience of the purchasers to operate and maintain the vessel; the ownership of shares in the company applying to register the ship;

III. in the case of a ship with a previous registration, a bill of sale with warranty against liens and encumbrances from the sellers;

IV. the log-book of the ship for inspection by the Registrar; evidence of financial resources sufficient for the operation and maintenance of the ship; and

V. the certificate of incorporation and Articles of Association of the company.

d. The owner of a ship or an applicant who is applying for the registration of a ship shall on or before making the application, cause the ship to be surveyed by a surveyor of ships and the tonnage of the ship to be ascertained in accordance with the Tonnage Regulations made under the MSA 2007.

e. Every ship in respect of which an application for registration is made shall, before it is registered, be marked permanently and conspicuously to the satisfaction of the Minister as follows: the name of the ship shall be marked on each of its bows, and the name of the ship and the name of the ship's port of registry shall be marked on the stern of the ship, on a dark ground in white or yellow letters, or on a light ground in black letters, such letters to be of a length not less than four inches and of a proportionate breadth.

f. A declaration to be made by a person or on behalf of a corporation as owner.

g. A certificate of registration to be issued by the Registrar upon the completion of registration.

The following are the functions of registration:

a. Allocation of a vessel to particular state and its subjection to a single jurisdiction.
b. Conferment of the right to fly the national flags.
c. The right to diplomatic protection and consular assistance by the flag state.
d. The right to naval protection by the flag state.
e. The right to engage in certain activities within the territorial waters of the flag state-for example, cabotage.
f. In case of war, for determining the application of the rules of war and neutrality to a vessel.
g. The protection of the title of the registered owner.
h. The protection of the title and the preservation of priorities between persons holding security interests over the vessel, such as mortgages.

Registration of Cabotage Vessels

Cabotage vessels are the vessels engaged in the carriage of goods and passengers originating from one Coastal or Inland point which could be ports, terminals, jetties, piers etc, to another point located within Nigeria.

Pursuant to section 22 of the Cabotage Act 2003, vessels intended for use in cabotage trade are required to be registered in the Special Register for Cabotage Vessels and Ship Owning Companies engaged in cabotage. The Minister of Transport is expected to establish the Special Register for Cabotage Vessels in the Office of the Registrar of Ships.

The Cabotage Act recognizes five types of registration namely:

(a) Registration of Wholly Nigerian owned vessels
(b) Registration of Joint Venture Owned vessels
(c) Registration of Bareboat Chartered vessels
(d) Registration of Foreign owned vessels
(e) Temporary Registration of Cabotage vessel

However, section 8 of the Cabotage Act exempts the following vessels from cabotage regime:

(a) Vessels engaged in salvage operations for the purpose of rendering assistance to persons or aircraft in danger or distress
(b) Vessels engaged in commercial salvage operations
(c) Vessels owned and operated by Nigerian Armed Forces and Government Paramilitary Agencies
(d) Vessels owned and operated by Nigerian Customs Service
(e) Vessels owned and operated by Nigerian Police Force
(f) Vessels owned and operated by the Federal and State Ministries and or their agencies provided the vessels do not engage in commercial activities
(g) Vessels engaged with the approval of the Minister of Transport or any other Government agencies in marine pollution emergency
(h) Vessels engaged in oceanographic research with the approval of the department of fisheries or the Minister of Foreign Affairs

3.4 CONSTRUCTION OF SHIPS

The Minister may is empowered to make construction rules prescribing requirements as to the hull, equipment and machinery of a Nigerian ship or any class of coastal or inland water ship. Every Nigerian ship or coastal or inland water ship shall, comply with the requirements of annual survey as are applicable unless exempted. See section 249(1) of the MSA 2007.

The Minister shall ensure that every ship constructed in Nigeria, to which the Safety Convention is applicable, shall comply in every particular with the provisions of the Convention. Section 249(4) of the MSA 2007.

The builder of a ship shall submit the plans and specifications of the ship in duplicate to the Minister, and shall not commence the building until the Minister has approved of the plans and specifications. If a builder of a ship builds a ship without complying with the provisions the Minister may order the ship to be detained absolutely or until the builder performs the conditions with respect to alterations as the Minister thinks fit. See section 250(3) of the MSA 2007

The builder of a ship shall pay such fees for the examination of the plans and specifications of a ship as the Minister may, from time to time, direct. See section 250(4) of the MSA 2007.

Any person who contravenes the construction rules commits an offence and on conviction is liable to a fine not less than one hundred thousand Naira. See section 250(5) of the MSA 2007.

The owner and the master of a ship being constructed shall ensure that the ship is equipped with Lifesaving Appliances. See section 252 of the MSA 2007.

A surveyor of ships may inspect a ship for the purpose of ensuring that the ship is properly provided with lifesaving appliances, for the purpose of the inspection shall have all the powers of an inspector under the MSA 2007. See section 253(1) of the MSA 2007.

If a surveyor of ships finds that the rules for lifesaving appliances have not been complied with, he shall give to the master or owner of the ship, a notice in writing stating in what respect there has been failure in compliance and what, in the opinion of the surveyor, is required to remedy the same. Section 253(2) of the MSA 2007.

4.0 CONCLUSION

In this unit, we have attempted to discuss ship registration, ownership, ship construction and registration. Ship that must sail freely must be registered and possess a national character. The registration of a vessel under the flag of a

state implies that her operation will be subjected to both international law, and the laws and fiscal regime of that country.

It should be note it is only the ships which are engaged in inland coastal transportation business that can be registered under the Cabotage Act 2003, the registration of other commercial vessels can only be effected under the MSA 2007.

Every vessel intended for cabotage activities shall meet all the requirements for eligibility as set forth under both the Cabotage Act and the Merchant Shipping Act and its amendments to the extent that the said Merchant Shipping Act is not inconsistent with the provisions of this Cabotage Act. In other words Cabotage Act will prevail over the Merchant Shipping Act in the event of any conflict between the provisions of the two Act.

5.0 SUMMARY

A ship is a chattel, and the passing of property in the ship is effected by transfer of a normal bill of sale from seller to buyer.

6.0 TUTOR-MARKED ASSIGNMENT

1. With reference to statutory provisions, discuss the procedure for the registration of a non-cabotage vessel in Nigeria.
2. Disucss the procedure for the Sale and Transfer of Ships under the Merchant Shipping Act 2007.

7.0 REFERENCES/FURTHER READINGS

Aleka Mandaraka-Sheppard (1949), Modern Admiralty Law. Cavendish Publishing Ltd.

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Coastal and Inland Shipping (Cabotage) Act No 5 of 2003

UNIT 4 MITIGATION; SAFETY OF LIFE AT SEA AND COLLISION REGULATION

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1.0 INTRODUCTION

It is incontrovertible that every traveler whether be sea, air or land desires safety. It was for this reason that some countries of the world have sat together to design laws that will govern the movement of ships in order to make traveling by sea a safe one. Safety is a condition of being safe from risk or danger. It is a state of not involving in risk or danger.

Sea is the continuous body of salt covering most of the earth's surface. It is also a named portion of this body of water, smaller than an ocean, sometimes partly or wholly enclosed by land. It is a vast inland lake

of salt or fresh water. Section 215 of the Merchant Shipping Act of 2007 provides that the following conventions and protocols and their amendments relating to Maritime safety shall apply that is-

(a) International Convention for the safety of Life at Sea, 1974 (SOLAS) was adopted by the International Conference on Safety of Life at Sea;
(b) Protocol Relating to the International Convention for the Safety of Life at Sea, 1988 and Annexes I to V thereto;
(c) International Convention on Standards of Training Certification and Watch Keeping of Seafarers, 1978 (STCW) as amended;
(d) International Convention on Maritime Search and Rescue, 1979 (SAR);
(e) International Labour Organization Convention (No.32 of 1932) on Protection Against Accident of Workers Employed in Loading or Unloading Ships (Dockers Convention Revised 1932);
(f) International Convention on Maritime Satellite Organization, 1976 (INMARSAT) and Protocol thereto:
(g) The Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 1974 and its protocol of 1990;
(h) Conventions for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988 and the Protocol thereto;
(i) International Convention on Salvage, 1989;
(j) Placing of Seamen Convention, 1920;
(k) International Ship and Ports Facility Security (ISPS) Code
(l) International Convention for Safe Containers, 1972.

A collision between ships is predicted on an unlawful act or omission on the part of someone responsibilities, usually the ship owner whose ship goes into collision with another vessel. Liability therefore depends on negligence. Ships proceeding along the course of a narrow channel or fairways are expected to take early action to allow sufficient sea room for the passage of other ships.

The 19th century saw the introduction of fast powerful steamships, which hasted the need to produced clear rules to prevent collision. Collision regulations are now coordinated and revised by international conventions.

2.0 OBJECTIVES

At the end of this unit, you should be able to understand the statutory regulations governing collision and the safety of life at sea.

3.0 MAIN CONTENT

3.1 SURVEY OF SHIPS

The Minister is empowered to appoint qualified persons as Surveyors of ships whether generally or for any specific purpose, or occasion. The Minister may as well make rules as to powers, functions and duties of Surveyors. See section 218(5) of the Act.

Every Surveyor of ships and every Radio Surveyor shall perform the powers , functions and duties conferred on him under the Merchant Shipping Act 2007 and such other powers, functions and duties as may be necessary to carry into effect the provisions of the part xii of the Act. See section 218(1)-(3) of the Act.

Specifically, a Surveyor of ships may go on board any Nigerian ship while the ship is still in Nigeria to survey of inspect the ship or any part of the ship , or any of the machinery, boats and equipments, cargo and other property or articles on board the ship , and any certificate or other documents which relate to the ship, or to any officer of the ship.

In the event of any accident involving a ship, or for any other reason he may consider necessary, a Surveyor of a ship may require the ship to be taken into the dock for the purpose of surveying or inspecting the hull of the ship. See section 218(4) of the Act

The owner of a Nigerian ship or coastal trade and inland water ship is under a statutory obligation to cause the ship to be surveyed in the manner provided in this part of this Act, at least once every year. But If the ship is, during the whole of the last month of any annual period prescribed, absent from Nigeria, the owner shall cause the ship to be surveyed within one month from the date on which the ship next returns to a Nigerian port. See section 219 of the Act

A Surveyor shall keep a record of the inspections he makes and certificates he issues in such form and with such particulars respecting the inspection and certificates as the Minister may direct. See section 220 of the Act.

No ship to which the section 221 of the Act applies shall, except where this Act otherwise provides, ply or proceed to sea or on any voyage or excursion unless there is a valid certificate of survey in force in respect of that ship under this part, which certificate is applicable to the voyage or excursion on which the ship is about to proceed. The classes of ships affected are listed in section 221(2) of the Act.

3.3 RECOGNITION OF CERTIFICATES OF SURVEY GRANTED IN OTHER COUNTRIES

Where a foreign ship, which is not a Safety Convention passenger ship, has a foreign certificate of survey attested by an appropriate Officer at a port in a foreign country, and the Minister is, by the production of that certificate, satisfied that
(a) the ship has been officially surveyed at the port;
(b) the certificate remains in force; and
(c) as to the matters covered by the survey made for the purposes of the certificate, it appears to meet substantially the requirements of this Act, the Minister may; subject to compliance by the owner with any condition which the Minister may specify, direct that, the certificate shall be deemed to be a certificate of survey issued under this Act, and the certificate shall have effect accordingly. See section 225(1) of the Act

The Minister may, by order declare that the provisions of section 225(1) of the Act shall not apply in the case of a foreign ship whose certificate of survey complies with the requirements of this section, if it appears to the Minister that corresponding advantages are not extended to Nigerian ships at the port at which the foreign ship was surveyed. Section 225(2) of the Act.

3.4 ISSUANCE OF CERTIFICATES OF SURVEY

The Minister is empowered under the Act to issue the following certificates:

(a) Certificate of Survey-section 226

(b) Safety certificates to passenger ships-section 227

(c) Certificates for cargo ships of safety equipments, and exemption certificate-section 228 of the Act

(d) Certificates for cargo ships of cargo certificates and exemption certificate-section 229 of the Act

(e) General safety certificates, short voyage safety certificate, a safety equipment certificate, or a radio certificate-section 230 of the Act.

Note that it is prohibited for a Nigerian ship to proceed to sea on an international voyage from a port in Nigeria unless there is in force in respect of the ship:

(a) if the ship is a passenger ship, a safety certificate relating to short voyage safety certificates, is applicable to the voyage on which the ship is about to proceed and to the trade in which it is for the time being engaged; or

(b) if the ship is a cargo ship, both a safety equipment certificate or a qualified safety equipment certificate, and a radio certificate, a qualified radio certificate or a radio exemption certificate. Section 235(1) of the Act

A cargo ship shall not be prohibited from proceeding to sea if there is in force in respect of the ship such certificate or certificates as would be required if the ship were a passenger ship. Section 235(2) of the Act

The master and owner of a ship which proceeds to sea without a certificate shall be deemed to have committed an offence and on conviction shall be liable to a fine less than five hundred thousand Naira or to imprisonment for three years or to both. Section 235(3) of the Act.

3.5 SAFETY CONVENTION SHIPS OF OTHER COUNTRIES

The Minister may by Order provide that certificates issued in accordance with the Safety Convention by the Government of a country other than Nigeria in respect of Safety Convention ships, not being Nigerian ships, be accepted as having the same force as corresponding certificates issued by the Minister under the Act, and the certificate shall be referred to as Accepted Safety Convention Certificate. See section 243(1) and (2) of the Act.

Where an Accepted Safety Convention Certificate is produced in respect of a Safety Convention passenger ship, not being a Nigerian ship:

(a) the ship shall not be required to be surveyed under this Act by a surveyor except for the purpose of determining the number of passengers, if any, that the ship is fit to carry; and

(b) on receipt of any declaration of survey for the purpose of determining the number of passengers, the Minister shall issue a certificate under section 227 of the Act containing only a statement of the particulars set out in paragraph (c) of subsection (1) of section 227 of the Act and a certificate so issued shall have effect as a certificate of survey. Section 244(1) of the Act.

Where there is produced in respect of any ship mentioned in section 244(1) of the Act an Accepted Safety Convention Certificate, and a certificate issued by or under the authority of the Government of the country in which the ship is registered or to which it belongs showing the number of passengers the ship is fit to carry, and the Minister is satisfied that the number has been determined substantially in the same manner as in the case of a Nigerian ship, the Minister may, if he thinks fit, dispense with any survey of the ship for the purpose of determining the number of passengers that the ship is fit to carry, and direct that the last mentioned certificate has effect as a certificate of survey. See section 244(2) of the Act.

Where a Safety Convention cargo ship, which is not a Nigerian ship, is surveyed in Nigeria in the manner prescribed under the Act, and there is produced in respect of the ship an Accepted Safety Convention Certificate by virtue of the production of which that ship is, under section 247 of this Act, exempted from the rules for lifesaving appliances, or, as the case may be, from the radio rules, the surveyor shall state in his declaration of survey that if the Minister upon receipt of a declaration of survey, issues a certificate of survey in respect of any such ship, the Minister shall state in the certificate the rules from which that ship is exempted and the reasons for the exemption. See section 245 of the Act

Where an Accepted Safety Convention Certificate is produced in respect of a Safety Convention ship which is not a Nigerian ship, and the certificate shows that the ship:

(a) is properly with the lights, shapes and means of making signals required by the collision rules; or

(b) complies with the requirements of the Safety Convention as to lifesaving and fire extinguishing appliances or if exempted from some of those requirements the ship complies with the rest; or

(c) that the ship complies with or is exempted from the requirements of the Safety Convention relating to radio communications, or if exempted from some of those requirements, the ship complies with the rest, the ship shall, to the extent to which the certificate is applicable, be exempted from inspection for the purposes of enforcing the collision rules or from the provisions of the rules for lifesaving appliances or of the radio as the case may be. See section 246 of the Act.

The master of a Safety Convention ship, which is not a Nigerian ship, shall produce to the collector of customs from whom a clearance for the ship is demanded in respect of an international voyage from a port in Nigeria, an Accepted Safety Convention Certificate that is the equivalent of the Safety Convention Certificate issued by the Minister under the Act, required to be in force in respect of the ship if the ship were a Nigerian ship; and a clearance shall not be granted, and the ship may be detained until the certificate is so produced. See section 247 of the Act.

3.5 CONVENTION ON THE INTERNATIONAL REGULATIONS FOR PREVENTING COLLISIONS AT SEA 1972 (COLREGS)

The International Regulations for the Prevention of Collision at Sea 1972 was adopted on the 20th of October, 1972 and came into force on the 15th of July, 1977. No doubt, the convention has international application, but are subject to variations of local laws of the countries giving effect to them.

The purpose of the convention is to regulate and prevent collision of ships or vessels, regulate the conduct of vessels in sight of one another, and the conduct of vessels in restricted visibility, steering and sailing, e.t.c. See Rule 3 of COLREGS

Steering and Sailing Rules-Regulation 4

Regulation 4 provides that the rules from Regulation 5-10 must be complied with in any condition of visibility.

Regulation 5 (as amended)-Proper lookout

The convention requires that every vessel shall at all times maintain a proper look-out by sight and hearing as well as by all available means appropriate in the prevailing circumstances and conditions so as to make a full appraisal of the situation and of the risk of collision. A faulty lookout has been is said to be the sole cause of many collision, but a proper lookout will depend at all times upon all circumstances. See The Maritime Harmony (1982) 2 Lloyd's Rep 406

The marking of successive radar plots of an approaching ship on the radar display gives the relative track of an approaching ship. See The Maloja II (1993) 1 Lloyd's Rep 48.

Regulation 6-Safe Speed

Rule 6 of COLREGS requires that every vessel shall at all times proceed at a safe speed so that she can take proper and effective action to avoid collision and be stopped within a distance appropriate to the prevailing circumstances and conditions. A safe speed is a relative term

requiring various factors to be taking into consideration, while an unsafe speed involves a speed that is slow as well as one that is excessive.

The rule further provides the factors which should be taken into account in determining safe speed and they are:

(a) The state of visibility
(b) Traffic density
(c) The maneuverability of the vessel with special reference to stopping distance and turning ability in the prevailing conditions
(d) At night, the presence of background light such as from shores etc
(e) The state of the wind, sea and current, and the proximity of navigational hazards
(f) The draught in relation to the available depth of water.

Vessels with operational radar shall take into account the following:

(a) The characteristics, efficiency and limitation of the radar equipment
(b) Any constraint imposed by the radar range scale in use
(c) The Effect on radar detection of the sea state, weather and other sources of interference
(d) The possibility that small vessels, ice and other floating objects may not be detected by radar at an adequate range
(e) The number, location and movement of vessels detected by radar.
(f) The more exact assessment of the visibility that may be possible when radar is used to determine the range of vessels or other objects of vicinity.

Regulation 7-Risk of Collision

This rule stresses the importance of using all available means appropriate to the prevailing circumstances and conditions to determine if risk of collision exists. The rule further stresses the proper use of radar equipment if fitted and operational and warns that assumption shall not be made on the basis of scanty information, especially scanty radar information. The court considered a proper use of radar in The Roseline (1981) 2 Lloyd's Rep 410.

Regulation 8-Action to Avoid Collision

Rule 8 provides that action to be taken to avoid collision shall be positive, made in ample time and due regard to observance of good seamanship and the provisions of regulation 5 and 6 shall be observed in avoiding collision.

Regulation 9-Narrow Channels

A vessel proceeding along the course of a narrow channel or fairway is obliged to keep as near to the outer limit of the channel or fairway which lies on her starboard side as is safe and practicable. The same Rule prevents a vessel of less than 20 metres in length or a sailing vessel from impeding the passage of a vessel which can safely navigate only within a narrow channel or fairway.

Regulation 10- Traffic Separation Schemes

This rule regulates opposing streams of traffic and vessels passing along the entire length of the scheme by establishing traffic lanes.

Regulation 11- Vessel in Sight of Another

This rule applies to vessels in sight of one another, while Regulation 12 deals with the actions to be taken when two sailing vessels are approaching one another, and which of them should keep out of the way to avoid a risk of collision.

Regulation 13- Overtaking Situations

This rule provides that the overtaking vessel should keep out of the way of the vessel being overtaken, while regulation 14 gives the guidelines when vessels are on a head on situations,

whereupon each shall alter her course to starboard so that each shall pass on the port side of the other.

Regulation 15: Crossing Situation

This rule deals with action to be taken when two vessels are crossing so as to avoid risk of collision, in which case, the vessel which has the other on her own starboard side shall keep out of the way and shall if the circumstances of the case admits, avoid crossing ahead of the other vessel. See The Nowy Sacz (1976) 2 Lloyd's Rep 682

Regulation 16-Action By give-Way Vessel

Every vessel which is directed to keep out of the way of another vessel shall, so far as possible, take early and substantial action to keep well clear. See MineraL Dampier and Hanjin Madras (2000) 1 Lloyd's Rep 282.

Regulation 17-Action By Stand-on Vessel

Whether one of two vessels is to keep out of the way, the other shall keep her course and speed. The latter vessel may however take action to avoid collision by her manoeuvre alone, as soon as it becomes apparent to her that the vessel required to keep out of the way is not taking appropriate action in compliance with these rules. See The Estrella (1977) 1 Lloyd's Rep 525.

Regulation 18-Specifies Responsibilities Between Vessels

Regulation 19-A vessel detecting by radar the presence of another vessel

A vessel detecting by radar the presence of another vessel should determine if there is risk of collision and if so take avoiding action. A vessel hearing fog signal of another vessel should reduce to a minimum. See The Ercole (1977) 1 Lloyd's Rep 516

Regulation 20-Applies To All Weather Conditions

This regulation states that rules concerning lights on vessels apply from sunset to sunrise or covers visibility of lights-indicating that lights should be visible at minimum ranges (in nautical miles) determined according to the type of vessel.

Regulation 21-Defines each type of light.

Regulation 22-Explains a new rule about visibility of lights.

Regulation 23-Specifies the type of lights to be exhibited by power driven vessels underway.

Regulation 24- Deals with the situation of lights during towing

Regulation 25- and **26-**Provides the requirements for sailing vessels, vessels under oars and fishing underway.

Regulation 28-34 cover

i. Light requirements for vessels not under command or restricted in their ability to maneuver;
ii. Light requirements for vessels constrained by their draught;
iii. Light requirements for pilot vessels;
iv. Light requirements for vessels anchored and aground;
v. Light Requirements for seaplanes. See Rule 26-30 of COLREGS

Regulation 35-37 cover issues dealing with sound and light signals, and the contents are as follows:

i. Definitions of whistle, short blast and prolonged blast;

ii. And says vessels 12 meters or more in length should carry a whistle and a bell and vessels 100 meters or more in length should carry in addition a gong;
iii. Maneuvering and warming signals, using whistle or lights;
iv. Sound signals to be used in restricted visibility;
v. And distress signal.

3.6 CONCEPT OF COLLISION UNDER NIGERIAN LAW

There are some provisions on collision under Nigerian Law and are contained under the Merchant Shipping Act 2007.

The Minister is empowered under the Act to make collision rules with respect to ships, and to aircraft on the surface of the water, for the prevention of collision. The rule shall contain such requirement necessary to implement the provisions of the international treaties, agreements and regulations for the prevention of collisions at sea that are for the time being in force. The collision rules, together with the provisions of this part of this Act relating to those rules or otherwise relating to collisions, shall apply to all ships and aircraft which are locally within the jurisdiction of Nigeria. See section 265 of the Act.

Every owner, master of ship and owner and person in command of an aircraft has obligation to obey the collision rules, and shall not carry or exhibit any light of shapes, carry or use any means of making signals, other than those which are required or permitted by the collision rules to be carried, exhibited or used.

Where an infringement of the collision is caused by the willful default of the owner or master of a ship, as the case may be, of the owner of any aircraft or of the pilot or other person on duty in charge of any aircraft, that person commits an offence and on conviction is liable to a fine not less than five hundred thousand Naira or to imprisonment for a term not less than two years or to both. See section 266(1) and (2) of the Act.

Where any damage to person or property arises from the noncompliance by any ship or aircraft with any of the collision rules, the damage shall be deemed to have been occasioned by the willful default of the officer in charge of the deck of the ship at the time or as the case may be, of the pilot or any other person on duty in charge of the aircraft at the time, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the rules necessary. See section 266(3) of the Act.

A surveyor of ships may carry out inspection of a ship in order to ensure that the ship is properly provided with lights, shapes and the means of making sound signals in conformity with the collision rules, and if he finds that the ship is not so provided, the surveyor of ships shall give to the master, owner or his agent notice in writing pointing out the deficiency, and also what is, in his opinion, requisite in order to remedy the same. See section 267(1) of the Act.

In every case of collision between two ships, the master or person in charge of each ship shall, if he can do so any of the following without danger to his own ship, crew and passengers:

(a) render to the other ship, its master, crew and passengers, if any, such assistance as may be practicable and necessary to save them from any danger caused by the collision, and shall stay by the other ship until he has ascertained that there is no need of further assistance; and

(b) give to the master or person in charge of the other ship the name of his own ship and of the port at which the ship is registered or to which it belongs and also the names of the ports from which it comes and to which it is bound.

If the master or person in charge of a ship fails, without reasonable cause, to comply with this section, he commits an offence and on conviction is liable to a fine not less than Five Hundred Thousand Naira or to imprisonment for a term not less than two years or to both. However, the failure of the master or person in charge of a ship to comply with the provisions of this section shall not raise any presumption of law that the collision was caused by his wrongful act, neglect or default. See section 268(2) and (3) of the Act

In every case of collision in which it is practicable so to do, the master of every ship shall, immediately after the occurrence, cause a Statement of the collision and of the circumstances under which it occurred, to be entered in the official log book; and the entry shall be signed by the master and also by the mate or one of the crew. Every master who fails to comply with this section commits an offence and on conviction shall be liable to a fine not less than One Hundred Thousand Naira. See section 269 of the Act

The Minister may, by Order, direct that the provisions of the rules shall, subject to any limitation of time and to any conditions and qualifications contained in the Order, apply to the ships and aircraft of foreign country, whether or not they are locally within the jurisdiction of Nigeria, and that those ships and aircraft shall, for the purpose of those rules and provisions, be treated as if they were Nigerian ships or aircraft registered in or belonging to Nigeria. See section 270 of the Act.

The master or person in charge of a ship shall, in so far as he can do so without serious danger to his own ship, its crew and passengers, if any, render every assistance to any person, even if that person is a subject of a State at war with Nigeria, who is found at sea in danger of being lost.

A master or person in charge of a ship who fails to discharge this obligation commits an offence and will be liable on conviction to a fine not less than two hundred thousand Naira or imprisonment for a term not exceeding two years or to both. However, the compliance by the master or person in charge of a ship shall not affect his right or the right of any other person to salvage. See section 271 of the Act.

4.0 CONCLUSION

In this unit, effort has been made to examine the relevant statutory and international regulations governing collision and the safety of lives at sea. The regulations are contained in the Merchant Shipping Act, 2007, and other international conventions and protocols which Nigeria has domesticated. Such regulations include annual survey of ships, obtaining of the relevant certificate, the construction and equipment of ships including the provision of lifesaving and fire-fighting appliances, radio communications in ships, the safety of navigation, the management and safe operation of ships, the construction, surveys and marking of high speed crafts, and special measures to enhance the memorandum on port state control e.t.c. The Breach of the safety regulations is a punishable offence under the Merchant Shipping Act, 2007, and also attracts civil liability.

5.0 SUMMARY

The owner of ship has a statutory duty of manning the ship with a competent crew members, and to ensure compliance with the relevant statutory and international regulations governing collision and the safety of lives at sea.

6.0 TUTOR-MARKED ASSIGNMENT

1. With reference to the relevant statutory provisions, discuss the concept of collision in maritime law.

2. With reference to judicial decisions, critically appraise the statutory regulations governing the safety of life at sea.

7.0 REFERENCES/FURTHER READINGS

Aleka Mandaraka-Sheppard (1949), Modern Admiralty Law. Cavendish Publishing Ltd.

L. Chidi Ilogu (2006), Essays on Maritime Law and Practice. Academic Press Plc, Lagos.

Merchant Shipping Act, No 27 of 2007

MODULE 2

Unit 1 Collision and Liability For Damage

Unit 2 Limitation of Liability

Unit 3 Salvage

Unit 4 Towage

Unit 5 Pilotage

UNIT 1 COLLISION AND LIABILITY FOR DAMAGE

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
    3.1 Disobeying Collision Regulations
    3.2 Negligence
    3.3 Defences To Liability
    3.4 Assessment of Damage
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
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1.0 INTRODUCTION

Liabilities in collision cases are both criminal and civil. A contravention of statutory regulation on collision and safety of lives on the sea is a punishable offence under the Merchant Shipping Act No. 27 of 2007. Malicious or intentional or reckless damage to property of another also constitutes a punishable offence under the Criminal and Penal Code.

The claimant may also institute a civil action against the defendant in tort, but the burden of proof is upon the claimant to prove the facts that have given rise to liability incurred due to negligence or want of good seamanship.

2.0 OBJECTIVES

At the end of this unit, you should be able to understand both the criminal and civil liabilities involved in collision cases

3.0 MAIN CONTENT

3.1 DISOBEYING COLLISION REGULATION

Failure to comply with COLREGS, whether the breach causes a collision or not constitutes a criminal offence under the Merchant Shipping Act 2007. See Regulation 5 of the COLREGS.

Section 266 of the Merchant Shipping Act, 2007 makes the infringement of a collision regulation a criminal offence if the infringement was caused by the willful default of the master or owner of the ship. The burden of proving that the default is willful rests on the prosecution. Where any damage to person or property arises from the noncompliance by any ship with any of the collision rules, the damage shall be deemed to have been occasioned by the willful default of the officer in charge of the deck of the ship at the time unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the rules necessary.

A breach of the collision regulations or of the provisions of the Merchant Shipping Act 2007 which result in loss of life, will give rise to a prosecution for manslaughter under the criminal law. See R v Adomako (1994) 3 All ER 79.

Other statutory offences against the collision regulations include:

(i) Failure to assist vessel after collision or to vessels or person in distress. See section 268(2) of the Merchant Shipping Act 2007
(ii) Breach of documentation and Reporting duties. See section 269 of the Merchant Shipping Act 2007
(iii) Dangerously unsafe ships and unsafe operation of ships. See section 279 of the Merchant Shipping Act 2007.

3.2 NEGLIGENCE

The master and crew or the owner of a ship who is in breach of the collision regulations, may be liable in negligence. However, the claimant must establish breach of the duty of care, standard of care, and damage.

Furthermore, the following persons may be held liable for any breach of the collision regulations:

(i) The employer of the wrongdoer in personam.
(ii) Salvors if in breach of the duty of care during a salvage operation.
(iii) Port Authority if it has been careless in providing navigational safety in breach of its statutory duties.
(iv) Ship Builders and Repairers who builds a defective ship, or failure to carry out a proper repair to a ship, or supply of defective equipments, by reason of which collision or death or personal injury occurs, will be held liable for negligence.

3.3 DEFENCES TO LIABILITY

The person(s) in breach of the collision regulations can plead the following:

(i) Inevitable Accident-The defendant must show that the proximate cause of the accident was totally unavoidable, and that all necessary precautions had been taken earlier. See The Marpesia (1872) LR 4 PC 212.

(ii) Contributory negligence-Where there is a collision between a ship and a non-ship, the rule of contributory negligence will apply. That means that there will be no recovery of damages from the defendant. On the other hand, where by the fault of two or more ships, damage or loss is caused to one or more of those ships, the proportionate fault rule will apply to those vessels at fault and their cargo on board. This means that there will be an apportionment of loss to the degree in which each vessel is at fault.

If it is not possible to establish different degrees of fault, the liability shall be apportioned equally, and no liability will be attached to a ship whose fault has contributed to the loss or damage at all. See section 339 of the Merchant Shipping Act 2007. See The Anneliese (1970) 1 Lloyd's Rep 355.

(iii) Alternate danger-The claimant's master may act under a situation which is beyond his control, and may do some act which helps to bring about collision. This means that where one ship places another ship in a position of extreme danger, that other ship will not be blamed if she does something wrong. See Bywell Castle (1879) 4 PD 219, P228.

(iv) The defence of necessity-The defendant may plead this defence to escape liability in circumstances in which his action might have been justified because of necessity to choose between two perilous situations, either in the interest of its own ship or in the interest of the third parties.

(v) Time bar defence-Section 342 of the Merchant Shipping Act 2007 provides for a period of two years within which to enforce any claim or lien against a ship or its owners in respect of any damage or loss to another ship, its cargo or freight, or any property on board, or damages for loss of life or personal injuries suffered by any person on board, caused by the fault of the former ship.

However, any court of competent jurisdiction may extend the period on such conditions as it thinks fit and shall, if satisfied that during the period there has not been a reasonable opportunity of arresting the defendant ship at any port in Nigeria, or within three miles of the coast of Nigeria or locally within the jurisdiction of the country to which the ship of the plaintiff belongs or in which the plaintiff resides or has his principal place of business, extend the period to the extent necessary to give such a reasonable opportunity .

3.4 ASSESSMENT OF DAMAGE

(i) Restitutio in integrum-The objective of this is to place the claimant in the same pecuniary position as he would have been in but for the defendant's act which caused the collision. See The Clarence (1850) See The Clarence (1850) 3 W Rob 283, p 285.

(ii) Value of the ship-If the kind of loss is foreseeable, the claimant will be entitled to the market value of the ship at the time of the collision. If there is no market value, he will be entitled to the value of the ship to her owner as a going concern, that is, the worth of the ship from a business point of view.

(iii) Cost of Repairs and Incidental Cost-The owner is entitled to the cost of repairs as to put his vessel in substantially the same state as she was in before the damage occurred. The repairs must be carried out at a reasonable expense and must be satisfactory. The shipowner and demise charterer can further recover any other loss foreseeably resulting from the collision, which is incidental or consequential to the collision, including financial loss. The incidental cost includes loss of profit, survey costs, the cost of drydocking, and out of pocket expenses, such as payment for salvage services, towage services, dock dues and charges. See The Admiralty Commissioners v SS Checkiang(1926) AC 637

(iv) Loss of Profit- If the vessel was under a chaterparty and is in need of repairs, the owner can claim the loss of freight or hire, less the disbursements already paid, and an allowance for wear and tear saved may be made. See The Naxos (1972) 1 Lloyd's Rep 149.

(v) Pollution damage-The liability incurred by pollution after collision will be part of damages claimed or apportioned.

4.0 CONCLUSION

In this unit, effort has been made to consider the types of liability which exist in the event of a collision. It has been shown that the master and crew or the owner of a ship who is in breach of the collision regulations may be charged for manslaughter under the criminal law, and be convicted

under the Merchant Shipping Act 2007 for breach of collisions regulation. Furthermore, the defendant can be held liable in negligence, but the burden of proof lies on the claimant. To succeed, the claimant must establish a duty and standard of care, and the resultant damage from the conduct of the defendant. The defendant may rely on any of the defences mentioned above in order to escape liability

5.0 SUMMARY

Failure to obey collision regulations, failure to assist vessel after collision or to vessels or person in distress, breach of documentation and Reporting duties, dangerously unsafe ships and unsafe operation of ships, are some of the statutory offences against collision regulations. Where there is a loss of life in a collision, the master and crew or the owner of a ship who is in breach of the collision regulations, may be charged for manslaughter under the criminal law. The civil liability of the master and crew or the owner of a ship who is in breach of the collision regulations lies in negligence

6.0 TUTOR-MARKED ASSIGNMENT

1. Critically appraise the statutory offences and civil liabilities in collision.
2. Critically examine the assessment of damages in collision cases.

7.0 REFERENCES/FURTHER READINGS

Aleka Mandaraka-Sheppard (1949), Modern Admiralty Law. (Cavendish Publishing Ltd).

Christopher Hill, Maritime Law, 3rd Edition (Cavendish Publishing Ltd)

Simon Baughen, Shipping Law, 2nd Edition. (Cavendish Publishing Ltd).

Merchant Shipping Act, No 27 of 2007

UNIT 2 LIMITATION OF LIABILITY

CONTENTS

1.0 Introduction
2.0 Objectives
3.0 Main Content
    3.1 History and Development of Limitation.
    3.2 Persons Entitled To Limit
    3.3 The Claims That Are Subject To Limitation.
    3.4 The Claims That Are Not Subject To Limitation.
    3.5 How Can The Right To Limit Be Lost
    3.6 Calculation of The Limitation Figure.
4.0 Conclusion
5.0 Summary
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1.0 INTRODUCTION

The Nigerian Maritime law and Practice recognizes the right of the ship-owner to limit his liability following a collision or other incident. The concept of limitation is well-known throughout maritime law and has, in modern times, become a basic premise upon which maritime commerce is conducted. It was conceived to meet the needs of commerce and it is a practicable device by means of which the effects of a maritime disaster are reasonably apportioned. It encourages ship-owners to stay in business. It is believed that by invoking limitation, the ship-owner is not admitting liability in respect of the claim brought against it. It only states that if it held liable, its maximum total liability in respect of all claims arising out of the incident will not exceed the amount of the applicable limitation figure.

The basic idea behind the creation of the right to limit maritime liability was to encourage ship-owners to carry on their business, and capitalists to invest their money in the maritime sector, despite the horrendous perils of the sea, thereby increasing the wealth and influence of maritime nations.

2.0 OBJECTIVES

At the end of this unit, you should be able to understand the limitation of liability under Nigerian Maritime law.

3.0 MAIN CONTENT

3.1 THE HISTORY & DEVELOPMENT OF LIMITATION

The precise origin of the right of a ship-owner to limit his liability to the value of his vessel is not entirely clear. Ozcayir is of the opinion that the Amalphitan Table, which was written for the Republic of Amalphia (Italy) in the 11th century, is the earliest existing evidence of a ship-owner's right to limit his liability. Sanborn, however, submits that the origins of a ship-owner's right to limit his liability can only be traced back to Mediterranean maritime practice around the 14th century.

Notions of limitation can be traced back at to Roman law. The *noxal* action relating to damages suffered at the hand of animals allowed the owner of the animal to surrender the animal to the claimant in final settlement of damages. But there is no indication of limitation in maritime law until the records of the early codes of the Mediterranean city states. And thus it was that the later

law regulating the right of a shipowner to limit his liability was confirmed in the Barcelonian *Consols de la Mar*.

In terms of the *Consols de la Mar*, owners' and part-owners' liability in respect of debts incurred by the master in obtaining ship's necessaries, or for cargo damage arising from improper loading, or from unseaworthiness was limited to the extent of their respective shares in the ship.

Following the commercial revolution of the 16th and 17th centuries, provisions relating to the privilege of a ship-owner's limited liability were contained in almost all the respective civil codes of Continental maritime powers of the time. For example, both the Statutes of Hamburg (1603) and the Maritime Codes of Charles II of Sweden (1667) contained provisions protecting a ship-owner's other property from the claims of creditors where such creditors had abandoned the ship. Furthermore, in the Hanseatic Ordinances (1614 and 1644), the liability of a ship-owner was limited to the value of his vessel, and the proceeds of the sale of the vessel were to be the extent of the satisfaction of all claims.

The most important of these civil codes was the Maritime Ordinance of Louis XIV, compiled under the direction of Minister Colbert in 1681, which constituted the first attempt to codify and systemize international maritime law in general and, more particularly, the rules relating to a ship-owner's right to limit his liability. The Maritime Ordinance of Louis XIV, was in turn, used as a model in the Netherlands, Venice, Spain and Prussia.

Although legal commentators disagree as to the origins of the principle that a shipowner should be entitled to limit his liability to those suffering damages as a result of the negligent navigation of his ship, as far as English law is concerned, limitation is clearly a creature of statute. It is in the English version of limitation of liability that the international conventions relating thereto, culminating in the Limitation of Liability Convention of 1976 have their basis.

Limitation was first introduced in the United Kingdom in 1734, by way of the enactment of the Responsibility of Shipowners Act of 1734. The Responsibility of Shipowners Act of 1734 limited a shipowner's liability to the value of his ship plus the freight for the voyage but only in respect of losses

The 1924 Limitation Convention was an international adoption of section 503 of the English Merchant Shipping Act of 1894. The 1924 Limitation Convention, which was ratified or acceded to by 15 states (of which 6 subsequently denounced in favour of a subsequent Convention), has been described both as a "dismal failure", as it did not go far enough in harmonizing international law in this area. Accordingly, the Comité Maritime International ("**CMI**") revisited the subject of limitation of liability in the 1950's and produced the Convention Relating to Limitation of Liability of the Owners of Seagoing Ships, which was signed in Brussels in October 1957 and entered into force in 1968

The 1957 Limitation Convention was ratified or acceded to by 46 states, of which 11 have since denounced in favour of the later 1976 Convention. Furthermore, several states adopted the 1957 Limitation Convention but failed to denounce the 1924 Limitation Convention. This has resulted in certain curious consequences as, in terms of Article 30(4) of the Vienna Convention on the Law of Treaties of 1969, where a dispute arises between two parties to a particular convention and one such party has acceded to a more recent version of the same convention but has not yet denounced the previous convention, the provisions of the convention to which they are both party must be applied in resolving the dispute.

Although the limitation system established under the 1957 Limitation Convention continued to closely mirror the English limitation regime, it was necessary for the United Kingdom legislators to amend s 503 of the Merchant Shipping Act of 1894 in order to accommodate the 1957 Limitation Convention.

The drafters of the 1957 Limitation Convention used the opportunity to increase the limits of liability for claims in respect of property damage as well as claims relating to loss of life and personal injury, thereby providing a larger fund for distribution amongst victims of the loss or damage resulting from the accident. Furthermore, limitation of liability was made applicable to the expenses and charges of wreck raising, an important enlargement in modern times when the cost of removal of a sunken vessel can far exceed the value of the vessel itself.

3.2 PERSONS ENTITLED TO LIMIT

Section 351 of the MSA 2007 provides that shipowners and salvors, may limit their liability, and that invoking limitation shall not constitute an admission of liability. "ship owner" means the owner, charterer, manager and operator of a ship. Please note that the definition of “shipowner” does not entitle a charterer to limit in respect in respect of the claims brought against it under the charterparty by the shipowner. See The Aegean (1998) 2 Lloyd’s Rep 39.

"salvor" means any person rendering services for salvage operations. The right to limit is extended to any person for whose act, neglect or default the ship owner or salvor is responsible. Simon Baughten is of the opinion that the purpose of this provision is to prevent claimants avoiding the limitation regime by proceeding against the servants or agents of the shipowner or salvor. Limitation is also possible in respect of undefended in rem claims and in respect of direct actions claims against insurers.

3.3 THE CLAIMS THAT ARE SUBJECT TO LIMITATION.

Section 352 of the MSA 2007 provides seven headings of claim in respect of which limitation can be claimed:

(a) claims in respect of loss of life or personal injury or loss of or damage to property (including damage to harbour works, basins and waterways and aids to navigation), occurring on board or in direct connection with the operation of the ship or with salvage operations, and consequential loss resulting there from;

(b) claims in respect of loss resulting from delay in the carriage by sea of cargo, passengers or their luggage;

(c) claims in respect of other loss resulting from infringement of rights other than contractual rights, occurring in direct connection with the operation of the ship or salvage operations;

(d) claims in respect of the removal, destruction or the rendering harmless of the cargo of the ship;

(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 this Act, and further loss caused by such measures;

(f) claims in respect of floating platforms constructed for the purpose of exploring or exploiting the natural resources of the sea-bed or the subsoil thereof;

(g) 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.

Please note that these claims set out above are subject to limitation of liability even if brought by way of recourse or for indemnity under a contract or otherwise. See section 352(2) of the MSA 2007.

However, claims set out under paragraphs (d)-(g) above are not subject to limitation of liability to the extent that they relate to remuneration under a contract with the person liable. Therefore, it is possible to fix a charge for the service in excess of the relevant limitation figure.

3.4 THE CLAIMS THAT ARE NOT SUBJECT TO LIMITATION

Section 353 of the MSA 2007 excludes from limitation the following claims:

(a) claims for salvage or contribution in general average;

(b) claims for oil pollution damage within the meaning of the Intemational Convention on Civil Liability for Oil Pollution Damage or of any amendment thereto which is in force;

(c) claims subject to any International Convention or national legislation governing or prohibiting limitation of liability for nuclear damage;

(d) claims against the shipowner of a nuclear ship for nuclear damage;

(e) claims by servants of the shipowner or salvor whose duties are connected with the ship or the salvage operations, including claims of their heirs, dependants or other persons entitled to make such claims, if under the law governing the contract of service between the shipowner or salvor and such servant the shipowner or salvor is entitled to limit his liability in respect of such claims, or if he is by such law only permitted to limit his liability to an amount greater than that provided for in section 357 of this Act.

3.5 HOW CAN THE RIGHT TO LIMIT BE LOST

The right to limit can be lost under section 354 of the MSA 2007. A right to limit can be lost if it is proved that the loss or damage resulted from his personal act or omission or the act or omission of his servants or agents acting within the scope of their employments committed with the intent to cause such loss or damage or recklessly and with knowledge that such loss would probably result. The right to limit may also be lost under an express contractual provision to that effect. See Clarke v Dunraven (1897) AC 59.

3.6 AMOUNT OF LIMITATION

The general limits for claims other than passenger claims arising on any distinct occasions are calculated on the basis of a sliding scale depending on the size of the vessel's tonnage.

Claims for personal injury or loss of life are treated preferentially to other claims. Up to 2,000 tons of a ship the limit 2 million Units of Account for a ship; from 2,001 to 30,000 tons another 800 Units of Account; from 20,001 to 70,000 600 Units of Account; and for each ton in excess of 70,000 tons 400 Units of Account.

In respect of any other claims 1 million Units of Account for a ship with a tonnage below 2,000 tons. For a ship with a tonnage in excess of 1 million Units, there is a sliding scale of tonnage to which more units of account are added per ton, in addition to that applicable to the first scale (2,001 to 30,000 tons, 400 Units of Account for each ton; 30,001 to 70,000 tons, 300 Units of Account for each ton; and in excess of 70,000 tons, 200 Units of Account per ton). See section 356(1) of the MSA 2007.

Where the amount calculated in accordance with section 356(1) (a) is insufficient to pay the claims mentioned in full, the amount calculated in accordance with section 356(1) (b) shall be available for payment of the unpaid balance of claims under section 356(1) (a) and such unpaid balance shall rank ratably with claims mentioned under section 356(1) (b).

Salvors not operating from their own ships are given a limit of 1,500 tons. See section 356(3) of the MSA 2007.

In respect of claims arising on any distinct occasion for loss of life or personal injury to passengers of a ship, the limit of liability of the shipowner shall be an amount of 175,000 Units of Account multiplied by the number of passengers which the ship is authorised to carry according to the ship' s certificate. See section 357(1) of the MSA 2007.

The phrase "claims for loss of life or personal injury to passengers of a ship" is defined under section 357(2) of the MSA 2007 to mean any such claims brought by or on behalf of any person carried in that ship under a contract of passenger carriage, or who, with the consent of the carrier, is accompanying a vehicle or live animals which are covered by a contract for the carriage of goods.

The Unit of Account referred to in sections 357 and 358 of the MSA is the Special Drawing Right as defined by the International Monetary Fund and in the absence of agreement between the parties concerned as to the applicable currency, the amounts mentioned in the said sections shall be converted into Naira at the date the limitation fund shall have been constituted, payment is made, or security given. See section 358 of the MSA 2007.

4.0 CONCLUSION

The limitation of liability in Nigeria is determined by two principal enactments. First, the section 351-359 of the MSA 2007 which implements the International Convention Relating to the limitation of Liability of Owners of Seagoing Ships 1957, and the 1976 Convention on Limitation of Liability for Maritime Claims. The main differences between the two main conventions is that the 1976 Convention calculates limitation in a different manner from that adopted by the 1957 Conventions and produces higher limitation figures.

5.0 SUMMARY

Limitation of liability in shipping has ancient roots, and has for many centuries been promoted as an essential protection of the shipping industry. It still has a role to play in the encouragement of investment in the shipping industry worldwide and helps to ensure a level playing field for international competition by exposing all those involved to the same level of risk in what is a global business. It tends to impose a discipline on claimants and discourages the development of system of recovery based on punishment rather than compensation.

6.0 TUTOR-MARKED ASSIGNMENT

1. Discuss the limitation of the liability of shipowners in maritime dispute
2. What is the history and Development of Limitation of liability.

7.0 REFERENCES/FURTHER READINGS

Aleka Mandaraka-Sheppard (1949), Modern Admiralty Law. (Cavendish Publishing Ltd).

Christopher Hill, Maritime Law, 3rd Edition (Cavendish Publishing Ltd).

Simon Baughen, Shipping Law, 2nd Edition. (Cavendish Publishing Ltd).

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UNIT 3 SALVAGE

CONTENTS

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1.0 INTRODUCTION

The regime of salvage regulates the position and reward of a salvor that renders useful service to maritime vessel or property in distress or peril. The concise definition of salvage includes important ingredients namely, real danger, voluntariness and a degree of success. The protection of lives at sea and of maritime property is of paramount importance.

2.0 OBJECTIVES

At the end of this unit, you should be able to understand the legal regime of salvage.

3.0 MAIN CONTENT

3.1 SALVAGE, DEFINED

Salvage may be defined as follows:

- It is a right in law, which arises when a person, acting as a volunteer (that is without any pre-existing contractual or other legal duty so to act) preserves or contributes to preserving at sea any vessel, cargo, freight or other recognized subject of salvage from danger.
- It is a service which confers a benefit by saving or helping to save a recognized subject of salvage when in danger from which it cannot be extricated unaided, if and so far as the rendering of such service is voluntary in the sense of being attributable neither to a pre-existing obligation, nor solely for the interests of the salvor.
- A reward payable either by the shipowner or by the owners of goods carried in the ship to persons who have saved the ship or cargo from shipwreck
- Voluntary services rendered towards the preservation of any vessel, cargo, freight or other recognized subject of salvage from the imminent peril of the sea.
- includes all expenses properly incurred by the salvor in the performance of salvage services

3.6 THE ORIGIN OF SALVAGE

The origins of salvage exist in ancient legal systems. Its fundamental principles were established in the early part of the 19th century. The first attempt to unify the principles on the law of salvage was the Brussels Convention 1910 through the initiative of the International Maritime Organization (IMO). The Convention was amended by the Brussels Convention on Salvage of Aircraft 1938. The amendment sought to extend the law of salvage to salvage by or to seaborn aircraft.

Due to the inadequacy of the 1910 convention, a draft convention was prepared by the comite Maritime International (CMI) in 1981, and by 28. April 1989, the new Salvage Convention 1989 was concluded. It replaced the Brussels Convention for the Unification of Certain Rules of Law Relating to Assistance and Salvage at Sea. 1910. The 1989 Convention came into force internationally on 14th July 1996.

In Nigeria, the provisions of the law relating to salvage is contained in part XXVII of the Merchant Shipping Act 2007. By virtue of section 387 of the Merchant Shipping Act 2007, the provisions of the International Convention on Salvage, 1989 shall apply in Nigeria.

3.3 RECOGNISED SUBJECT OF SALVAGE

Anything constructed or used for the carriage on, through or under water of persons or goods qualify as subject of salvage. However, other subject of salvage includes:

- hovercraft/ aircraft
- Bunkers
- Cargo
- Freight
- Life Salvage

3.4 ELEMENTS OF SALVAGE

The following are the elements of salvage:

(i) Danger-There must be some real danger which may expose the property to destruction or damage. There must be a state of difficulty and reasonable apprehension even though there is no absolute danger. See The Phantom (1866) LR 1 A & B 58, P 60, The Charlotte (1848) 3 W Rob 68, The Helenus (1582) 2 Lloyd's Rep 261.

The danger may be future or contingent. There would be a reasonable future apprehension of danger even when the swing of the ship by the wind had stopped temporarily. See The Troilus (1951) AC 820.

The existence of danger is a question of fact. The master's decision that the ship is in danger must be reasonable otherwise, there would be no danger for salvage. See The Aldora (1975) 1 Lloyd's Rep 617.

(ii) Voluntary services-The salvage services must be voluntary. The means that the services must not have been rendered under a pre-existing agreement or under official duty, or purely for the interests of self preservation. See The Sava Star (1995) 2 Lloyd' Rep 134.

A salvor is person who without any particular relation to a ship in distress, confers useful service and gives it as a volunteer adventurer without any pre-existing covenant connected with the duty of employing himself for the preservation of the ship. See The Neptune (1824) 1Hagg 227.

Salvage may, be performed under an oral or written contract, but it must nevertheless be voluntary. If the master of the salved vessel or her owners refuse the salvor's offer of services, no salvage remuneration is payable. The refusal, however, must be express and reasonable. On the other hand, no consent is necessary when an abandoned vessel is salved.

However, to avoid the requirement of voluntariness, it must be shown beyond doubt that there existed a duty to render the services wholly and completely and, secondly, that the duty was owed to the owners of the property saved.

Please note that by virtue of section 388 of the Merchant Shipping Act 2007, the master of a vessel has authority to conclude contracts for salvage operations on contract, on behalf of the owner of the vessel. In respect of the property on board, the master or owner of a vessel has authority to conclude salvage contracts on behalf of the owner of any property on board his vessel.

An agreement for assistance or salvage entered into at the moment and under the influence of danger may at the request of either party to the agreement, be annulled or modified by the court, if it considers that the conditions agreed upon are not equitable.

If it is proved that the consent of one of the parties to a salvage agreement is vitiated by fraud or concealment, or the remuneration is, in proportion to the services rendered in an excessive degree too large or too small, the agreement may be annulled or modified by the court at the request of the affected party.

(iii) Success-The salvage operations must be successful for there to be a salvage award. Section 389 (1) of the Merchant Shipping Act 2007 provides that every act of assistance or salvage which yields a useful result gives a right to amount of reward. Equitable reward and as otherwise provided payment shall not be made to a salvor if salvage operations do not yield any beneficial results. See The Cheerful (1855) 11 PD 3.In the Melaine v The San Onofre (1925) AC 246. The Killeena (1881) 6 PD 193.

Please note that a person who takes part in salvage operations notwithstanding the express and reasonable prohibition on the part of the vessel to which the services were rendered, shall not be entitled to receive a reward. See section 389 (3) of the Merchant Shipping Act 2007.

Please note that a tug shall not receive reward for assistance rendered to or for salvage of the vessel or the cargo of the vessel the tug tows unless it renders exceptional services which cannot be considered as rendered in fulfillment of the contract of towage. See section 389 (4) of the Merchant Shipping Act 2007.

Please note that the amount of reward to be paid for salvage shall be fixed by agreement between the parties and, where there is no agreement between the parties by the court. See section 389 (5) of the Merchant Shipping Act 2007.

3.5 THE CRITERIA FOR DETERMINING THE REWARD FOR SALVAGE OPERATIONS

Section 391 (1) of the Merchant Shipping Act 2007 list the criteria for determining the reward for salvage operations as follows:

(a) the salved value of the vessel and other property;
(b) the skill and efforts of the salvors in preventing or minimizing damage to the environment;
(c) the measure of success obtained by the salvor;

(d) the nature and degree of the danger;
(e) the skill and effort of the salvors in salving the vessel, other property and life;
(f) the time spent and expenses and losses incurred by the salvors;
(g) the risk of liability and other risks run by the salvors or their equipment;
(h) the promptness of the services rendered;
(i) the availability and use of the vessels or other equipment intended for salvage operations.
(j) the state of readiness and efficiency of the salvor's equipment and the value thereof;

Payment of reward fixed shall be made by all the vessel and other property interests in proportion to their respective salved values. See section 391(2) of the Merchant Shipping Act 2007

The rewards, exclusive of any interest and recoverable legal costs that may be payable on the rewards, shall not exceed the salved value of the vessel and other property. See section 391(3) of the Merchant Shipping Act 2007.

The court may deprive the salvors of all rewards or may award a reduced reward if it appears that the salvors have by their fault rendered the salvage operation or the assistance that was required more difficult or are guilty of theft, fraudulent concealment or other dishonest conduct. See section 391 (4) of the Merchant Shipping Act 2007.

Please note that section 390 of the Merchant Shipping Act 2007 imposes a duty upon the master of every vessel involved in a collision to render assistance to any person in danger of being lost at sea. Failure to comply with the statutory duty without any reasonable excuse is a criminal offence liable conviction to a fine not less than five hundred thousand Naira or to imprisonment for a term not exceeding two years or both.

Please note that the exercise of the statutory duty does not constitute a bar to the salvage award. See The Melanie v The San Onofre (1925) AC 246

4.0 CONCLUSION

The principles of salvage in maritime law has been codified under Nigerian law. They are found in the Merchant Shipping Act 2007. Salvage deals with the recovery of property lost at sea, recovery of property which is in danger of being lost or damaged, life salvage.

5.0 SUMMARY

The right to salvage may arise, but does not necessarily arise out of an actual contract. The statute also imposes a duty upon the master of every vessel involved in a collision to render assistance to any person in danger of being lost at sea. The breach of this duty attracts criminal sanctions..

6.0 TUTOR-MARKED ASSIGNMENT

1. With reference to the relevant statutory provisions and judicial decisions, discuss the concept of salvage in maritime law.
2. Discuss the criteria for determining the reward for salvage operations.
3. Write short notes on the elements of a suceesful salvage operations

7.0 REFERENCES/FURTHER READINGS

Aleka Mandaraka-Sheppard (1949), Modern Admiralty Law. (Cavendish Publishing Ltd).

Christopher Hill, Maritime Law, 3rd Edition. (Cavendish Publishing Ltd).

Simon Baughen, Shipping Law, 2nd Edition. (Cavendish Publishing Ltd).

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UNIT 4 Towage.

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1.0 INTRODUCTION

Towage is the service provided, usually by specially tugs, to assist the propulsion, or to expedite the movement of another vessel which is not in danger. Unlike salvage, towage services are rendered always under contract concluded between a tug and tow for specific services or purpose at a fixed price. It is a contract for services. Towage is governed by the basic principles of law of contract. Towage is the employment of one vessel to expedite the voyage of another, when nothing more is required than the accelerating of her progress.

Towage contracts are usually entered into directly between the owner of the tow and professional tug owning companies. Sometime, the master of the ship may sign as an agent of the owners, and as the agent of the cargo owner if there is cargo on board.

The contract for the hire of a tug may take the hiring of the tug itself without a crew, or the hiring of the tug and crew, or operating under the orders of the tow.

2.0 OBJECTIVES

At the end of this unit, you should be able to understand the legal regime of towage in Nigeria.

3.0 MAIN CONTENT

3.1 AUTHORITY OF THE MASTER TO BIND THE SHIPOWNER.

The master of a ship has an implied actual authority to enter into towage contracts only when it is reasonably necessary and the terms are reasonable. A captain cannot bind his owners by every towage contract which he may think fit to make, and it is binding upon them when the surrounding circumstances are such as to render it reasonable to be made, and also when its terms are reasonable. See The Ocean Steamship v Anderson (1883) 13 QBD 651.

Subject to any instructions lawfully given by his principal, the implied actual authority of the master extends to doing whatever is incidental to, or necessary for, the successful prosecution of the voyage and the safety and preservation of the ship. See The Unique Mariner (1978) 1 Lloyd's Rep 438.

3.2 AUTHORITY OF THE MASTER TO BIND THE CARGO-OWNERS

Unless there is agency of necessity, the master of the ship would not have authority to bind the cargo owners to the towage contract, except when the cargo-owners give express authority to him. The ship-owners or their masters do not have any authority to bind the goods or the owners of the goods by any contract. See Anderson and Ocean Steamship (1884) 10 App Cas 107, p 117.

The master is always the agent of the ship and, in special cases of necessity, the agent of the cargo. See The Onward (1874) LR 4 A&E 38, p 51.

3.3 AUTHORITY OF THE TUGMASTER

A tugmaster of a professional tug company acts within the scope of his employment contract when he enters into a towage contract and his authority will be actual, express or implied to do what is necessary and reasonable to bind his employers to the contract.

Where the master of a merchant ship decides to tow a vessel without the express authority of his employer, such act will not bind the owners of his ship to a towage contract.

3.4 COMMENCEMENT, INTERRUPTION AND TERMINATION OF TOWAGE

The towage contract commences when the ropes have been passed between the vessels, and ends when the tow-rope has been finally slipped. See The Clan Colquhoun (1936) Lloyd's Rep 153. The Uranienborg (1936) Lloyd's Rep 21.

An interruption in towage occurs when there is a break in towing services being rendered by a tug. This can be as a result of the acts or defaults of the master or crew of the tugboat, or by any defect in or breakdown of or accident to the towing equipment or towing gear of the tugboat.

Where the towage is interrupted, it is the duty of the tug to return to the tow and resume towage, or if this cannot be done, it must not leave the tow until she is safe or other assistance is sought. If neither of these duties is performed, the towage terms will cease to operate and the interruption of the towage will amount to a breach of contract. See The Refrigerant (1925) Lloyd's Rep 130.

Termination of towage operations occurs on the happenings of one of the following events:

(a) When the final orders by the tow to cease holding, pushing, pulling, moving, escorting, guiding or standing by, or to cast off the ropes wires or lines have been carried out; or

(b) When the towing line has been finally slipped. The latest of either of these events will be taken into account, provided the tug is safely clear of the tow. See The Walumba (1965) 1Lloyd's Rep 121.

3.5 DUTIES OF THE TUGOWNER

The following terms will be implied in the absence of the express terms:

(a) Fitness of the tug for the purpose for which she is required. See Steel v State Line Steamship Co (1877) 3 App Cas 72
(b) To use best endeavour to complete the towage. See The Minehaha (1861) 15 Moo PC 133
(c) The duty to exercise proper skill and diligence throughout the towage operations and voyage. See The Julia (1861) 14 Moo PC 210.

3.6 DUTIES OF THE TOW

The master or the owner of the ship being towed has the following duties:

(a) Duty to specify what is required and to disclose the condition of the tow. The position and the condition of the tow must be made clear. See Elliot Steam Tug Co. v New Medway Steam Packet (1937) 59 LIL Rep 35.
Note that whether the tow should be in a seaworthy condition for towage will depend on the circumstances which have necessitated the towage.

(b) Duty to exercise due care and skill during the towage. See The Devonshire (1912) HL 21, The Aburis (1920) 2 LIL Rep 411, Minnie Sommers (1921) 6 LIL Rep 398.

(c) Duty to pay remuneration to the tug. Towage is a service contract, and therefore, payment is done on completion of the service. Failure to perform towage will result in no remuneration.

3.7 TOWAGE IN NIGERIA

The legislation in respect towage in Nigeria exists only as regards the conduct of towing and pushing operations, and not on the rights and duties of the Parties to the towage contract.

The rules are aimed at preventing collision at sea while towing. They prescribe, with regards to the type of vessel, lights to be exhibited by the towing vessels e.t.c. A claim in respect of the towage of ship is classified under the Admiralty Jurisdiction Act LFN 2004 as a general maritime claim and is within the admiralty jurisdiction of the Federal High Court

4.0 CONCLUSION

Towage must also be distinguished from salvage, primarily in most cases towage, unlike salvage, does not involve any marine peril. It is also not a voluntary activity, the feature which is peculiar to salvage. It does not result in the payment of salvage reward, but gives rise purely to the payment of the sum agreed. Where the towage is done to preserve the tow and its cargo from peril, or from the risk of peril, and, in consequence, the service rendered by the tug go beyond those usually rendered under a more towage contract, however, salvage remuneration may be awarded. The legislation in respect of towage in Nigeria does not cover the rights and duties of the parties to the towage contract. The rights and duties of towage in Nigeria are based on common law principles.

5.0 SUMMARY

Towage is a service rendered to assist the movement of another vessel which is not in danger. Danger is an element of salvage. Unlike salvage, towage services are contractual in nature. The services are rendered always under contract concluded between a tug tow for agreed consideration.

6.0 TUTOR-MARKED ASSIGNMENT

Discuss the principle of towage in maritime law.

7.0 REFERENCES/FURTHER READINGS

Aleka Mandaraka-Sheppard (1949), Modern Admiralty Law. (Cavendish Publishing Ltd).

Christopher Hill, Maritime Law, 3rd Edition (Cavendish Publishing Ltd).

Simon Baughen, Shipping Law, 2nd Edition. (Cavendish Publishing Ltd).

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UNIT 5 Pilotage.

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1.0 INTRODUCTION

Pilotage is an act carried out by a qualified person known as a pilot in assisting the master of a ship in navigation when entering or leaving a port in confined waters. Sometimes, the expression is used as an abbreviated form of pilotage dues. Pilotage is regulated by statute.

The principal legislation governing pilotage in Nigeria is the Nigerian Ports Authority Act No 38 of 1999. The Act can be found in Cap N126 LFN 2004. There are other subsidiary legislations made under the Port Act Cap 361 LFN 1990. Though the Port Act was repealed by the NPA Act of 1999, the various orders and Regulations contained in the subsidiary legislation remain in force. Some of the provisions of the NPA Act and its subsidiary legislation owe their origin to the Brussels Convention of 1910.

2.0 OBJECTIVES

At the end of this unit, you should be able to understand the legal regime of pilotage in Nigeria.

3.0 MAIN CONTENT

3.1 A PILOT DEFINED

Aleka Mandaraka-Sheppard defines the term pilot as a person with specialized knowledge of local conditions and navigational hazards who is generally taken on board a vessel at a specific place for the purpose of navigating or guiding a ship through a particular channel, river, or other enclosed waters to or from a port.

Section127 of the NPA Act defines a pilot as a person not belonging to a ship who has conduct thereof. The same definition is repeated in section 2(1) of the Nigerian Ports Authority (Port) Regulations as well as section 2 of the Nigerian Port Authority (Pilotage) Regulations.

Two categories of pilots are recognized by the NPA Act and Regulations. These are the Authority Pilot and a Licensed Pilot. The Authority Pilot is usually employed and appointed by NPA while the Licensed Pilot is the Pilot licensed by NPA to carry out pilotage services. See section 127 of the NPA Act and section 2 of the Nigerian Port Authority (Pilotage) Regulations. The master of a ship may be a licensed pilot if satisfies the requirements specified under section 7 of the Nigerian Port Authority (Pilotage) Regulations.

The functions of a pilot are to guide vessels from open sea into port, or vice versa, to guide a ship from anchorage to a berth or from berth to a terminal within a port, or to help a ship to dock or undock within a port.

3.2 PILOTAGE DISTRICT

A pilotage district is a district established as a pilotage district by law. The Minister of Transportation is empowered to make Orders in a gazette establishing a pilotage district in any port or its approaches, or in the territorial waters of Nigeria or in the exclusive economic zone of Nigeria. See section 41 of the NPA Act.

The Minister may in the Order delineate any pilotage district or part thereof as a compulsory pilotage district. See section 41(2) of the NPA Act.

Every ship navigating within a compulsory pilotage district for the purpose of entering, leaving or making use of the port in the district shall be under the pilotage of an Authority Pilot or a licensed pilot of the district or the master of the ship who shall also be a licensed pilot. See section 41(1) of the NPA Act and Regulations 14 of the NPA (Pilotage) Regulations 1961.

The following ships are however exempted from the rule:

(a) ships belonging to any of the armed forces of Federation;

(b) ships owned or operated by the Authority

(c) pleasure yachts;

(d) ferry boats plying as such exclusively within of a port;

(e) ships not exceeding ten tons gross tonnage;

(f) tugs, dredgers, barges or similar vessels course of navigation does not extend beyond a port; and

(g) ships exempted from compulsory pilotage by regulations made by the Authority under this part this Decree.

3.3 LIABILITIES OF A PILOT

The NPA Act or NPA (Pilotage) Regulations do not the duties and responsibilities of a pilot. However, the Pilot has a duty under common law to use diligence, prudence and reasonable skill in the performance of his duties. Whether performing voluntary or compulsory pilotage, he will be liable for his own negligence. The pilot may be liable to the owners of the ship and third parties for any damage or loss suffered as a result of his negligence.

Please note that section 101 of the NPA Act provides that a pilot who, when in charge of a ship by wilful breach of duty, neglect of duty or reason of drunkenness, causes the loss, destruction or serious damage of a ship, or endangers the life or limb of a Person on board the ship, or refuses or fails to do a lawful act proper and requisite to be done by him for Preserving the Ship from loss, destruction or serious damage, or a person on board the ship from danger to life or limb is guilty of an offence and liable on Conviction to imprisonment for a term of 3 years.

Please note that section 55(1) of the NPA Act provides that the pilot's liability shall not exceed N10,000 (Ten Thousand Naira) and the exact amount is to be determined by the court under section 55(3) of the NPA Act. This will be distributed by the court rateably among the several claimants against the pilot. See section 55(4)(c) of the NPA Act.

3.4 LIABILITIES OF MASTER OF A SHIP UNDER PILOTAGE

The Master is answerable for any loss or damage caused by the ship or by any fault or the navigation of the ship by the pilot. See section 54 of the NPA Act. The reason is that the master is deemed in law to be in command of the vessel as he has a duty to interfere in a proper situation with the action of the pilot, for example where there is a danger to his ship, otherwise he would be adjudged to have contributed to any resulting accident. See The Prinses Juliana (1936) Lloyd's Rep 139

3.5 LIABILITIES OF OWNER OF A SHIP FOR NEGLIGENCE OF THE PILOT

The ship-owner is deemed to be the employer of the pilot while on board the ship, therefore, he may be vicariously liable for the act of the pilot. See section 54 of the NPA Act. The word answerable as used in section 54 of the NPA Act was interpreted in Tower

Field (Owners) v Workington Harbour & Dock Board (1950) 84 Lloyd's Rep 233; Palmline Ltd v NPA 1 NSC 144 @ 148.

3.6 LIABILITIES OF THE NIGERIAN PORT AUTHORITY IN RELATION TO PILOTAGE IN NIGERIA

The NPA has a duty to maintain and improve the ports, ensure efficient management of port operations and provide for the approaches to all ports and the territorial waters of Nigeria, such pilotage services and lights, marks and other navigational services and aids, including cleaning, deepening and improving of all waterways. See section 7(b),(c),(d) of the NPA Act. A breach of this duty amounts to negligence.

By virtue of section 87(1) of the NPA Act, the NPA may be liable for any loss or damage resulting from its performance or failure to perform duties under Part X of the Act and for any loss or damage to a ship or merchandise or any other thing whatsoever on board a ship, or any other property or right of any kind, whether on land or on water or whether fixed or movable.

Please note that the Authority shall not be liable for damages beyond the amount of N10,000 multiplied by the number of Authority and licensed pilots entitled to pilot ships in the pilotage district where the loss or damage occurred on the date when the loss or damage occurred.

Please note further that the liability of the Authority is conditional upon the loss or damage being attributable to their actual fault or privity.

4.0 CONCLUSION

The regulation of pilotage in Nigeria is by statute. Pilots whether Authority or Licensed are appointed under the statute, that is the NPA Act. The NPA Act or the NPA (Pilotage) Regulations fails to set out the duties and responsibilities of a pilot. However, the pilot has a duty under common law to be diligent, reasonable, and prudent in pilotage.

5.0 SUMMARY

The duties of a pilot are restricted to navigation and does not supersede the master. A pilot must be qualified to appraise situation in the particular area in which he has been authorized. The master can always rely on the pilot's guidance except in some exreme cases.

6.0 TUTOR-MARKED ASSIGNMENT

1. With reference to the relevant statutory provisions and judicial decisions, discuss the legal regime of pilotage in maritime law.

2. Critically appraise the liabilities of a pilot, master of a ship, and the shipowner in under pilotage.

7.0 REFERENCES/FURTHER READINGS

Aleka Mandaraka-Sheppard (1949), Modern Admiralty Law. (Cavendish Publishing Ltd).

Christopher Hill, Maritime Law, 3rd Edition. (Cavendish Publishing Ltd).

Simon Baughen, Shipping Law, 2nd Edition. (Cavendish Publishing Ltd).

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MODULE 3

Unit 1 History and Cause of Business Of Lloyd's

Unit 2 Utmost Good Faith

Unit 3 Indemnity

Unit 4 Insurable Interests

Unit 1 History and Cause of Business of Lloyd

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2.0 INTRODUCTION

Lloyd, also known as Lloyd of London, is a British insurance and reinsurance market. It serves as a partially-mutualised marketplace where multiple financial backers, underwriters, or members, whether individuals or corporations, come together to pool and spread risk. Unlike most of its competitors in the insurance and reinsurance industry, it is not a company. Uberrimae fidei (meaning utmost good faith in Latin) is the motto of Lloyd.

In 2009, over £21.97 billion of gross premium was transacted in Lloyd, and it achieved a record pre-tax profit of over £3.8 billion. The Lloyd building is located at 1 Lime Street in the City of London.

2.0 OBJECTIVES

At the conclusion of this unit, you should be able understand the history and cause of business of Lloyd.

3.0 MAIN CONTENT

3.1 History of Lloyd

The market began in Edward Lloyd coffee house around 1688 in Tower Street, London. His establishment was a popular place for sailors, merchants, and ship owners, and Lloyd catered to them with reliable shipping news. The shipping industry community frequented the place to discuss insurance deals among themselves. Sometime in 1691, the coffee shop relocated to Lombard Street. This arrangement continued until 1774, long after Lloyd death in 1713, when the participating members of the insurance arrangement formed a committee and moved to the Royal Exchange on Cornhill as The Society of Lloyd.

Due to the focus on marine business, during the formative years of Lloyd (between 1688 and 1807), one of the primary sources of Lloyd business was the insurance of ships engaged in slave trading, as Britain rapidly established itself as the chief slave trading power in the Atlantic. British shipping carried more than 3.25 million people into slavery, meaning that by the end of the eighteenth century, slave trading had become one of the primary constituents of all British trade. The dangers involved necessarily meant that insurance of slave-trade shipping was a major concern. Between 1689 and 1807, 1,053 British vessels were lost whilst undertaking slave-trading activities.

The Royal Exchange was destroyed by fire in 1838, and, although the building was rebuilt by 1844, many of Lloyd early records were lost. In 1871, the first Lloyd Act was passed in Parliament which gave the business a sound legal footing. The Lloyd Act of 1911 set out the Society's objectives, which include the promotion of its members' interests and the collection and dissemination of information.

The membership of the Society, which was largely made up of market participants, was considered to be too small in relation to the market's capitalisation and the risks that it was underwriting. Lloyd response was to commission a secret internal inquiry, known as the Cromer Report, which reported in 1968. This report advocated the widening of membership to non-market participants, including non-British subjects and women, and to reduce the onerous capitalisation requirements (which created a more minor investor known as a mini-Name). The Report also drew attention to the danger of conflicts of interest.

During the 1970s, a number of issues arose which were to have significant influence on the course of the Society. They were the tax structure in the UK, an increase in its

external membership, Scandals, and lack of regulation and the legal inability of the Council to manage the Society.

There were some other wider issues: firstly, in the United States, an ever-widening interpretation by the Courts of insurance coverage in relation to workers' compensation in relation to asbestos-related losses, which had the effect of creating a huge hole in Lloyd reserves. Secondly, by the end of the decade, almost all of the market agreements, such as the Joint Hull Agreement, which were effectively cartels had been abandoned under pressure of competition. Thirdly, new specialised policies had arisen which had the effect of concentrating risk.

In 1980, Sir Henry Fisher was commissioned by the Council of Lloyd to produce the foundation for a new Lloyd Act. The recommendations of his Report addressed the 'democratic deficit' and the lack of regulatory muscle.

The Lloyd Act of 1982 further redefined the structure of the business, and was designed to give the 'external Names', introduced in response to the Cromer Report, a say in the running of the business through a new governing Council. Immediately after the passing of the 1982 Act, evidence came to light, and internal disciplinary proceedings were commenced against, a number of individual underwriters who had siphoned sums from their businesses to their own accounts. These individuals included a Deputy Chairman of Lloyd, Ian Posgate, and a Chairman, Sir Peter Green.

In 1986 the UK government commissioned Sir Patrick Neill to report on the standard of investor protection available at Lloyd. His report was produced in 1987 and made a large number of recommendations but was never implemented in full.

In the late 1980s and early 1990s, Lloyd went through the most traumatic period in its history. Unexpectedly large legal awards in U.S. courts for punitive damages led to large claims by insureds, especially on APH (asbestos, pollution and health hazard) policies, some dating as far back as the 1940s. Many of these policies were designed to cover all liabilities not excluded on broadform liability policies.

Also in the 1980s Lloyd was accused of fraud by several American states and the names/investors. Some of the more high profile accusations included:

Lloyd withheld their knowledge of asbestosis and pollution claims until they could recruit more investors to take on these liabilities that were unknown to investors prior to investing in Lloyd; Enforcement officials in 11 U.S. states charged Lloyd and some of its associates with various wrongs such as fraud and selling unregistered securities; Ian

Posgate, one of Lloyd leading underwriters, was charged with skimming money from investors and secretly trying to buy a Swiss bank; he was later acquitted.

The current Members of Lloyd was held liable to pay these historical losses due to the Lloyd accounting practice known as 'reinsurance-to-close' (RITC).

Membership of a Lloyd Syndicate was not like owning shares in a company. An individual "joined" for one calendar year only – the famous Lloyd annual venture. At the end of the year, the Syndicate as an ongoing trading entity was effectively disbanded.

It was very common for the Syndicate to re-form for the next calendar year with more or less the same membership and the same identifying number. In this way, a Syndicate could appear to have a continuous existence going back (in some cases) fifty years or more, but in reality it did not. There would have been fifty separate incarnations of the Syndicate, each one a unique trading entity that underwrote insurance for one calendar year only.

Claims take time to be reported and paid, so the profit or loss for each Syndicate took time to become apparent. The practice at Lloyd was to wait three years (that is, 36 months from the beginning of the Syndicate) before 'closing' the year and declaring a result.

For example, a 2003 Syndicate would ordinarily declare its results at the end of December 2005. The Syndicate's members would be paid any underwriting profit during the 2006 calendar year, in proportion to their 'participation' in the Syndicate; conversely, they would have to reimburse the Syndicate during 2006 for their share of any underwriting loss.

Part of the result would include setting aside reserves for future claims payments; that is, reserves both for claims that had been notified but not yet paid, and estimated amounts required for claims which have been "incurred but not reported" (IBNR). The estimation process is difficult and can be inaccurate; in particular, liability (or long-tail) policies tend to produce claims long after the policies are written.

The reserve for future claims liabilities was set aside in a unique way. The Syndicate bought a reinsurance policy to pay any future claims; the premium was the exact amount of the reserve. In other words, rather than putting the reserve into a bank to earn interest, the Syndicate transferred its (strictly, its Members') liability to pay future claims to a reinsurer. This was "reinsurance-to-close" – a transaction that allowed the Syndicate to be closed, and a profit or loss declared.

In this manner, liability for past losses could be transferred year after year until it reached the current Syndicate. A member joining a Syndicate with a long history of such transactions did pick up liability for losses on policies written decades previously. So long as the reserves had been correctly estimated, and the appropriate RITC premium paid every year, then all would have been well, but in many cases this had not been possible. No one could have predicted the surge in APH losses.

Therefore, the amounts of money transferred from earlier years by successive RITC premiums to cover these losses were insufficient, and the current members had to pay the shortfall. As a result a great many individual Members of syndicates underwriting long-tail liability insurance at Lloyd faced financial loss, even ruin, by the mid 1990s.

It is alleged that, in the early 1980s, some Lloyd officials began a recruitment programme to enrol new Names to help capitalise Lloyd prior to the expected onslaught of APH claims. This allegation became known as “recruit to dilute”; in other words, recruit Names to dilute losses. When the huge extent of asbestosis losses came to light in the early 1990s, for the first time in Lloyd's history large numbers of members refused or were unable to pay the claims, many alleging that they were the victims of fraud, misrepresentation, and negligence. The opaque system of accounting at Lloyd made it difficult, if not impossible, for many Names to realise the extent of the liability that they and their syndicates subscribed to.

The market was forced to restructure. In 1996 the ongoing Lloyd was separated from its past losses. Liability for all pre-1993 business was compulsorily transferred into a special vehicle called Equitas at a cost of over $21 billion and enormous personal losses to many Names.

Lloyd then instituted some major structural changes. Corporate members with limited liability were permitted to join and underwrite insurance. No new “unlimited” Names can join (although a few hundred existing ones remain). Financial requirements for underwriting were changed, to prevent excess underwriting that was not backed by liquid assets. Market oversight has significantly increased. It has rebounded and started to thrive again after the September 11 attacks, but it has not regained its past importance as newly created companies in Bermuda captured a large share of the reinsurance market.

3.2 The Structure of Lloyd

Lloyd is not an insurance company. It is an insurance market of members. As the oldest continuously active insurance marketplace in the world, Lloyd has retained some unusual structures and practices that differ from all other insurance providers today. Originally

created as an unincorporated association of subscribing members in 1774, it was incorporated by the Lloyd's Act 1871, and it is currently governed under the Lloyd's Acts of 1871 through to 1982.

Lloyd itself does not underwrite insurance business, leaving that to its members. Instead the Society operates effectively as a market regulator, setting rules under which members operate and offering centralised administrative services to those members.

3.3 COUNCIL OF LLOYD

The Lloyd's Act 1982 defines the management structure and rules under which Lloyd operates. Under the Act, the Council of Lloyd is responsible for the management and supervision of the market. It is regulated by the Financial Services Authority (FSA) under the Financial Services and Markets Act 2000.

The Council normally has six working, six external and six nominated members. The appointment of nominated members, including that of the Chief Executive Officer, is confirmed by the Governor of the Bank of England. The working and external members are elected by Lloyd members. The Chairman and Deputy Chairmen are elected annually by the Council from among the working members of the Council. All members are approved by the FSA.

The Council can discharge some of its functions directly by making decisions and issuing resolutions, requirements, rules and byelaws. The Council delegates most of its daily oversight roles, particularly relating to ensuring the market operates successfully, to the Franchise Board.

The Franchise Board lays down guidelines for all syndicates and operates a business planning and monitoring process to safeguard high standards of underwriting and risk management, thereby improving sustainable profitability and enhancing the financial strength of the market.

3.4 BUSINESS AT LLOYD

There are two classes of people and firms active at Lloyd. The first are Members, or providers of capital. The second are agents, brokers, and other professionals who support the Members, underwrite the risks and represent outside customers (for example, individuals and companies seeking insurance or insurance companies seeking reinsurance).

Coverholders are an important source of business for Lloyd. Their numbers have increased steadily in recent years, and there are now about 2,500 Lloyd's coverholders producing around 30% of Lloyd's premium income each year. The balance of Lloyd's business is distributed around the world through a network of brokers. Coverholders allow Lloyd's syndicates to operate in a region or country as if they were a local insurer. This is achieved by Lloyd's syndicates delegating their underwriting authority to coverholders. A coverholder can have full or limited authority to underwrite on behalf of a Lloyd's syndicate.

It will usually issue the insurance documentation and will often handle claims. The document setting out the terms of the coverholder’s delegated authority is known as a binding authority.

Lloyd is not publicly traded, though some of its members are listed companies, such as Hiscox Ltd, Catlin Group Ltd and Hardy Underwriting Bermuda Ltd.

Lloyd's capital structure, often referred to as the Chain of Security, provides financial security to policyholders and capital efficiency to members. The Corporation is responsible for setting both member and central capital levels to achieve a level of capitalisation that is robust and allows members the potential to earn superior returns.

There are three 'links' in the chain: the funds in the first and second links are held in trust, primarily for the benefit of policyholders whose contracts are underwritten by the relevant member. Members underwrite for their own account and are not liable for other members' losses.

Lloyd's syndicates write a diverse range of policies, both direct insurance and reinsurance, covering casualty, property, marine, energy, motor, aviation and many other types of risk. Lloyd has a unique niche in unusual, specialist business such as kidnap and ransom, fine art, aviation, marine, and other insurances.

4.0 Conclusion

Lloyd is not an insurance company. It is an insurance market of members. Lloyd has some unusual structures and practices that differ from all other insurance providers today. Lloyd itself does not underwrite insurance business, leaving that to its members. Instead the Society operates effectively as a market regulator, setting rules under which members operate and offering centralised administrative services to those members

5.0 Summary

Lloyd serves as a partially-mutualised marketplace for the multiple financial backers, underwriters, or members, whether individuals or corporations. They come together to pool and spread risk. Unlike most of its competitors in the insurance and reinsurance industry, it is not a company.

6.0 Tutor-Marked Assignment

Discuss the historical development and Business of Lloyd's.

7.0 References/Further Readings

Visit www.Lloyd.org

Unit 2 Utmost Good Faith

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    3.3 Utmost Good Faith and Misrepresentation
4.0 Conclusion
5.0 Summary
6.0 Tutor-Marked Assignment
7.0 References/Further Readings

3.0 INTRODUCTION

The very foundation of a contract of marine insurance sits on the principle of uberrimae fidei, that is the principle of utmost Good Faith.

This is not only applicable to marine insurance but also to insurance generally. A contract of marine insurance is a contract based upon the doctrine of utmost good faith, and failure of either of the parties to observe this principle may lead to the contract being voided at the instance of the aggrieved party.

In other words, marine insurance law imposes an overriding duty of honesty that goes well beyond a mere absence of bad faith and applies to both parties to the insurance contract and their agents.

2.0 OBJECTIVES

At the conclusion of this unit, you should be able understand the principle of utmost good faith in marine insurance.

3.0 MAIN CONTENT

3.1 Relationship Between Utmost Good Faith And Duty Of Disclosure

The duty of disclosure is admittedly closely related to the doctrine of utmost good faith. The duty of disclosure stems from the principle of utmost good faith and not vice versa. This however, does not mean that the two notions are synonymous covering the same ground. They may well overlap, but as the duty of utmost good faith is the source from which the duty of disclosure originate, it has to be the wider and more potent of the two concepts. A breach of the duty of utmost good faith is generally established by proof of non-disclosure or misrepresentation. See Carter v Boehm (1766) 3 Burr 1905.

It is the obligation on the part of the assured to observe utmost good faith in dealing with the insurer that compels him to disclose every material circumstance which is known to him. Section 19 and 20 of the Marine Insurance Act 2004, imposes a duty of disclosure on the assured. The assured must disclose to the insurer, every material circumstances which in the ordinary course of business, ought to be known to him. Failure to discharge this duty, entitles the insurer to avoid the contract.

A circumstance is material if it would influence the judgment of a prudent insurer in fixing the premium or determining whether to take the risk. Whether any circumstance that is not disclosed is material or not is a question of fact.

The following are examples of material facts which must be disclosed:

1. The fact of previous proposals of the prospective insured or his business partners rejected by other insurers. See Locker and Woolf Ltd v Western Australian Insurance Co.(1936) 1 KB 408
2. The nature, if any, of a criminal offence ever committed by the proposer.
3. Previous losses suffered by the proposer.
4. Nationality of the prospective insured.
5. whether the ship was missing at the time the risk was placed;
6. that the ship had gone into port for repairs at the commencement of the voyage;
7. that the ship had gone aground and was leaking;
8. the age of the vessel;
9. that the vessel was to be towed up and down river;
10. that two scows were towed together, rather than singly;
11. that the vessel was generally weak and did not have a certificate required under the Nigerian Merchant Shipping Act; and
12. the unfavourable claims history of the insured.

In the absence of any inquiry, the following circumstances need not be disclosed:

1. any circumstance that diminishes the risk;
2. any circumstance that is known to the insurer;
3. any circumstance as to which information is waived by the insurer; and
4. any circumstance the disclosure of which is superfluous by reason of any express
5. warranty or implied warranty.

3.2 Disclosure To Agent of Insurer

The assured must disclose to the insurer every material fact known to him, but where the insurance is effected for him by an agent, such agent must also disclose to the insurer every material circumstance known to him or which in the ordinary course of business ought to be known by, or have been communicated to him.

An insurer is bound by a disclosure of representation to its agent, and such a disclosure shall be deemed to be a disclosure or representation to the principal provided that the agent was acting within the scope of his authority. The disclosure must, however, be disclosure at the inception of the contract since the duty of disclosure arises only at that time. See Northern Assurance Co. Ltd v Idugboe (1966) 1 All NLR 88.

The court has held that the knowledge of the agent is the knowledge of the insurer and, accordingly, the insurer could not repudiate liability. See Bawden v London, Edinburgh and Galsgow Assurance Co (1892) 2 QB 534

3.3 Utmost Good Faith and Misrepresentation

The principle of utmost good faith imposes on both to the contract of marine insurance a duty not to misrepresent facts. Every material representation made by the insured or the insured's agent to the insurer during the negotiations for the contract and before the contract is concluded must be true.

A representation is material if it would influence the judgment of a prudent insurer in fixing the premium or determining whether to take the risk. Whether any representation is material or not is a question of fact. A representation may be as to a matter of fact or as to a matter of expectation or belief. A representation may be withdrawn or corrected before a contract is concluded.

Where there is a misrepresentation of material fact, whether fraudulent or innocent, the party misled is at liberty to avoid the contract. See Peek v Gumey (1873) L.R 6 H.C 377. In Demetriades and Company v Northern Assurance Company(1925) Lloyd Rep 265. Bamidele & Another v Nigerian General Insurance Co. Ltd (1973) 3 UILR 418.

An assured who procures an agent to effect an insurance on his behalf, will be held liable for the consequences of any misrepresentation made by the agent. He will also be held liable for the failure of the agent to disclose material facts. See Northern Assurance Co. Ltd v Idugboe(Supra).
The misrepresentation or non-disclosure of material information obtained by an insurer’s agent binds the insurer provided the agents had acted within the scope of his authority. See Golding v Royal London Auxiliary Co. Ltd (1914) 30 T.L.D 350.

The effect of non-disclosure or misrepresentation of a material fact will render the contract voidable at the instance of the party misled. The insurer will be at liberty to either repudiate liability under the policy and discountenance any claim made thereon, or waive its right to avoid the contract and treat the contract as valid.

4.0 Conclusion

The insured is obligated to disclose to the insurer every material circumstance. A circumstance or fact is material if it would affect either the premium or the decision to

accept the risk. The disclosure must be made before the contract is concluded. Where insufficient information is given, it will be a case of non-disclosure. Where inaccurate information is supplied, it is misrepresentation. The concept of materiality is crucial to disclosure, but what is material and would induce a prudent insurer to contract is a question of fact.

Representations are not limited to questions of fact but can also relate to expectations or beliefs although the latter are deemed to be true if made in good faith. A material misrepresentation entitles the insurer to avoid the contract.

5.0 Summary

The assured is expected to disclose all material facts known to him and within his knowledge in the ordinary course of business. The insurer and his agents are also required to disclose all material facts within their knowledge.

6.0 Tutor-Marked Assignment

With the aid of the relevant statutory provisions and judicial decisions, discuss the concept of utmost good faith in marine insurance.

7.0 References/Further Readings

Indira Carr (1999). Principles of International Trade Law, (2nd Edition). Cavendish Publishing Limited

Funmi Adeyemi (1992), Nigerian Insurance Law, (1st Edition). Dalson Publication Limited.

Unit 3 Indemnity

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4.0 INTRODUCTION

The principle of indemnity is one of the general principles of insurance. A right of Indemnity is an incident of certain legal relationships, and may arise either from contract express or implied from an obligation resulting from the relationship of the parties or statutes.

The principle of indemnity applies on the occurrence of a certain insured event, and the insured makes a case for a claim. The principle of indemnity seeks to restore the insured, who has suffered a loss to the financial position which he was before the occurrence of the event which has caused the loss.

2.0 OBJECTIVES

At the conclusion of this unit, you should be able understand the principle of Indemnity, and the applicability of the principle to losses in marine insurance.

3.0 MAIN CONTENT

3.1 The Legal Consequence of Indemnity

Indemnity principle introduces some degree of certainty to insurance agreement. Insurers do measure their financial obligations to their clients, and the insured do measure their claim against the insurers and to commence an action in case of disparity in the claims.

Once the insurer pays the full claim, the insurer is at liberty to transfer other rights against third party to the insurer. See the comment of Lord Blackburn in Burnard v Rodochanachi (1882) 7 App Cas. 333.

A claimant will have full indemnity if the amount paid is the exact financial amount that the subject matter was worth before the loss. What this implies is that the exact amount of a claim payable must have been determined before the occurrence of the loss.

3.2 Indemnity In Total Loss

The Marine Act, 1961 provides for indemnity in the event of a total loss. Total loss includes physical destruction of the subject-matter insured by fire or by enemy or where a ship is lost and after a lapse of reasonable time and no news of her having been received, an actual total loss is presumed. If the policy is a valued policy, the measure of indemnity is the sum fixed by the policy. In the case of an unvalued policy on the otherhand, the measure of indemnity is the insurable value of the subject-matter insured.

3.3 Indemnity In Partial Loss

The measure of Indemnity in the case of a partial loss of a ship is as follows:

(a) Where the ship has been repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty.

(b) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, computed as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregate amount shall not exceed the cost of repairing the whole damage computed as above.

(c) Where the ship has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage as computed above.

3.4 Partial Loss Of Freight

Where there is a partial loss of freight, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight lost by the assured bears to the whole freight at the risk of the assured under the policy.

3.5 Partial Loss Of Goods And Merchandize

Where there is a partial loss of goods and merchandize, the measure of indemnity is as follows:

(i) Where part of the goods, merchandize or other moveables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy.

(ii) Where part of the goods, merchandize, or other moveables insured by an unvalued policy is totally lost, the measure of indemnity is the insurable value of the part lost, ascertained as in the case of total lost.

(iii) Where the whole or any part of the goods or merchandize insured has been delivered damaged at its destination, the measure of damage of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the difference between the gross sound and damaged valued at the place of arrival bears to the gross sound valued.

(iv) Gross value, means the wholesale price, or if there is no such price, the estimated value, with in either case, freight, landing charges, and duty paid before hand.

3.6 Indemnity and Doctrine of Constructive Total Loss

The principle of constructive total loss is applicable where the insured has a right to abandon the subject-matter insured and claim for a total loss. Abandonment is a voluntary cession by the insured to the insurer of what remains in the subject-matter insured, together with all proprietary rights and remedies in respect thereof. Professor Olusegun Yerokun noted that the principle of abandonment is part of every contract of indemnity, and that whenever there is a claim for absolute indemnity under a contract of indemnity, there must be an abandonment on the part of the person claiming indemnity of all his rights in respect of that for which he receives indemnity. See Rankin v Potter(1873) L.R.6 H.L

3.7 Method of Providing Indemnity

Where there is a loss under a contract of indemnity, the insurer must is bound to put the insured back in the position he occupies in respect of the thing insured before the loss. Although the insurer reserves the right to decide the method of providing an indemnity, but in practice, the insurer always allows the assured to decide on the method of settlement he desires, but reserves the option to accept or reject. The following are the recognized methods of providing indemnity, and these are:

(i) Cash Payment
(ii) Repair
(iii) Replacement
(iv) Reinstatement

4.0 Conclusion

The principle of indemnity is aimed at restoring the insured, who has suffered a loss to the financial position which he occupied before the loss. Except in life and personal accident insurance, all classes of insurance are contract of indemnity. The reason is that the insurer's liability is only limited to the actual loss. Indemnity principle introduces some amount of certainty to insurance agreement.

5.0 Summary

We have in this unit discussed the principle of indemnity in law of insurance, and its applicability to different losses in marine insurance. The principle of indemnity is important to marine insurance as well as other classes of insurance with the exception of life and personal accident insurance.

6.0 Tutor-Marked Assignment

Consider the applicability of the principle of indemnity to the contract of marine insurance.

7.0 References/Further Readings

Indira Carr (1999). Principles of International Trade Law, (2nd Edition). Cavendish Publishing Limited

Funmi Adeyemi (1992), Nigerian Insurance Law, (1st Edition). Dalson Publication Limited.

Professor Olusegun Yerokun: Insurance Law in Nigeria, Nigeria Revenue Projects Publication.

Unit 4 Insurable Interest

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5.0 INTRODUCTION

Another established principle of marine insurance law is insurable interest. A consequence of marine insurance being a contract of indemnity is that the person for whose benefit the insurance policy is effected has or expects to acquire an insurable interest in the property, otherwise the contract of insurance is void. This requirement of insurable interest is a statutory creation and also applicable in marine insurance.

2.0 OBJECTIVES

At the conclusion of this unit, you should be able understand the principle of insurable interest as it relates to marine insurance.

3.0 MAIN CONTENT

3.1 Nature of Insurable Interest

The main feature which distinguishes an insurance transaction from a wagering contract is that the insured is required to have an insurable interest in the subject-matter of insurance. A man is said to have an insurable interest in a thing if he will benefit from its existence and be prejudiced by its loss. See Lucena v Crawford (1806) 2 Bos. & P.N.R.269.

For an interest to be insurable, it must be pecuniary and legal in nature. Sentiment must not be the basis of an insurable interest, and the interest must be one which can be enforced or protected by legal process. See Macaura v Northern Assurance Co. (1925) AC 619.

Furthermore, interest must be real and subsisting. The insured can only insure in respect of a risk which is capable of being assessed.

3.2 Insurable Interest In Marine Insurance

Marine Interest ranges from the interests of owners, hirers and financiers of a ship to interests in goods carried by sea or the interests of the crew of a ship. Any person who is interest in marine adventure has an insurable interest in the property or interest connected with such an adventure.

In marine policies, a person having an interest in the subject-matter of insurance may insure on behalf and for the benefit of other persons interested as well as for his own benefit. Section 16 of Marine Insurance Act 2004. The insured may recover in excess of his own interest, subject to the limit stipulated in the policy and any amount obtained in excess of his own insurable interest will be held in trust for those other parties on whose behalf he has acted.

A person is interested in a marine adventure when he stands in any legal or equitable relation to the adventure or to any property at risk therein in consequence of which he may benefit by the safety or due arrival of insured property or may be prejudiced by its loss, or damage thereto or by the detention thereof or in respect of which he may incur a liability. See section 7 of Marine Insurance Act 2004

Where the subject-matter insured is mortgaged, the mortgagor has an insurable interest in the full value of the property and the mortgagee has an insurable interest in respect of any sum due or to become due under the mortgage. A mortgagee, consignee or other person having an interest in the subject-matter insured may insure on behalf and for benefit of other persons interested as well as for his own benefit. But the creditors of a ship-owner have an insurable interest only in the freight and not in the ship itself.

In marine insurance, insurable interest need not exist at the commencement of the policy provided the assured has a reasonable expectation of acquiring such an interest. However, interest must exist in favour of the assured at the time of loss otherwise the insurer will not be held liable.

3.3 Insurable Interest and Insurable Value

A person may not insure in excess of the value of his interest in the subject-matter of insurance. Subject to any express contrary provision or valuation in the policy, the insurable value is measure in the following manner:

(i) Ship

In insurance of steamship, the insurable value includes the value of machinery in the ship, boilers, and coals and engine stores if owned by the assured. In the case of a ship engaged in a special trade, the insurable value includes the ordinary fittings requisite for that trade , installed in the ship at the of the risk, including her outfit, provisions and stores for the officers and crew, money

advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy plus the charges of insurance upon the whole.

(ii) Freight

In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance.

(iii) Goods or Merchandise

In insurance on goods and merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and accidental to shipping and the charges of insurance upon the whole.

4.0 Conclusion

Insurable interest is a legal requirement founded on public policy distinguishing insurance from a wagering contract. It is the interest of a person in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it. It needs to be noted that the principle of insurable interest is defined under the Marine Insurance Act 2004 in term of an adventure, that is, the insurable interest of a person in marine adventure.

5.0 Summary

In this unit, we have stated that an insured must have an insurable interest in the subject-matter of the insurance, otherwise the contract of insurance is void. Furthermore, we have also mentioned that for an interest to be insurable, it must be pecuniary and legal.

6.0 Tutor-Marked Assignment

Discuss the legal principle of insurable interest in marine insurance.

7.0 References/Further Readings

Indira Carr (1999). Principles of International Trade Law, (2nd Edition). Cavendish Publishing Limited

Funmi Adeyemi (1992), Nigerian Insurance Law, (1st Edition). Dalson Publication Limited.

Professor Olusegun Yerokun: Insurance Law in Nigeria, Nigeria Revenue Projects Publication.

MODULE 5

Unit 1 Types of Policy

Unit 2 Losses and other Incidents of Liability

Unit 3 Right of Insurers

Unit 4 Peril Insured Against

UNIT 1 TYPES OF POLICIES

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6.0 INTRODUCTION

The law which governs the contract of a marine insurance in Nigeria is the Marine Insurance Act of 1961, and common law principles. A contract of marine insurance is an agreement whereby the insurer undertakes to indemnify the assured against marine losses. A contract of marine insurance will not be admissible in court unless it is embodied in a marine policy. A court will not take cognizance of a marine contract not embodied in a marine policy.

The document that contains the terms and conditions of the Marine Insurance entered into between the insurer and the insured is called a “Marine Policy”. A marine policy is the formal instrument that provides legally valid evidence of the insurance contract.

There are various types of Marine insurance policies. They are categorized in various ways. They may be "time" policy, voyage" policy, "valued" or "Unvalued" policy, Open Cover policy, and "floating" policy.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- Identify the different types of marine insurance policies
- State the contents and assignment of a marine insurance policy

3.0 MAIN CONTENT

3.1 Types of Policy

Valued Policy

A valued policy is one which specifies the agreed value of the subject matter insured in the valuation clause. In the absence of fraud, the value fixed by the policy between the insurer and the assured, is conclusive of the insurable value of the subject intended to be insured, whether the loss is total or partial. See section 29(2) of the Marine Insurance Act, 1961.

The value agreed between the insurer and the assured does not necessarily reflect the actual or real value of the goods. Sometimes, the agreed value may be less than the actual value of the goods, or the agreed value of the goods may be greater than the actual value of the goods. Where the agreed value exceeds the real value, the assured needs to disclose this to the insurer. Failure of which may be regarded as a non-disclosure of a material fact. See Mathie v The Argonaut Marine Insurance Co Ltd (1924) 18 LIL Rep 118, Piper v. Royal Exchange Assurance (1932) Lloyds Report 103, Ionides v Pender (1874) L.R. 9Q.B. 531.

A valued policy need not contain the words "valued at", so long as there is a specific agreed value proposed by the assured and accepted by the insurer. In the absence of fraud, the valuation is binding upon the insurer. The fact that a loss is total or partial under a valued policy does not automatically translate to the assured recovering the value stated in the policy.

Unvalued Policy

According to S.30 of the Marine Insurance Act 2004, an unvalued policy is defined as:

> ***"An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained in the manner specified in section18 of this Act."***

Where there is a total loss under the unvalued policy, the insurer pays a sum equal to the insurable value of the subject matter insured. The value used is that of the insured property at the inception of the risk, not at the time of loss. See Williams v Atlantic Assurance Co Ltd (1933) 1 K.B. 81

Where the risk is subscribed to by more than one insurer, each insurer is liable for such proportion of the measure of indemnity as the amount his subscription bears to the insurable

value. See Kyzuna Investments Ltd. v. Ocean Marine Mutual Insurance Association (Europe) (2000) 1 Ll. Rep. 505

In any instance, what constitutes a valued or unvalued policy would depend to a large extent on the actual words of the policy. Clear words of description of the value or valuation are required.

Floating Policy

In a floating policy, the insurance is described in general terms leaving the name of the ship or ships and other particulars to be defined by subsequent declaration.

The subsequent declarations may be made by endorsement on the policy or in other customary manner. In the absence of any contrary position in the policy, the declarations are expected to be made in the order of dispatch or shipment.

A floating policy is useful in a contract where several consignments of cargo are sent over a period and the insurer does not have all the details such as the names of the ships on which the consignments are to be shipped and the dates of the shipment at the time of taking out the policy. The names of the ships, dates of shipments, and the values of the shipments will be declared by the assured at the time of the shipment of the goods.

Once the values are declared, the amount of cover available on the floating policy will be reduced by that amount, and when the declared values add up to the original amount, the policy will be run off or written off.

The disadvantage of floating policies is that, the moment the amount is exhausted, cover ceases immediately and some of the cargo may not be covered. For the assured to remain covered, a further floating policy may be required.

Open Cover Policy

An open policy is not a policy of marine insurance, but is merely an agreement whereby the insured undertakes to declare every item that comes within the scope of the policy cover in the order in which the risk attaches. The insurer agrees at the time of concluding the contract to accept all valid declarations coming within the scope of the cover up to the agreed limit for each declaration.

Open cover policy are for import export of goods and it indicates the rates, terms and conditions agreed upon by the insured and insurer to cover the consignments to be imported or exported. A declaration is to be sent along with the premium at the agreed rate by which the insurer will then issue a certificate covering the declared consignment.

The court has held that a marine open cover policy is an example of a marine floating policy provided the cover incorporates all the essential features of a marine policy. See National Insurance Corporation of Nigeria v Power and Industrial Engineering Company Limited(1986)

Voyage Policy

A marine policy is a voyage policy if it uses the words “at and from” or “from” a particular place to another place. See section 27 of the Marine Insurance Act 2004. Voyage policy comes to an end at the conclusion of the voyage. For a voyage policy there is an implied term that the marine adventure will commence within a reasonable time and if it is not, the insurer may avoid the contract unless the insurer waived the right to avoid or was aware of the circumstances causing the delay.

In voyage policy, the limits of the risk arc defined by places and the subject matter of the insurance is insured for only a particular voyage e.g. Lagos to United States. For a proper appreciation and understanding voyage policy will be discussed under three headings namely:

(i) Voyage policies on ship; (ii) Voyage policies on goods; and (iii) Voyage policies on freight.

(i) Voyage Policies On Ship

In a voyage policy on ship, the attachment of risk normally depends on whether the voyage is described as being "from" a port or "at and from" a port.

Where the voyage is being described as being "from" a particular place or port, then the voyage must start from that place mentioned else the policy will not stand. The policy will only cover the risk after the vessel has sailed from the exact place mentioned in the policy.

On the other hand, if the policy stipulates that the risk will run while the ship is on voyage "at" and "from", that means the policy will start running while the ship is at the stipulated destination; and it does not matter that the ship was not yet at the mentioned destination when the contract was concluded. Whenever she arrives there, the policy will start running provided, she arrives there in good safety. That simply means that she arrives there in good physical safety.

In voyage policies on ship, where the ship is to sail from a particular port and it sails from another port especially another country, the policy would not attach. See Bendel Insurance Co. v. Edokpolor (1989) 4NWLR (Part 118) 725. See Edokpolor and Co. Ltd V Bendel Ins. Co. (1997) 2 NWLR (part 482) 131.

Similarly, where the ship sails to a different destination other than that specified in the policy, the policy will not be upheld, the ship is said to have changed voyage Section 46 and 47 of Marine Insurance Act LFN 2004

However, the insurer will only avoid liability where the change of voyage is voluntary. See Richards v Forestal Land, Timber and Plys Co. Ltd (1942) 3 All ER 62.

The risk on ship ceases on her arrival at the port named in the policy. This is when she arrives at the place where ships of that tonnage and kind usually cast anchor. The ship must be moored in the usual place and manner that will allow her to start discharging her cargo before the risk can be said to have ceased.

ii. Voyage Policies On Goods

Just like the voyage policies on ships, the risk will not attach if the vessel on which the goods are loaded sails from a port not specified in the policy or if the ship sails to a different destination.

In a voyage policy on goods, transshipment may be allowed depending on the circumstances warranting it. If it is done for the preservation of the goods, then it will not determine the policy, especially where there is an already agreed liberty to do so. Where however, transshipment does not put an end to the risk envisaged and loss occurs during the time of transshipment, landing or even reshipment then the insurer will be liable. See section 60 of the Marine Insurance Act LFN 2004

It is worthy of note that where the insurance policy, contains a transit clause, the goods will still be covered by the policy even though there was a deviation.

In voyage policy for goods, the risk may terminate earlier than in the general rule where there is a "termination of contract of carriage" clause in the policy.

iii. Voyage Policies On Freight

Freight has being defined under section 90 of the Marine Insurance Act LFN 2004 as including the profits derivable by a shipowner from the employment of his ship to carry his own goods or moveable, as well as freight payable by a third party, but does not include passage money. It is divided into ordinary freight, chartered freight and owner's trading freight.

Ordinary freight is the reward paid to the owner of the ship for carrying goods in his ship to the delivery port. Chartered freight on its own, depicts the sum of money paid to the shipowner by the charterer for the use of the entire ship for a voyage or for a specified period of time. The owners trading freight means that addition to the cost of his own goods carried in his own ship which the ship owner charges at the port of delivery as the price of carriage.

WARRANTIES IN VOYAGES POLICIES

In a voyage policy, certain warranties are implied and they include:

i. Seaworthiness of the ship. This implies that the ship should be seaworthy at the commencement of the voyage where the voyage is carried out in stages. A ship is

seaworthy when she is reasonably fit in all respect to withstand all the ordinary peril(s) of the sea adventure up to its expected destination.

ii. Legality of the voyage. There is an implied warranty that the adventure or voyage to be embarked upon or contracted in the policy is a legal one, and is to be carried out in a lawful manner. For instance, it is implied that the ship should not undertake any illegal venture like trading with enemy, smuggling or piracy. If the ship is used for an illegal voyage, and there is a loss, the assured cannot claim for any loss there from.

iii. Deviation. The ship must not deviate from the voyage contemplated. If she does, the insurer will be discharged from his liability from the time of such deviation.

Time Policy

Time policy is for a definite period of time; a policy may be a "mixed" time and voyage policy. A specific date for the commencement and termination of the risk must be stated in the policy. A policy on ship is nowadays almost invariably insured for a period of time, whereas cargo is usually insured by a voyage policy. A policy for a period of time does not cease to be a time policy merely because the period of time may be extended or abridged pursuant to one of the policy's contractual provisions. See The Eurysthenes [1977] 1 QB 49 (CA).

3.2 Contents of Policy

The First Schedule to the Marine Insurance Act 2004 stipulates five essential details that must be specified in every marine policy as follows:

(a) the name of the assured or the person effecting the insurance on his behalf;

(b) the subject matter and risk insured against;

(c) the voyage or period of time covered by the insurance;

(d) the sum or sums insured; and

(e) the peril insured against

(f) the name or the names of the insurers.

A marine policy must be signed by or on behalf of the insurer, provided that in the case of a corporate entity, the corporate seal may be sufficient. Where a policy is subscribed

by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the insured.

3.3 Assignment of Policy

The MIA provides that a marine insurance policy is assignable, unless it contains terms expressly prohibiting assignment.

Marine Insurance Law, recognizes the assignment of both the contract and the benefit under it. Upon assignment of the policy, the original assured is replaced by the assignee.

Assignment of a marine insurance policy requires transfer of the whole beneficial interest therein. Transfer of interest in international commerce usually connotes a transfer of property in the goods, but it is an accepted practice in insurance that mere delivery without an indorsement on the policy is inadequate to transfer title to the policy.

Assignment of the beneficial interest entitles the Assignee to sue in his own name.

The effect of this is that the assignee takes the benefit of the assigned policy subject to the insurer's equities and rights of set-off valid against the original assured. Section 51(2) of the Marine Insurance Act 2004 provides that the insurer is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

Some defences that have been allowed include breach of the duty of utmost good faith by the assured, breach of warranty, fraudulent claims, and outbreak of war which renders the assured an enemy alien thus barring the assured from recovery. See William Pickersgill and Sons Ltd. v. London & Provincial Marine and General Insurance Co. Ltd. [1912] 3 K.B. 614, The Litsion Pride (1985)1 LI. Rep. 437, Bank of New South Wales v South British Insurance Co. (1920) 4 Lloyd Rep 266.

The assured cannot assign his right to compensation from a third party causing loss or he will be liable to reimburse the insurer. See Colonial Versicherung AG v Amoco Oil Co. (1997) 1Lloyd Rep 261

The contract of insurance entered into between the parties could however contain certain restrictions on assignment of the policy. As long as the restrictions are not against public policy, they would be valid.

The Effect Of Assignment

where a marine policy has been assigned so as to pass the beneficial interest in such policy, the assignee of the policy is entitled to sue thereon in his own name. The defendant (the insurer) is entitled to make any defence arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf of whom the policy was effected.

4.0 Conclusion

Marine insurance is a wide and detailed area of insurance practice which is still developing. Marine insurance law is still developing because many of the provisions of the Marine Insurance Act have not been tested in our courts, and, there is scarcity of Nigerian judicial decisions on that area of law.

5.0 Summary

Marine insurance is one of indemnity which the court will not admit unless it is embodies in a policy. A policy is a document containing the terms and conditions of the marine insurance contract between the insured and the assured. A valid policy must contain all the essential details. A marine insurance policy is assignable under the Marine insurance law.

6.0 Tutor-Marked Assignment

1. Write short notes on Valued Policy, Unvalued Policy, Open Policy, Floating Policy, Voyage Policy, and Time Policy.

2. How can a Marine Insurance Policy be assigned under the law.

7.0 References/Further Readings

Indira Carr (1999). Principles of International Trade Law, (2nd Edition). Cavendish Publishing Limited

Funmi Adeyemi (1992), Nigerian Insurance Law, (1st Edition). Dalson Publication Limited.

Unit 2 Losses and other Incidents of Liability

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1.0 Introduction
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    3.3 Actual Total Loss
    3.4 Constructive Total Loss
    3.5 Partial Loss
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5.0 INTRODUCTION

Regardless of the sum stated in the policy, the insured cannot recover more than his loss unless the policy is a valued policy. In order to recover in the event of any loss, it must be established that the loss was proximately caused by a marine peril insured against. Section 56(1) of the Marine Insurance Act 2004 expressly provides that unless the policy provides otherwise, the insurer is liable for any loss proximately caused by peril insured against, but not liable for any loss which is not proximately caused by a peril insured against.

There are various types of losses in marine insurance, and they are General Average Loss, Particular Average Loss, Actual Total Loss, Partial Loss, Constructive Total Loss.

2.0 OBJECTIVES

At the end of this unit, you should be able to:

- Identify the different types of losses in marine insurance.
- Understand the limitation to the recovery of losses in marine insurance.

3.0 MAIN CONTENT

3.1 General Average Loss

Section 67 of the Marine Insurance Act 2004, defines general average loss as a loss caused by or directly consequential on a general average act, and includes a general average expenditure as well as a general average sacrifice.

It is caused by a general average act which is any extraordinary sacrifice or expenditure voluntarily and reasonably made or incurred in time of peril for the purposes of preserving the property imperiled in the common adventure. *See Birkley v. Presgrave* (1801) 1 East 220. The peril must be real and not imaginary.

Where there is a general average loss, the loss is not that of the party whose interest is sacrificed alone. The person whose interest is directly affected is entitled to a fraction of the contribution, called a general average contribution, from the other parties interested in the adventure. The parties who may bear the loss may include the ship owners or charterers who have interest in the ship or freight as the case may be and shippers for their interest in the cargo.

In the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against.

Where ship, freight, and cargo, or any two of those interests are owned by the same assured, the liability of the insurer in respect of general average losses or contributions is determined as if those subjects were owned by different persons.

3.2 Particular Average Loss

Particular average loss is a partial loss caused by a peril insured against. With the exception of general average and particular charges, all partial losses (including salvage charges) are particular average losses. A particular average may also be suffered in respect of a ship, for instance if a ship accidentally runs into a submerged rock causing a hole in its hull or damage to the engine. The cost of repairing the hull or the engine whichever is the case, is a particular average. See section 65 of the Marine Insurance Act 2004.

3.3 Actual Total Loss

Where the subject matter insured is destroyed or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived thereof there is an actual total loss. See section 57(4) of the Marine Insurance Act 2004. A ship which is so damaged that it cannot sail or be taken to a port for repairs can be described as totally lost. A ship which is sold by the master without consulting the owners due to irreparable damage, will be deemed to be totally lost. See Captain J.A. Cates Tug and Wharfage Co., Ltd v Franklin Insurance (1927), 137 2.T 709.

An insurer will also be liable for a loss in the case of a missing ship which does not arrive at her port of destination, and no news is received of her after a reasonable period has elapsed. See section 59 of the Marine Insurance Act 2004. See Koster v Reed (1826) 6 B & C 19

There may be actual total loss of goods where they cease to be available to their owner for any purpose whatever, except, perhaps, as a waste or refuse. See Cologan-v-London Assurance(1816) 5M & S. 447.

There is no total actual loss where the goods arrive, although damaged, without loss of species. Glennie v London Assurance (1814) 2 M & S 371.

There is a total loss of freight where Freight is payable on the delivery of the goods at the port of destination, and there is a total loss of them before arrival there. There is a total loss of freight where the ship owner from any cause whatever has been unable to transport the goods to their port of destination.

3.4 Constructive Total Loss

There is a constructive total loss where the subject matter insured is reasonably abandoned on account of its actual total toss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its when the expenditure had been incurred. See section 61 of the Marine Insurance Act 2004.

In particular, there is a constructive total loss where the assured is deprived of the possession of his ship or goods by a peril insured against, and it is unlikely that he can recover the ship or goods as the case may be, or the cost of recovering the ship or goods would exceed their value when recovered.

There is a constructive total loss in the case of damage to a ship where she is so damaged by a peril insured against, that the cost of repairing the damage would exceed the value of the ship when repaired.

In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interest, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired.

There is a constructive total loss in the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

Effect of Constructive Total Loss

Where, there is a constructive total loss the assured may either treat the toss as a partial loss, or abandon the subject matter insured to the insurer and treat the loss as a if it were an actual total loss.

It should be noted that if the assured abandoned a wreck and intends to claim under his policy on the basis of constructive total loss, he is required under section 63 of the

Marine Insurance Act 2004 to give to the insurer notice of abandonment of the thing insured coupled with an intention to pass the wreck to the insurer. Failure to give such a notice will treat the loss as a partial loss.

3.5 Partial Loss

The measure of indemnity in relation to a damaged ship is as follows:

i. If the ship has already been repaired, the insured is entitled to the reasonable cost of repairs up to the limit of the sum insured in respect of any one accident.
ii. If the ship has only been partially repaired, the assured is entitled to the reasonable cost of such repairs up to the limit of the sum insured in respect of any one accident.
iii. If the repairs have not been effected on the ship, and has not been sold in her damaged condition, the assured is entitled to be indemnified for the unrepaired damage provided this does not exceed the reasonable cost of repairing such damage. See section 70 of the Marine Insurance Act 2004.

Regarding partial loss of freight, unless the value provide otherwise, the measure of indemnity in the case of a value policy is such proportion of the sum fixed by the policy as the proportion of freight lost by the assured in relation to the whole freight at the risk of the assured under the policy.

The measure of indemnity in respect of an unvalued policy depends on the insurable value of the subject-matter of insurance. See section 71 of the Marine Insurance Act 2004.

4.0 Conclusion

Losses in Marine insurance could be qualified depending on the circumstances under which they occur. This accounts for types of losses in Marine Insurance Law. An actual total loss refers to situation where the position is dear and Constructive total loss refers to situation where a loss is inferred.

However, the failure of any claimant to successfully establish a case of actual total loss reduces such claim to partial loss. Similarly failure to successfully convince the court to draw inference of constructive total loss will in most cases reduced such claim to partial loss. Constructive total Loss however is not without the concept of notice of abandonment which is said to be given by the claimant to entitle him to claim constructive total loss**.**

5.0 Summary

In order to establish a right of recovery, it is a fundamental principle underlying insurance contract that the loss must be shown to be remotely caused by peril insured against.

6.0 Tutor-Marked Assignment

Discuss the concept of loss as it relates to contract of marine insurance.

7.0 References/Further Readings

Indira Carr (1999). Principles of International Trade Law, (2nd Edition). Cavendish Publishing Limited

Funmi Adeyemi (1992), Nigerian Insurance Law, (1st Edition). Dalson Publication Limited

UNIT 3 RIGHT OF INSURERS

CONTENTS

1.0 Introduction
2.0 Objectives
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1.0 INTRODUCTION

In many cases an insured is sued for both covered and uncovered claims, and damages. Equally, is for an insured to be sued for damages beyond its policy limits. Not surprisingly, when an offer is made to settle such a case within the potentially available policy limits, the insured often wants to accept the offer so as to terminate any personal exposure. At the same time, the insurer or insurers may claim that the entire case is uncovered, that it may be able to defend the case, or that the settlement demand is just too high. Conversely, there are cases where the insured feels there is little or no liability and wants to vindicate itself.

2.0 OBJECTIVES

At the end of this unit, you should be able to understand the rights of an insurer under the contract of marine insurer.

3.0 MAIN CONTENT

3.1 Insurer's Rights and Obligations Concerning Settlement.

The "cooperation," "no-action," and "voluntary payments" clauses in liability policies generally, allow an insurer to control the settlement of a claim. In fact, upon these provisions, courts have recognized an insurer's right to settle a claim even over its insured's objections. (See Maryland Casualty Co. v. Imperial Contracting Co. (1989) 212 Cal.App.3d 712, 720-721.)

Even though an insurer generally has the discretion to control settlement decisions, the courts have imposed certain guidelines on the insurer in its decision making. For example, in evaluating a settlement demand, the insurer may not consider its own

coverage beliefs. Instead, the insurer must conduct itself as though it alone were liable for the entire amount of the judgment. (Johansen v. Cal. State Auto Ass'n Inter-Ins.Bureau, supra, 15 Cal.3d at p. 16.)

3.2 Right of Subrogation.

An insurer has the right to be subrogated to any right the exercise of which will diminish the loss suffered by the insured. See Castellain v Preston (1883) 1 Q.B.D 380. The insurer's right to be subrogated is founded on the principle that once the insurer has performed its obligation to the insured as regards settlement of claim, the insurer shall be subrogated to all the rights of the insured in respect of the loss in question. The insurer may recover damages from the ship owner or carrier or bailee in the case of loss of damage to the insured cargo. Recovery may also be obtained from third parties for causing a damage to an insured ship.

The right of subrogation does not pass to an insurer until the assured is indemnified and discharged of all claims arising under the policy. See Lion of Africa Insurance Co. Ltd v Scanship (Nigeria) Ltd 1969 N.C.L.R 317.

The insured cannot by virtue of subrogation right recover from a third party an amount paid to a claimant on ex-gratia basis as ex-gratia payment do not constitute indemnity in law. Furthermore, where a policy contains clauses on average or excess, the insurer must over to the insured after recovering from a third party an amount equal to the extent to which the insured was his own insurer.

4.0 Conclusion

Although an insurer may have the right to control settlement decisions, its exercise of this right must be accompanied by considerations of good faith. Thus, while the insurer is required by law to consider the insured's interests in evaluating a settlement demand, the reality is that the interests of the insured often conflict with those of the insurer and the insurer might not always consider the insured's interests before accepting or rejecting a demand. Both the insurer and insured benefit from a reasonable settlement within policy limits. The insurer will save substantial defense fees and costs and preserve its policy limits; while the insured will avoid personal liability, and preserve its business reputation and relationships.

5.0 Summary

The insurers usually have the right to control settlement decisions, the exercise of which must be accompanied by consideration of good faith. Once the insurer has performed its obligation to the insured as regards settlement of claim, the insurer shall be subrogated to all the rights of the insured in respect of the loss in question.

6.0 Tutor-Marked Assignment

Discuss the rights of an Insurer under the contract of marine insurance.

7.0 References/Further Readings

Indira Carr (1999). Principles of International Trade Law, (2nd Edition). Cavendish Publishing Limited

Funmi Adeyemi (1992), Nigerian Insurance Law, (1st Edition). Dalson Publication Limited

UNIT 4 PERIL INSURED AGAINST

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6.0 INTRODUCTION

The purpose of marine insurance is obviously to secure the assured with an indemnity for loss of or damage sustained by the subject matter insured during the course of a marine adventure. A 'marine adventure' occurs when any ship, goods or other moveables are exposed to maritime perils. The vast number of cases which have come before the courts for the purpose of determining the meaning and scope of the phrase 'perils of the seas' have clearly demonstrated the fact that the term is not as simple or as straightforward as it may seem. Ships are often faced with the following perils: unseaworthiness, wear and tear, fire and explosion, negligence, barratry and wilful misconduct.

2.0 OBJECTIVES

At the end of this unit, you should be able to understand the various perils ships often encounter on the sea.

3.0 MAIN CONTENT

3.1 Definition of Perils of the Sea

Terms such as “marine risks”, “the hazards of the sea”, have been construed by the courts as synonymous with perils of the seas. It is defined as “Every accidental circumstance not the result of ordinary wear and tear, delay, or of the act of the assured, happening in the course of the navigation of the ship, and incidental to the navigation, and causing loss to the subject-matter of insurance".

The term 'perils of the Seas' usually brings up the picture of a turbulent sea, violent storms, forceful gale, hurricanes, excessive squalls, tsunami, large washes of waves, collision, stranding, tempestuous weather or perils peculiar to the sea or to a ship at sea and which could not have been avoided by the exercise of reasonable care. See Canada Rice Mills v Union Marine (1941) AC 55.

An interesting meteorological account of range of weather conditions which a ship could encounter during the course of a voyage was given by Justice Mustill in the case of The Miss Jay Jay(1985) 1 Lloyd's Rep 264 @ 271. The types of weather to which a ship may be exposed to were categorized as follows: -

(i) Abnormally bad Weather;

(ii) Adverse Weather;

(iii) Favourable Weather; and

(iv) Perfect Weather.

Indeed, it is impossible to attribute a loss to 'perils of the Seas' if the weather conditions to which the ship was exposed to at the time of loss, were favourable or perfect. In such a situation some other cause or causes such as unseaworthiness., wear and tear, or the-willful misconduct of the assured would most probably be found responsible for the loss.

Note that the term "Perils of the Sea" does not cover every accident or causality which may happen to the subject matter of the insurance on the sea. It must be a peril "of the Sea. Furthermore, it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. See The Xantho (1887) 57 LT 701, Cullen and Butler(1816) 5 M & S 461

Note that the perils of the sea does not protect the shipowner from damage or loss from events that are not peculiar to the sea or to a ship at sea. So where goods are destroyed due to rats on board a ship, or due to cargo being dropped upon them during loading, the shipowner will be unable to escape liability. See Hamilton Fraser and Co v Pandorf and Co (1887) 12 AC 518, Scott v Marten (1916) 1 AC 304

3.2 Perils of the Sea and Negligence

It is always implied in every contract of affreightment that the shipowner will use due care and skill in navigating the ship and carrying goods. See The Xantho (Supra).

Furthermore, there is also a duty on the part of the master representing the shipowner, to take reasonable care of the goods entrusted to him, not merely in doing what is necessary to preserve them on board the ship during the ordinary incident of voyage, but also in taking reasonable

steps to prevent their loss, destruction or deterioration, by reason of accident. See Notara v Henderson (1872) 26 LT 442.

A loss proximately caused by a peril of the Seas could be as a result of the negligence of the master, crew, pilot charterer, shipowner, repairer, engineer, stevedore, or any person. See Hamilton, Fraser & Co v Pandorf & Co (Supra).

Provided that the loss is proximately caused by a peril insured against, an assured may recover for the loss even though the loss would not have happened but for the misconduct or negligence of the master or crew.

3.3 Perils of the Sea and Barratry

Whenever a ship is lost at sea by reason of the entry of seawater, barratry and a peril of the seas are often pleaded in the alternative as causes of loss. This is because sea water could accidentally or fortuitously enter a ship and cause a loss, or could be invited to enter a ship to cause a loss. In the case of the former, the action of the winds and waves i.e. Perils of the Seas, would be regarded as the proximate cause of loss; whilst in the latter, either barratry or willful misconduct on the part of the shipowner would be considered as the proximate cause of loss.

In any event, Scuttling a ship, whether done with or without the knowledge or consent of the shipowner is not a peril of the seas. See Samuel V Dumas (1924) 18 Lloyd’s Rep 211.

Note that the distinction between a peril of the seas and barratry is well defined. The former is a fortuitous act, while the latter is an intentional act committed by a person, the master or crew.

3.4 Perils of the Sea and Unseaworthiness

The seaworthiness of a ship is frequently brought into question and raised as a defence by an insurer whenever a claim is made for loss of or damage sustained by the subject matter insured by reason of either the entry of sea water into the ship or the violent action of the elements. It is to be noted that, regardless of the nature of the subject matter insured, an insurer always has the right to plead unseaworthiness as a defence to an action brought by an assured claiming that perils of the sea has caused the loss or damage.

A seaworthy ship could be described as one which is reasonably fit in all respects of encountering the ordinary perils of the seas of the adventure insured. This necessarily means that if she is incapable of enduring even the most ordinary of sea perils, she cannot be said to be seaworthy and, consequently' the loss cannot be attributed to perils of the Seas.

On the subject of weather conditions, a ship is expected to be able to deal adequately with adverse as well a favourable weather. Adverse weather falls within the scope of ordinary perils

of the seas if it is a weather which could reasonably be foreseen that the vessel might encounter or, the voyage in question.

3.5 Fire and Explosion

As explosion is now specially recognized as an insured peril. The question, which had so troubled the courts in the past as to whether it was included within the term 'fire', is now academic. See George Kallis V success insurance Limited [1985] 2 Lloyd's Rep 8.

The question as to whether a loss or damage sustained as a result of a fire which has started as a result of the negligence of master or crew is covered by the peril of 'fire' was examined in Busk v Royal Exchange Assurance Co (1970) 2 Lloyd's Rep 386. In that case, Justice Bayley observed thus:

> "There is no authority that says that the underwriters are liable for a loss, the proximate cause of which is one of the enumerated risks, but the remote cause of which may be traced to the misconduct of the master and mariners."

In the Bell of Portugal (1970) 2 Lloyd's Rep 386, the court held that electrician's negligence did not defeat the plaintiffs' right of recovery under the policy.

4.0 Conclusion

The main risks insured against in a marine policy are stated in the "perils" clause which is often supplemented by "specially to cover" clauses, or restricted by provisions eliminating one or more of the insured risks. Among the perils of the seas that are deemed to be covered under a marine policy are extraordinary action of the wind and wavers, collision foundering, stranding on rocks and iceberg. Not covered are ordinary wear and tear and losses which can be anticipated as regular incidents of sea carriage or navigation.
Finally, the assured can take solace in the marine insurance polices so as to provide sufficient palliative measures for them in case of huge losses recorded during the course of carriage of goods by sea or even navigation.

5.0 Summary

Generally, the shipowner has the obligation to ensure that the ship is fit in design and structure, and must be equipped to encounter ordinary perils likely on the particular route to her destination at that time of the year.

6.0 Tutor-Marked Assignment

Discuss the principle of insurable perils in marine insurance.

7.0 References/Further Readings

Indira Carr (1999). Principles of International Trade Law, (2nd Edition). Cavendish Publishing Limited

Funmi Adeyemi (1992), Nigerian Insurance Law, (1st Edition). Dalson Publication Limited.