

SHIP AGENT'S LIABILITY FOR CARGO CLAIMS UNDER NIGERIAN LAW

Bills of lading usually contain clauses where the carrier is expressed to be contracting on behalf of himself and his servants and agents. These servants and agents are usually the vessel's port agents and stevedores with the result that when goods are lost or damaged on the carrying vessel, such agents are able to claim immunity from suit. Consequently, a number of marine cargo claims instituted by cargo interests against ship agents do not see the light of day as they are usually struck out at the preliminary stages by the Nigerian courts.

The courts' reasoning have always been based on the general principles of the law of agency that an agent acting on behalf of a disclosed principal cannot incur personal liability in his capacity as agent or be sued where his principal is disclosed. This position was of immense benefit to ship agents' as all they were required to do when sued by cargo interests was to raise the defence of the disclosed principal.

This was the position in Nigeria until the 30th of September 1991 when the Admiralty Jurisdiction Decree (AJD) was promulgated but which became operative in 1993. The AJD introduced the concept of personal liability for ship agents into Nigerian law. Section 16 of the AJD now makes it possible for ship agents to incur personal liability irrespective of whether they acted for disclosed principals or not. The relevant provisions of section 16 are reproduced below.

- “(3) A person who acts as an agent of the owner, charterer, manager or operator of a ship may be personally liable irrespective of the liability of his principal for the act, default, omission or commission of the ship in respect of anything done or failed to be done in Nigeria.

- (4) A person who does anything or carries out any duty under the provisions of this Decree or under the provisions of any law in force in Nigeria in respect of any ship in the territorial waters of Nigeria shall by doing that thing or carrying out that duty constitute himself the agent of the ship”

From the above provision, it is clear that a ship agent in Nigeria can now incur personal liability for the act or omission of the ship irrespective of whether such agent acted for a disclosed principal. Furthermore, no formal instrument of appointment is required to constitute an agency contract. All that is required is for the agent to have carried out any duty in respect of the vessel.

Following the introduction of Section 16 of the AJD, a lot of debate was generated in the local shipping circles on the scope of the section. On one hand cargo interests argued that ship agents can no longer rely on the disclosed principal rule to escape personal liability when sued for cargo claims, while ship agents were of the view that because the operative word used in the section is "may" and not "shall", the onus still lies on the plaintiff to prove their liability and where the onus is not discharged for instance because of a Himalaya clause, the agent will not be liable.

These were the divergent views proffered by the various interest groups until the Federal High Court in Lagos made a judicial pronouncement in the case of Omidiran Enterprises Limited vs Brawal Shipping Nigeria Limited. The Plaintiff instituted an admiralty action for loss of goods carried on board the second defendant's ship. The first defendant, "Brawal Shipping Nigeria Limited was the shipping agent of the second defendant. It applied that the case against it be dismissed on the basis that it acted for a disclosed principal (who was also sued as a party in the action). The first defendant also relied on clause 18 of the relevant bill of lading, which contained a Himalaya clause exempting it from liability in the following terms:

"No servant or agent of the carrier.....shall in any circumstance whatsoever be under liability to the Merchant for any loss, damage or delay arising or resulting directly from any act, neglect or default on his part while acting... in the course of his employment and every immunity, defence and exemption shall be available to protect such agent".

In reply, the plaintiff submitted that the provisions of clause 18 of the bill of lading, which sought to confer immunity on the first defendant, were of no effect because of the provisions of section 16(3).

In her ruling, Honourable Justice R. N. Ukeje rejected the plaintiff's submission and held that under section 16 a ship agent can prima facie be liable in respect of any act or omission of a ship. However, she went further to consider the effect of the exemption provided in clause 18 of the bill of lading and found that the first defendant as the agent of the second defendant was granted immunity and therefore exempt from the personal liability envisaged under section 16(3) of the AJD. Accordingly, notwithstanding the provisions of section 16(3) the judge held that the first defendant was not a proper party to the action and was not liable to the plaintiff. The judge based her decision on the fact that the operative word used in section 16(3) is optional and not mandatory.

Although a court of first instance gave this decision, it is opined that if the matter was to be heard by an appellate court, the same conclusion will

be reached. This opinion is buttressed by the fact that despite the personal liability envisaged under section 16, the principle that has guided and will continue to guide the courts is the freedom of parties to enter into contracts. Therefore, if it is clear from the contract that the intention of the parties is to exclude ship agents from personal liability in respect of anything done in pursuance of the contract of carriage, that intention will be given effect by Nigerian courts.

Furthermore, it is believed that if the intention of the lawmakers were to oust the operation of exemption clauses, the appropriate word "shall" which is mandatory would have been used in the section.

Based on the above decision and unless a contrary pronouncement is made by the Court of Appeal, where a ship agent is sued as a defendant along with the carrier in respect of a bill of lading containing a Himalaya clause, the Himalaya clause will prevail over section 16 provided there are no other extraneous issues.

In conclusion, it is my opinion that the concept of personal liability introduced under Section 16(3) though novel does not alter Nigerian law with regard to the liability of ship agents in any material respect. Any other interpretation will amount to an alteration of the generally accepted principles of common law and the practice of carriage of goods by sea, which if the legislators intend to alter, must be done in clear and unequivocal terms. Such interpretation will also lead to the absurd effect of elevating an agent to the position of a principal. It is hoped that the above will allay the fears of industry operators on the effect of the changes introduced into ship agents' liability under Nigerian law.

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