



## Issues in Purchase of New Build

**H**aving decided on a new build and the type and specification of vessel to be purchased - whether tanker, general cargo vessel, ro-ro, tug or rig - the services of a ship broker is engaged to scout for and identify the appropriate shipyard and advise on cost.

Thereafter an order is placed with the shipyard for the construction of a specified type and size of vessel.

Shipping being an international business has its own peculiar and international contract terms expressed in Standard Form called the

Shipbuilding Contract of Shipowners Association of Japan (SAJ). The SAJ governs contracts for new build and by itself constitutes a binding agreement and therefore must be well understood by all the parties. In summary, the SAJ provides for allocation of rights, obligations and risks borne by parties on all relevant matters including market, technical specifications, loss or damage to the vessel during and after construction, remedies for non-performance by either party, installmental payments/milestones and when property in the res i.e. ship passes. It is an error to assume that all implied terms in ordinary contract applies automatically to shipbuilding or ship purchase contracts as the applicable Standard Form is comprehensive on the rights and remedies of parties.

# Ship Financing

*MFON EKONG USORO, DG/CEO NIGERIAN MARITIME ADMINISTRATION AND SAFETY AGENCY*

**T**he sale or purchase of a ship simply put is the transfer of ownership in a ship from buyer to seller for a price i.e. the purchase price. The process of securing funds for the transaction is called ship finance. The critical parties in a ship purchase transaction are the seller (shipowner), buyer (shipping company), broker / bank (financing). The transaction usually involves three major processes i.e. the purchase and registration of the vessel and creation of statutory mortgage but in practice, negotiation of and securing a mortgage to finance the purchase is usually settled before the actual purchase.

### The Banks

Often times, banks erroneously regard a ship as any other chattel and therefore apply the principles and processes of funding the purchase of other chattels like property to ship finance transactions. The common practice is for the commercial departments of banks to exclusively control the negotiation for ship financing and invite the legal department only at the point of documentation after commitments have been made and in some cases, loan facilities partially disbursed. This should not be. The legal department and the bank's maritime lawyers ought to be involved in the transaction right from the beginning.

The starting point for the bank is for all the key departments to fully understand the intricacies of ship finance

transaction and engage a knowledgeable shipping lawyer to drive the transaction and advice on documentation. This assumes that the bank has performed all necessary credit and risk assessments and a decision has been taken to finance the purchase of a vessel. We would devote a greater part of this article to issues related to financing the purchase of old ships.

“All those exclusion of liability and exemption clauses in common contracts do not apply to shipping for several reasons principal of which is the concept of maritime liens which are inchoate, attaches to the ship, extends beyond the sale and may crystallize several years after the purchase.”

### Issues in Purchase of Old Vessel

In comparison to the purchase of a new build, buying a second hand vessel is more complicated and carries greater risk. However, because of the cost of new build and the longevity of ships,

# Unveiling Tinapa

The multimillion US Dollars Tinapa Business Resort in Calabar, Cross River State of Nigeria was officially commissioned by President Olusegun Obasanjo on 02 April 2007. One of the centerpieces of the Tinapa Project apart from the numerous shopping malls and other facilities is the Studio Tinapa, a concept that seeks to recreate the American Hollywood for the use of Nigerian film and movie makers.

The Studio Tinapa project was awarded as a turnkey project to one of PUC's Clients and PUC was responsible for negotiating the multibillion Naira contract terms between the owners of the Tinapa Business Resort and our Clients. Our Client was also appointed as the managers of the Studio Tinapa for a term of years under a management agreement that we negotiated on their behalf.

For the actual construction of the Studio and the supply of the equipment thereof, we negotiated several sub-

purchase of old bottom is generally the most frequent transaction in acquisition of vessels and even more so in Nigeria due to the financial situation of most operators and the reluctance of banks to fund shipping operations.

The parties as in the case of new build are the buyer, broker, seller and the bank. Purchase of old build is governed by standard contract terms expressed in Norwegian Shipbroker's Association Memorandum of Agreement (MOA) for Sale and Purchase of Ships (NSF 93). This Standard Form is also a binding agreement and provides for allocation of rights, obligations and risks borne by parties on all relevant matters including market, technical specifications, loss or damage to the vessel during and after construction, remedies for non-performance by either party, installmental payments/milestones and when property in the res passes.

The entire transaction encompasses three broad phases:

#### *Phase One: Pre-delivery*

This is a very crucial stage. It is at this time that brokers and the shipowners generally take advantage of the ignorance of a potential buyer. Most banks in Nigeria sadly do not know of the existence of the Memorandum of Agreement as the governing instrument for the sale and purchase of secondhand vessels. We have had instances where banks use their existing format agreement for purchase and mortgage of ordinary chattels for a ship purchase transaction to their detriment. Please note that you must be familiar with the MOA and that all those exclusion of liability and exemption clauses in common contracts do not apply to shipping for several reasons principal of which is the concept of maritime liens which are inchoate, attaches to the ship, extends beyond the sale and may

crystallize several years after the purchase. The MOA provides for all the peculiarities of ship purchase transaction. A complete team of commercial and shipping lawyers together with the loan applicant would need to negotiate and execute the MOA.

Other matters provided for by the MOA include:

- Deposit, inspection of the vessel, timelines and sequence for closing, discharge of mortgage if any, deletion, termination of existing insurance;
- Arrangement for insurance, registration of vessel with classification society, crew, obtaining temporary registration in the new trade area as applicable, bunkers and registration of vessel

#### *Phase Two: Delivery*

This stage involves simultaneous actions by the representatives of both buyer and seller. The transaction is consumed at closing after final inspection by the buyer. It involves:

- Delivery and exchange of documents between buyer and seller. Documents may include trading certificates and bill of sale.
- Payment of purchase price
- Physical delivery aboard ship
- Where the sale is international, a law firm of repute is usually entrusted by both parties as the custodian of title documents which are to be exchanged only after full payment of purchase price and any other terms as specified in the MOA

#### *Phase Three: Post-delivery*

At this stage the commercial transaction would have been completed remaining the statutory requirement of registration of vessel with the flag registry, in this case, the Nigerian Maritime Administration and Safety Agency

# Unveiling Tinapa's

contract agreements with foreign firms and organizations on behalf of our Client and PUC was involved right from the project conceptualization processes up to the actual execution thereof. The Studio was indeed the cynosure of attention during the commissioning ceremony and has received rave reviews from the Nigerian public and film industry stakeholders.

Apart from Studio Tinapa, another of our Clients has the contract for the supply and installation of security equipment and systems for the entire Business Resort. We also, on behalf of our Client, negotiated this contract which was very slightly shy of N1 billion, with the Resort managers and owners. On the whole, we feel very proud to have played a part in the realization of and to be identified with such worthy cause as the Tinapa Business Resort.

(NIMASA). The bank or buyer through their agent or solicitor would have to complete the following procedures:

- Registration of vessel under Buyer's name;
- Registration of vessel under new flag as desirable; and
- Conversion of temporary registration to permanent registration.

## Mortgage to Finance Purchase of A Ship

It is advisable for participating banks in ship financing to create a statutory mortgage which confers on them both proprietary and security interest in the property. The potential mortgagee must cause a detailed and specialized due diligence to be conducted on the seller, the ship itself and the ship owning company. The choice of relevant authorities beyond the registry for collecting the relevant information is itself critical and the banks plus buyer would have to secure the services of a maritime lawyer.

## Stages in Creation of a Statutory Mortgage

Traditional mortgage and equitable mortgage are generally not considered reliable security interests and should not be contemplated in ship finance. To create a statutory mortgage, a Deed of Mortgage must be executed between the bank and the loan beneficiary in addition to the execution of NIMASA's Statutory Mortgage Forms. Creation of statutory mortgage involves a 4-phased process listed below:

- 1st Stage: Completion of purchase and delivery of vessel;
- 2nd Stage: Registration of vessel in NIMASA;
- 3rd Stage: Registration of mortgage at Corporate Affairs Commission
- 4th Stage: Registration of

mortgage at NIMASA.

Each of the aforementioned stages requires specific documentation.

## Rights and Obligations of the Bank as Mortgagee

The bank does not become and is not treated as the owner of the ship by reason of mortgage save in so far as it is necessary to realize its security. It has a right to institute an action in personam against the shipowner for breach of personal covenant to pay. As a mortgagee, the bank can intervene in court proceedings affecting its interest or the ship. The bank has an insurable interest in the ship but may add premium to mortgage debt only if expressly so provided in the Deed and it is entitled to assignment of insurance benefit.

The mortgagee bank has contractual and common law rights to take possession of the ship where any of the following events occurs:

- Default in payment;
- Impairment of security in the form of -
  - o maritime lien, unpaid crew wages,
  - o insolvency;
  - o cancellation on hull and machinery insurance;
  - o time chartered after loan becomes payable;
  - o existing Charterparty. (Bank is however bound by subsequent Charterparty provided it does not impair its security).

The bank also has the power of sale both express and implied but such right is exercised only to realize its security. The law requires the bank to act bona fide even though the duty of care in tort is not applicable.

In addition, the mortgagee bank by virtue of our Admiralty Jurisdiction Act can arrest and sale the vessel under

# gallery

On March 28, 2007, the new offices of Paul Usoro & Co was formally opened by former Chief Justice of the Federation, Justice Mohammed Uwais at a ceremony



L-r: Hon. Justice Mohammed Lawal Uwais, GCON, retired Chief Justice of the Federation, Abdullahi Ibrahim, SAN, CON, former Attorney-General of the Federation, Olusegun Olusanya, Director, Union Bank Plc, Mrs Mfon Ekong Usoro DG/CEO Nigerian Maritime Administration and Safety Agency, Senator Ike Nwachukwu, former External Affairs Minister



L-r: Mr Paul Usoro SAN with Hon. Justice Akin Ejiwunmi JSC (rtd) and Abdullahi Ibrahim SAN.

L-r: Mfon Ekong Usoro welcomes Mr Sandeep Jayaswal, Executive Director, Hyperia Limited.

L-r: Paul Usoro, SAN and Mfon Ekong Usoro with Hon Justice Uwais.



L-r: Bayo Ligali, CEO Cettel Nigeria Limited and Bernard Longe, MD/CEO, Transcorp Nigeria Plc

L-r: Kola Awodein, SAN, Hassan Odukale, MD/CEO Leadway Assurance Ltd and Mr. Henry Imasekha, Director, Cettel Nigeria Ltd.

which drew the cream of the Nigerian society and marked the first anniversary of the fire incident that gutted the NIDB House, Broad Street, Lagos which for many years, was home to PUC. A few days after, PUC played host to Akwa Ibom State Governor, Arc. (Obong) Victor Attah and other dignitaries. Here are snapshots for the events.



Back l-r: Mrs Gloria Essien ED Mobil Producing Nigeria Unlimited, Mr Herbert Wigwe DMD Access Bank Plc, Mr Emmanuel Udom ED Zenith Bank Plc, Mr Aigboje Aig-Imokhuede MD Access Bank Plc, Front l-r: Mr Paul Usoro SAN, Senior Partner PUC, Akwa Ibom State Governor Arc. (Obong) Victor Attah, Barth Ebong GMD Union Bank and Mr Udo Udo-Aka.



Paul Usoro, SAN with Dr. Fidelis Oditah, SAN, QC



Mr Muniru Liadi, Partner PUC.



Tayo Adenirokun, MD/CEO Guaranty Trust Bank



Mfon Ekong Usoro with Justice Uwais in the library of PUC



L-r: Olaniyi Kukoyi, Legal Adviser First Bank with deputy Mr Niyi Ijalaye and Mrs Folashade Jacobs, ED Bank of Industry.



Abdulahi Ibrahim, SAN and Layi Babatunde, SAN.



L-r: Hon Justice Dalhatu Adamu, Justice of the Court of Appeal, Mrs Mfon Ekong Usoro Hon. Justice Mohammed Lawal Uwais, Paul Usoro, Hon. Justice Akin Ejiwunmi JSC (rtd), Abdulahi Ibrahim, SAN, CON, Chief Adegboyega Awomolo, SAN, flanked by PUC lawyers.

action in rem. It can also take actual or constructive possession of the vessel for sale or trading. The rights above are of course predicated on the bank's primary rights to repayment.

### Rights and Obligations of the Loan Beneficiary as the Mortgagor

Admiralty law in the interest of trade offers a lot of protection to the shipowner. Our own Cabotage law restricts the Banks' interests to protecting its security interests and prevents them from becoming shipping operators. The shipowner therefore remains in possession of the ship as the legal owner.

The shipowner has right of redemption and the right to action for redemption for wrongful action by mortgagee. Its remedy in such action would include damages, specific performance and/or injunction.

Intrinsic in the transaction is the shipowners' express and implied obligation to repay accompanied with the obligation to pay interest on the loan. He also is obliged to pay for the operational cost of running the ship.

The shipowner is entitled to freight, has an insurable interest and all other rights specified in the Deed of Mortgage.

### Additional Security for the Mortgagee Bank

Apart from securing the loan by creating a statutory mortgage over the ship, the bank would be advised to further reduce its risk by taking the following additional security in its favour:

- Assignment of earnings by the ship;
- Assignment of contracts for which ship is employed;
- Floating charge on shipping company's assets;
- Assignment of Hull and Machinery insurance; and
- Lien on cargo

### Checklist of Documents to be Submitted at Closing

The following documents are necessary for transfer of title, security, mortgage and registration of vessel whether new or old build.

- Executed NIMASA Forms for registration of vessel;
- Executed NIMASA Forms for statutory mortgage;
- Notarized Power of Attorney to register vessel and mortgage
- Board resolution approving purchase, registration of vessel and mortgage, grant of Power of Attorney to bank

It is advisable for participating banks in ship financing to create a statutory mortgage which confers on them both proprietary and security interest in the property.

- Bill of Sale
- Transcript of Registry or Certificate of Ownership, no encumbrances.
- Class confirmation certificate
- Certified board resolutions of the seller
- Power of Attorney of the seller
- Commercial invoice for the ship
- Commercial invoice for bunkers, lubricating oil and other items.
- Safety and International Trading Certificates:
  - o ISM, Loading, Tonnage, Radio, Safety Construction Certificate
- ISPS Code compliance documents
- Certificate of Deletion if ship has to be deleted from its current Register or letter of undertaking to deliver a Certificate of Deletion within a specified time.
- Protocol of Delivery and Acceptance.

### Conclusion

This article is by no means exhaustive. Banks and shipping operators and would be buyers should avail themselves of the free advice available in NIMASA. We take our goal of increasing Nigeria's tonnage very seriously and do intend to organize in conjunction with interested banks, specialized courses for banks on risk assessment in ship finance and ship operations. Banks would do well to send their young talented personnel for training abroad on shipping operations and ship finance.

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# Tax Collections by Local Governments

We successfully represented a multinational oil producing company in a tax dispute involving a Local Government Council in the Niger-Delta recently. It all started sometime in April 2005, when the Company received three separate documents from the Council detailing various forms of taxes and levies payable by the Company. These taxes and levies included:

- i. Mobile Advert Permit/ Mobile Advert sticker
- ii. Operational Permit
- iii. Development Rate
- iv. Sanitation Fees/Sanitation (Mobile) Stickers
- v. Community Development/Youth Empowerment Stickers
- vi. Agricultural Development Permit
- vii. Excavation/Oil Land Gate Way Stickers, and
- viii. NDDC Levy.

The company objected to this slew of levies and taxes on the ground inter alia that they were ultra vires the statutory powers of the council. The council rejected the company's objections and, for the purposes of collecting these illegal taxes and levies, resorted to various self-help methods including mounting roadblocks, impounding the company's vehicles and, harassment and intimidation of the company's employees. To gain some momentary respite, the company, under duress, paid for these taxes and levies and thereafter briefed PUC to challenge the legality of these taxes and levies and the self-help method of collection adopted by the council.

We anchored our claim before the Federal High Court on the 1999 Constitution of the Federal Republic of Nigeria and the Taxes and Levies (Approved List for Collection) Act Cap T2 Laws of the Federation of Nigeria 2004. There being no disputes as to the facts, we commenced the proceedings by way of an Originating Summons seeking the determination of, in the main: (i) whether the Council has the powers or competence to impose and demand those heads of taxes and levies from the Company; (ii) whether the Company's inscriptions "P" and "Q" on the Company's and its employees vehicles amount howsoever to "Mobile Advert" requiring the payment of Mobile Advert Permit; (iii) whether the Council's conducts and actions in mounting, putting up and/or constructing road blocks for purposes of collecting taxes, fees and levies and to impound, seize and/or

hijack the company's vehicles for failing to pay same are not unconstitutional and illegal; and lastly (iv) whether the company's designated signs, notices and directions within its premises and for its own private use constitute "Outdoor Advertisement" and consequently subject to taxation by the council. We accordingly sought for favourable declarations on each of the questions submitted for determination.

Incidentally, the council did not appear quite willing or ready to file and prosecute its defence against the company's claims. Beyond filing a conditional appearance and a Preliminary Objection on grounds of jurisdiction, it did not file any Counter Affidavit neither did it file its Written Address in respect of the substantive matter. Even the council's Preliminary Objection was struck out after several adjournments and the consistent failure of its counsel to appear for the arguments thereof. Perhaps the tardy manner of its defence counsel reflected the council's faith in its own case. In any case, we filed our own Written Address on the substantive matter, in line with the Court's Order and adopted same in our oral submissions.

The court, in its well considered and reasoned judgement delivered in March 2007 answered all the issues in our favour and granted all the reliefs and remedies sought. We consider this to be a landmark case given the propensity of state and local governments especially to impose indiscriminate taxes and levies on supine citizens. Also worthy of note was the judicial condemnation of crude methods of tax collections by government officials. Mostly in the Southern parts of Nigeria, it is common to find roadblocks mounted by government officials for the purposes of collecting various taxes and levies. The judicial pronouncement from this suit reaffirms the position of the law in this regard: It is not permitted for the governments, at any level, to use such extortionist methods in tax collections, no matter and notwithstanding the legality of the taxes and levies.

We must however admit here that such desperate tax and levies collection as was attempted by the Council are engendered in part by the extreme neglect of and the glaring poverty in the Niger Delta host communities. PUC advocates lawful collection of legally permissible taxes and good corporate social responsibility by oil-producing companies in their host-communities.

THE FIRM

# Supporting business

Paul Usoro & Co, PUC, is a full-service firm, providing comprehensive legal services to leading companies, financial institutions, public agencies and governments nationally and internationally. Our clients include leading organisations in the telecommunications, maritime, oil and gas and power sectors, national and multinational companies, financial institutions, public agencies and governments at state and federal levels. Our people have been recognised amongst Nigeria's pre-eminent lawyers, widely respected for their deep insights, professionalism, responsiveness and focus. Our passion for excellence drives us to deliver the best in all that we do. We have invested in cutting edge technology and a robust reference library so we can serve our clients better.

Headquartered in Lagos, Nigeria, our global outlook enables us to offer best-in-class professional services that meet the needs of the international business community. We offer our clients rewarding legal partnership which they require to become and remain industry leaders. We earn their trust by consistently delivering timely, personalised services that keep them ahead.

What We Do

PUC is a one-stop shop for corporate legal services; but we are more active in four practice areas, namely:

- *General Commercial and Transactional Practice*
- *Advocacy and Dispute Resolution Practice*
- *Communications Law Practice*
- *Maritime and Environmental Law Practice.*

## Contact Details

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## Feedback

### Russia Goes 3G.

Decision-making about who qualifies to get Russia's 3 G Licences are presently on going according to Global Insight online resource site, quoting press reports. Russia's Federal Communications Agency (Rossvyaz) announced tenders for three 3G licences, in January 2007, received bids from 16 January 2007 until 26 February 2007 and commenced decision-making on winners from April 20. The fees for the licences were set as 2.64 million roubles (US\$100,000). While the prices are deemed cheap, the outlay on infrastructure is likely to run into billions of dollars. Mobile operators will therefore need to examine how profitable 3G roll-out is likely to be to their operation.

*Criteria for qualification*

These will include the experience of bidders in the country's mobile sector, the number of licences already held by bidders, the number of 3G base stations planned for construction by the bidders and roll out schedule. Successful bidders will be obliged to launch commercial 3G services within two years of receiving licences. Bids were accepted 16 January to 26 February 2007.

*Frequency Profile*

Licences will cover 3 range of frequencies 1) 1,935-1,950 MHz and 2,125-2,140 MHz ranges; 2) 1,950-1,965 MHz, 2,015-2,020 MHz, and 2,140-2,155 MHz ranges; and 3) 1,965-1,980 MHz, 2,020-2,025 MHz, and 2,155-2,170 MHz ranges. Although these frequency ranges are currently being used by military and government bodies they will be freed once the 3G licences have been awarded.

*Likely Players*

The country's big three mobile MTS, VimpelCom, and Megafone are likeliest to obtain the licences, although bids are also being invited from syndicates and foreign companies.

*Ikenna Ikoku of Celtel forwarded the details above for our information copyrighted to Global Insight- an online resource.*