

# Nigeria's Blacklisting of Crude Oil Tankers

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Marine  
solicitors

This article looks at the recent blacklisting and raises some of the potential legal implications for vessels calling at Nigeria.

## Background

On 15 July 2015 the Nigerian National Petroleum Corporation (NNPC) issued a memo to 27 of the main Nigerian oil terminal operators detailing a list of 113 blacklisted vessels citing a directive from Nigeria's recently elected President Muhammadu Buhari. With the recent change of government and a new party in power such radical steps are perhaps not unexpected. Some of the vessels may not have called at Nigerian ports for some considerable time. Others will be trading there regularly, but either way there is a suspicion that this is simply a thinly veiled drive for much needed funds.

No reasons have been given in this memo, although the marine press has focussed on rumours concerning the reconciliation of authorised quantities against shipped/outturn quantities, amongst other issues. If that is right and if this involves practices such as "topping up" then such incidents may be taking place without the knowledge of the owners themselves, who will want to protect themselves where they can. There is some anecdotal evidence to suggest that this has been a problem where the discharge ports are in China and owners have faced spurious charges of delivering amounts different to those stated on the bills of lading.

The directive allegedly prohibits with immediate effect the vessels, mainly VLCCs, "from engaging in crude oil/gas loading activities in any of the terminals within Nigerian territorial waters until further notice". They have also been banned from transiting Nigerian territorial waters. Some prestigious fleets are affected.

NNPC's notification is copied to the main agencies involved, namely the Navy, Department of Petroleum Resources, Nigerian Maritime and Safety Agency (NIMASA) (where unsurprisingly the previous

Director General has been replaced) and the Customs Services who are likely to be responsible for enforcing the blacklist and detaining vessels that breach the directive. Experience suggests that any such detention will potentially take weeks to resolve.

To add to the confusion, vessel's names and IMO numbers are variously misstated. The list cites various ETAs, many in June 2015, the latest of which was 13 July 2015. It would therefore appear that most of these vessels will, by now, have sailed but that alleged cargo discrepancies have since been identified.

As such the blacklisting will more likely affect future trading.

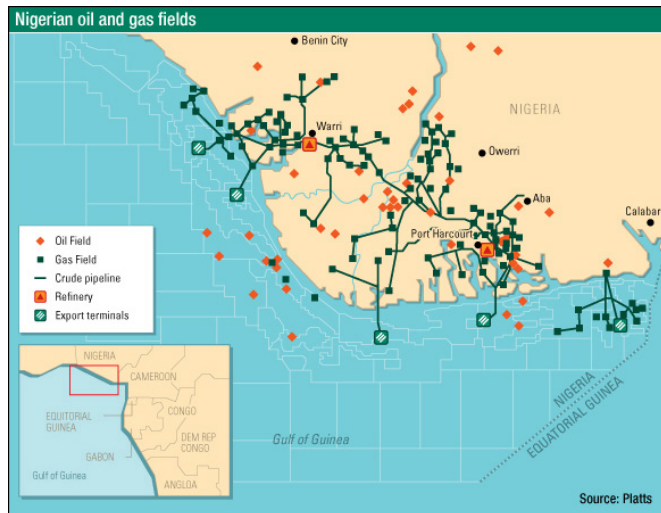
Furthermore a marker has been laid down that vessels now or in the future displaying unreconciled quantities might equally be the subject of future blacklisting. Owners will no doubt want to review their standard charter terms to ensure that any liability for such delays falls on charterers.

## Territorial Waters

One question is whether a vessel loading at an SBM situated outside of Nigerian territorial waters, but where the main terminal facility is ashore, is caught by the blacklisting and, if not, whether it therefore is trading lawfully.

Such questions will involve issues of Nigerian law, but again, experience shows that the Nigerian Navy are likely to enforce such blacklists in territorial waters and in the exclusive economic zone. An owner would in our view be taking a significant risk in trying to argue with the Navy that the Navy did not have authority to act against ships outside territorial waters. Even if such an argument is supported

as a matter of local law it will take time to sort that out.



## Immediate action

Those owners of blacklisted vessels not already fixed for a voyage to Nigeria or committed to trade there have the luxury of time. They could simply exclude Nigeria from future trades. It is not entirely clear what resources the Nigerians will allocate to this task, but it is reasonable to assume that they have severely dented the country's ability to export crude. That may come back to haunt them, but owners may find that getting themselves off the blacklist could take months. Resolving the situation directly with the authorities may prove to be the better way forward for individual owners. Meanwhile we would expect organisations such as Intertanko to be active in guiding its members.

Those committed to calling at Nigeria will need to look at their charters and decide their options. However, they too may have little choice but to engage with the authorities and determine why they have been blacklisted. If blame can be pointed at existing charterers then liability may fall on charterers for breach of lawful trading provisions. But what will be important in the short term will be the lifting of any blacklisting. That may involve providing detailed records for the recent cargoes loaded in Nigeria and making robust representation to the Government. Otherwise delays are inevitable. Those delays, and any evidence produced by the Nigerians to support the allegations, will throw up issues to be resolved under a charter in cases where one or other party has suffered loss and wishes to consider recovery options.

## Commercial difficulties

Primarily, the owner may no longer be able to trade with Nigeria and should avoid entering Nigerian EEZ waters until his ship is delisted. At this stage, one cannot entirely rule out the potential risk of vessels under the same management being arrested and enquiries might sensibly be raised locally as to whether sister ships are being targeted by authorities before voyage commitments are made.

Owners of blacklisted vessels will certainly wish to protect their interests by including a restriction in their charters on the blacklisted ship being ordered to or visiting any Nigerian ports. Charterers meanwhile may press tanker owners for a warranty of no blacklisting in Nigeria.

It is not clear if the blacklisting will be defeated by the sale of a ship. In previous cases it has not. Accordingly, the blacklisting of a ship may also present a barrier to the sale of the vessel. It is not unusual for a potential buyer to request a certificate from the seller stating the ship has not been blacklisted.

## Charterparties

### Owners remedies and hire under time charterparties

Problems may arise for a vessel fixed under a new time charter prior to the establishment of the blacklist on 15 July 2015 with an agreed trading area including Nigeria/West Africa (or other warranty that she is not blacklisted there). What if that vessel is now subject to the blacklist? Critical to the owner's remedies will be whether the reasons leading to the blacklisting were incurred under the existing charter. Under Shelltime 4, for example, it is probable that the main terms will have been amended so that any trade must be lawful and where there is express provision that the charterers must not expose the vessel to trade to ports where such trading would expose the vessel to "restrictions, obligations or penalties...".

Owners have further protection against being placed off hire for example, under Clause 21(a)(v) which puts the risk on owners of delay...

*"...due to the detention of the vessel by authorities ...attributable to legal action against or breach of regulations by the vessel ...unless brought about by the neglect of charterers."*

In other words if the charterers exposed the vessel to the detention by their own illegal action then they are unlikely to be able to avoid paying hire during any detention. If a single voyage has been performed under a voyage charter, without interruption in Nigeria, the blacklist is unlikely to have any immediate practical implications for the relevant charterers of that voyage. The owners may have some resultant difficulties outlined herein.

## Delay claims

In the similar situation of the Arab League's blacklist of vessels which have called at Israeli ports, there have been cases where the owners has been ordered to pay damages to their charterers for failure to remove the ship from the Arab League blacklist, where this caused a delay.

It is early days and therefore unclear what the Nigerian government's approach is in terms of enforcing and revising this blacklist and how long removal from the blacklisting would take.

## Frustration

The blacklist prevents tankers from entering Nigerian ports and territorial waters and so owners and/or charterers might seek to argue that their charter is frustrated on the basis that the vessel is unable to navigate to Nigerian ports. It must be noted, though, that frustration is difficult to argue successfully under English law.

It would require the party claiming frustration to show that the

event relied on had fundamentally changed the performance obligations originally contemplated by the parties and had made further performance under the charter impossible, illegal or radically different from that which was originally contemplated by the parties.

Whether there is frustration will depend on the nature of the charter and the length of the delay caused. Those entering into charters that might be affected by the blacklist should consider incorporating terms that allocate the risks associated with such occurrence e.g. for delays, extra expenses etc.

## Removal from the blacklist

Logically, affected owners would wish to clear their vessel from the list by applying via appropriate channels in Nigeria. However, what if production of mate's receipts and bills of lading issued in good faith throws up a discrepancy against cargo declared to the Nigerian authorities, upon which taxes have perhaps not been duly paid, with the result that the ship's blacklisting continues?

In that case owners might look to their rights against charterers. For example voyage charter NYPE at clause 5 requires that the vessel be engaged in lawful trades whilst clause 37 provides that charterers shall be responsible for taxes and dues on cargo. Local Nigerian lawyers advise that appeals to the government for withdrawal will likely take months to be considered and decided upon.

## Owner's trading warranty

If charterers were intending or are committed to ordering a recently blacklisted vessel to load crude in Nigeria and now proceed to make such an order, owners will have to consider whether they are entitled lawfully to refuse that order. If charterers are then obliged to charter in a substitute vessel to meet their commitments causing loss, are owners in breach of the trading warranty and liable to indemnify charterers for their losses?

In the event of such liability, will owners have an enforceable claim for damages against their previous charterers under whose orders the blacklisting has arisen? The answers to these questions will likely turn upon whether the evidence demonstrates that charterers knowingly engaged in or turned a blind eye to misdeclarations on the subject voyage. This evidence may not be readily available to owners unless the Nigerian government is prepared to back up its allegations by producing the relevant records.

## Conclusion

Owners whose vessels are blacklisted will have to be careful that they do not commit to trading to Nigeria whilst the threat of detention hangs over them. As the Nigerian investigation seems to have only just started and all evidence so far points to the government's willingness to analyse historical incidents stretching back over perhaps the last decade, it is likely further vessels will be subject to the blacklisting, owners and charterers alike should ensure their charters address the resultant liabilities accordingly and, where appropriate, exclude or restrict trade into Nigerian ports and waters.

## Summary

Blacklisted vessel owners' responses might sensibly include:

- Collection of comprehensive documentary evidence for cargoes recently loaded in Nigeria;
- Seeking local legal advice and representation - appeals against blacklisting may take months to be processed;
- Following the guidance of Intertanko or other trade bodies who may have their fingers on the pulse;
- Placing previous (or current) charterers on notice if the Nigerian government's allegations include voyages under the orders of those charterers;
- Excluding Nigeria from charterparty trading warranties until de-listed;
- Ensuring the vessel does not transit Nigeria waters including its EEZ until de-listed;
- Taking careful advice in response to charterers' orders to proceed to Nigeria - and refusing where such orders are, pending de-listing, unlawful; and
- Incorporating terms in fixtures allocating the risks associated with blacklisting (delays, extra expenses) to charterers.

It would be prudent for tanker owners who regularly trade to Nigeria, but are not included on the blacklist, to:

- Consider reviewing their documentary evidence for previous cargoes loaded in Nigeria;
- Carefully monitor the loading process and associated documentation to guard against future threats of blacklisting; and
- Consider incorporating terms in new charterparties allocating the risks associated with blacklisting (delays, extra expenses) to charterers.

## Contact details

For further information please contact **Stephen Askins, Simon Tatham** or **Alex Macinnes** at Tatham Macinnes.

## Tatham Macinnes LLP Partners

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Stephen Askins

T +44 (0)20 7929 4830  
M +44(0)7841 098858  
stephen.askins@tatham-macinnes.com  
Twitter: @steveaskinsinc  
LinkedIn: stephenaskins



Alex Macinnes

T +44 (0)20 7929 2023  
M +44(0)7956 463588  
alex.macinnes@tatham-macinnes.com



Simon Tatham

T +44 (0)20 7929 0548  
M +44(0)7885 026554  
simon.tatham@tatham-macinnes.com

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## Tatham Macinnes LLP

1 Gracechurch Street, London EC3V 0DD

T +44 (0)20 7929 2957  @tathammacinnes [www.tatham-macinnes.com](http://www.tatham-macinnes.com)