

CABOTAGE – THE NIGERIAN PERSPECTIVE

Introduction

Over the years, each country has sought to protect its citizens by restricting participation in key sectors of the economy to its citizens usually through restrictive/protectionist policies and although shipping is international, the maritime industries of some nations have not been immune from such policies. An example is the restriction of participation in the coastal carriage of cargo of a maritime nation to the exclusive preserve of its citizens otherwise known as cabotage.

In May 2003, the Federal Government of Nigeria signed the Cabotage bill, which had earlier been passed by the National Assembly into law. The bill is now known as the Coastal and Inland Shipping (Cabotage) Act 2003¹ and its objective is basically to restrict participation in the coastal or domestic trade in Nigeria to Nigerians. A similar legislation, the Merchant Marine Act 1920 popularly known as the Jones Act was passed in the United States with the objective of restricting coastal movement of cargo to vessels built, crewed and owned by citizens of the United States. Other countries with similar protectionist legislation include India, Canada, Germany and Japan amongst others.

The Nigerian Cabotage Act defines cabotage as the carriage of goods or passengers either by vessel or by vessel and any other mode of transport, from one place in Nigeria to any other place in Nigeria or a vessel engaged in any other marine transportation activity of a commercial nature in Nigerian territorial waters. The Act provides that only vessels, *wholly owned* (italics for emphasis) and manned by Nigerian citizens, built and registered in Nigeria, shall engage in the domestic or coastal carriage of cargo and passengers within Nigerian territorial waters or any point within the waters of the Exclusive Economic Zone of Nigeria.

Vessels wholly owned by Nigerian citizens are defined as vessels whose entire shares are beneficially owned by Nigerian citizens free from any trust or obligation in favour of a non-Nigerian or companies registered in Nigeria whose entire shares are beneficially owned by Nigerian citizens. Vessels wholly manned by Nigerians are described as vessels with an all Nigerian shipboard personnel and vessels built and registered in Nigeria are vessels whose major components including the hull and superstructure are fabricated in Nigeria.

All foreign vessels, barges and tugs with the exception of the vessels listed below, are prohibited from engaging in the coastal carriage of

¹ Although the act is still in print, it is understood that the provisions of the cabotage bill was incorporated verbatim into the Act.

cargo (including petroleum products) within ports in Nigeria, carriage of materials or supply of services to and from oil rigs, platforms and installations in Nigeria. The foreign vessels exempt are:

1. Vessels engaged in salvage operations.
2. Vessels engaged with the approval of the Minister or any other relevant government agency in activities related to a marine pollution emergency or to any threatened risk thereof.
3. Vessels engaged in any ocean research activity commissioned by the Department of Fisheries or any other government department responsible for carrying out such research; or
4. Vessels operated or sponsored by a foreign government with the consent of the Minister of Foreign Affairs to conduct marine scientific research in Nigeria.

Registration

All vessels intended to be used for cabotage must be registered in the Special Register for Vessels and Ship Owning Companies engaged in Cabotage. Vessels eligible for registration include cargo vessels, passenger vessels, crew boats, bunkering vessels, fishing trawlers, barges, tugs, tankers and floating petroleum storage vessels. The Act further prohibits vessel from being registered unless the Minister is satisfied that such vessel is:

- wholly and beneficially owned by Nigerian citizens or companies wholly and beneficially owned by Nigerians;
- on bareboat charter to Nigerian citizens who have full control and management, or a company wholly and beneficially owned by Nigerian citizens or a joint venture company in which Nigerian citizens own a minimum of 60% of the shares in the company;
- a foreign vessel granted a licence under the Act;
- in full possession of all certificates and documents in compliance with international and regional maritime conventions and meets all safety and pollution requirements imposed by Nigerian law and international conventions.

Foreign vessels, which are presently engaged in the domestic trade in pursuance of executing a valid contract at the commencement date of the Act are to be given temporary registration for the duration of the contract.

Waivers

The Minister is empowered to grant a waiver to a duly registered vessel on the requirement for a vessel intended to be used for cabotage to

be wholly owned, manned by Nigerian citizens and built in Nigeria, if the Minister is satisfied that there is no wholly owned Nigerian vessel suitable to provide the services required, no qualified Nigerian officer or crew for the position specified or no Nigerian shipbuilding yard with the capacity to construct the particular type and size of vessel specified.

In the event that the Minister decides to grant a waiver, he is obliged to give preference to vessels owned under a joint venture arrangement between Nigerians and foreigners in a ratio of 60:40 provided the shares held by Nigerians are free from any trust or obligation in favour of non-Nigerians and thereafter to any vessel registered in Nigeria and owned by a shipping company registered in Nigeria.

Licences

The owner of a foreign owned vessel interested in participating in cabotage in Nigeria may apply to the Minister for a licence, which may be issued if any of the following conditions exist:

- there is no wholly owned Nigerian vessel, which is manned by Nigerians and built in Nigeria, suitable and available to provide the services or perform the activity sought to be carried out.
- the foreign vessel is eligible to be registered in Nigeria.
- the ship owning company has a representative office in Nigeria.
- all applicable duties, levies and tariffs imposed have been paid.
- the vessel possesses current and valid certificates and documents in compliance with international and maritime conventions and meets all safety and pollution requirements imposed by Nigerian law and international conventions

Enforcement

Although the Cabotage Act was signed into law in May this year, the provisions are not enforceable until the expiration of one year after the commencement date of the Act. It is believed that the one-year period is to give potential indigenous operators enough time to acquire vessels given the present dearth of indigenous ship owners in Nigeria.

Cabotage Vessel Financing Fund

A Cabotage Vessel Financing Fund ("the Fund") was created under the Act to promote the development of indigenous ship acquisition capacity by providing financial assistance to Nigerian operators. A surcharge of 2% of the contract sum performed by any vessel engaged in cabotage, monies generated under the Act as well as any sum that

shall from time to time be determined and approved by the National Assembly are required to be paid into the Fund. These monies are to facilitate the acquisition of vessels by indigenous operators.

Critique of the Cabotage Act

Firstly, the Act provides a blanket definition of cabotage as foreign vessels engaging in the carriage of goods, passengers or marine activity in Nigeria. Unfortunately, the Act makes no distinction in this respect between foreign ships carrying goods destined for more than one port in Nigeria. It is instrumental to note that the bill of lading being held for instance by the consignee in the second port would have that port as the port of delivery with the shipowner as the carrier. However, with the implementation of the Act, foreign ships will be unable to call at more than one port with the consequence that they will have to tranship into Nigerian vessels. In the event of a loss during the transshipment, the goods are lost, who does the consignee sue. Will the consignee have a right of action or indeed want to sue the Nigerian shipowner. What remedies would it have against the carrier who by the time would have sailed far from Nigeria and how effective will the enforcement of remedies be considering that the res may no longer be within the jurisdiction of the court.

Secondly, the Act classifies eligible vessels as wholly owned, manned, built and registered in Nigeria. The question that readily comes to my mind is how many Nigerian owned or manned vessels or vessels built in Nigeria are in existence. Would it not have been preferable for the government to have re-introduced the Shipbuilding Acquisition and Building Fund (SASBF)² equivalent of the Cabotage Fund, and tried to build an indigenous fleet before proscribing foreign vessels from participating in the coastal/domestic carriage of cargo within Nigeria. As stated earlier although the Act provides a gestational period of 12months, it is submitted that this period is not adequate to build an indigenous fleet cargo enough to cater for the coastal domestic demands for carriage of cargo within the country.

Thirdly, the issue of waivers and licences - the conditions prescribed for obtaining a waiver or license are so simplistic that it is likely that most foreign ships will be granted licenses and waivers to engage in Cabotage in Nigeria. This is simply due to the fact as earlier stated there is presently not enough Nigerian fleet to cater for our needs. It may turn out to be a re-enactment of what is presently prevalent except that the government will make additional revenue and the payment by owners may result in increased freight to importers, which would ultimately result in price increase for the consumer.

² The SASBF was suspended due to non-payment by beneficiaries of the loan.

Conclusion

There is no doubt that the passage of the Cabotage Act spells a new dawn for the Nigerian Shipping Industry as foreign vessels, which had hitherto participated unhindered in the domestic coastal carriage of cargo within Nigeria may find themselves unable to do so as from May 2004, particularly with regard to on-carriage of cargo within Nigerian ports and through bills of lading. Laudable as its provisions appear to be, caution must be exercised to ensure that it is faithfully implemented. However, the exact effect of the Act would in the final analysis depend on how faithfully or otherwise the provisions are implemented. Analysts have pointed out that the licence the Minister is empowered to grant foreign vessels may if the indigenous fleet is not developed as quickly as anticipated, become the order of the day, which would consequently defeat the objective of the Act.

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