

Newsletter

CABOTAGE REGIME IN NIGERIA - the implementation guidelines.

Introduction:

The National Assembly on 30th April 2003 passed the Coastal and Inland Shipping (Cabotage) Act (“the Cabotage Act”) into Law. It was stipulated that the provisions of the Cabotage Act would become enforceable from 1st May 2004. The much awaited guidelines for the implementation of the provisions of the Cabotage Act were eventually released by the Honourable Minister of Transport on 7th of June 2004. We intend to give an overview of the guidelines in this newsletter.

The intention of the Cabotage Act is primarily to stimulate the development of indigenous capacity in the Nigerian Maritime Industry. The Act therefore seeks to reserve domestic coastal trade (“cabotage or cabotage trade”) within Nigerian Coastal and Inland Waters to vessels built and registered in Nigeria, wholly owned and wholly manned by Nigerian citizens. Foreign owned vessels and companies are however allowed to participate in cabotage trade within Nigerian waters, subject to obtaining a waiver and/or a licence from the Federal Ministry of Transport.

Under the Cabotage Act, “Nigerian Waters” is defined to include inland waters, territorial waters or waters of the Exclusive Economic Zone (respectively, together or any combination thereof) and the meaning

given to them by the National Inland Waterways Authority Decree 1997.

Cabotage Services:

Services that qualify as cabotage trade are identified as follows:

- The carriage of goods and passengers originating from one coastal inland point (this could be ports, terminals, jetties, piers etc.) to another point located within Nigeria.
- The carriage of goods and passengers by sea in relation to the exploration, exploitation, or transportation of the mineral or non-living natural resources in or under Nigerian waters.
- The carriage of goods and passengers on water or underwater (sub-sea) installations.
- The carriage of goods and passengers originating from a point in Nigeria destined for Nigeria but transiting through another country then back to Nigeria for discharge.
- The engaging by vessel in any other marine transportation activity of a commercial nature in Nigerian waters. These include towage, pilotage, dredging, salvage, bunkering, etc.

Registration:

All vessels intended for use in cabotage trade are required to be registered by the Registrar of Ships in the Special Register for Vessels and Ship Owning Companies engaged in cabotage (“Cabotage Register”) at the Nigerian Maritime Authority (“NMA”). Vessels seeking registration to participate in cabotage trade are required to comply with the provisions of the Merchant Shipping Act (Cap. 224 Laws of Nigeria 1990), as well as obtain all other applicable licences and permits from other relevant government agencies, such as the National Inland Waterways Authority (“NIWA”).

Cabotage Vessels:

The following types of vessels are identified under the Act and the guidelines as cabotage vessels:

- Passenger Vessels
- Crew Boats
- Fishing Trawlers
- Barges
- Tugs
- Off-shore Service Vessels
- Anchor handling Tugs and Supply Vessels
- Floating Petroleum Storage
- Dredgers
- Tankers
- Carriers
- Any other craft or vessel for carriage on, through or underwater of persons, property or any substance whatsoever.

The Act and the guidelines do not address the specific status of Barge Rigs, Seismic Vessels and other similar vessels which may, in the course of their operations, be involved in the carriage of persons and property even though the primary purpose and activity of such vessels is not the carriage of persons and property. On a literal interpretation of the Act, these vessels may be caught by the provisions of the Cabotage Act.

Types of Registration:

The guidelines issued by the Minister of Transport provide for five categories of registration. These are:

1. Registration of Wholly Owned Nigerian Vessels

To qualify for registration in this category, the vessel's 64 shares must be wholly and beneficially owned by Nigerian citizens or by a company registered in Nigeria with 100% of its share capital wholly and beneficially owned by Nigerian citizens. All the shares in the vessel or in the company that owns the vessel must be held free from any trust or obligation in favour of any person who is not a citizen of Nigeria.

2. Registration of Joint-Venture Owned Vessels

As the name implies, this category applies to the registration of vessels owned under a Joint-Venture arrangement between Nigerian citizens and non-Nigerians. It is required that the equity shareholding of the Nigerian partner(s) in the vessel and/or the shipping company must be at least 60% held free from any trust or obligation in favour of non-Nigerians.

3. Registration of Bareboat Chartered Vessels

To qualify for registration in this category, the bareboat chartered vessel is required to be under the full control and management of Nigerian citizens or a Company with 100% of its share capital wholly and beneficially owned by Nigerian citizens, free from any trust or obligation in favour of non-Nigerians.

4. **Registration of Foreign-Owned Vessels**

To be eligible for registration in the Cabotage Register, foreign owned vessels are required to obtain a waiver and a licence for participation in coastal trade (cabotage) from the Minister of Transport.

5. **Temporary Registration of Cabotage Vessels**

The Cabotage Act in Section 27 provides that foreign owned vessels presently engaged in cabotage trade, may be granted a temporary registration in the Cabotage Register for the duration of the contract for which the vessels are employed. However, as stipulated in the guidelines, where the period left to run on the contract exceeds one year from 1st May 2004, the foreign vessel will only be granted temporary registration for one year and not for the duration of the contract for which the vessel is employed.

Thereafter the vessel is required to obtain a licence from the Minister of Transport and obtain registration as a foreign owned vessel. This appears to be inconsistent with the Act which provides that temporary registration will be granted for the duration of the contract.

Requirements for Registration:

The registration requirements for all the five categories are similar except that in the case of a Bareboat Chartered Vessel, a copy of the Bareboat Charter Agreement is required and in the case of a foreign owned vessel, a licence from the Federal Ministry of Transport is required prior to registration. The duly completed application form is required to be submitted to the Registrar of Ships with the applicant's corporate documents and the statutory certificates for the vessel as specified in the guidelines.

Vessels above 15 years old:

Vessels registered in the Nigerian Registry at the enforcement of the Act (i.e. 1st May 2004), that are above 15 years old shall continue to be eligible for participation in cabotage for a period of 5 years after the enforcement date, subject to the vessel possessing a Certificate of Registry and a Certificate of Seaworthiness from a recognised classification authority.

From these provisions, it appears that vessels that are above 15 years old, 5 years from the enforcement date (i.e. from 1st May, 2009) may not be eligible to register for participation in cabotage trade. Regrettably, the guidelines issued by the Minister of Transport did not adequately clarify this issue. Indigenous operators have raised objection to this provision on the ground that it may disqualify most indigenous operators from participating in cabotage trade. The indigenous operators have started lobbying government for a review of the law and the guidelines in this respect.

Duration of Registration:

The guidelines stipulate that the Cabotage Ship Registration Certificate for categories 1-4 shall be valid for a period of (5) years, subject to annual endorsement by the Registrar of Ships.

The documents required to be provided for the annual endorsement of the certificate by the Registrar of Ships are:

- (a) Evidence of payment of 2% surcharge (where applicable).
- (b) Copy of Joint Maritime Industrial Council ("JOMALIC") certificate and declaration of compliance with Seafarers' condition of employment.

Waiver, Licence and Exemptions:

The Cabotage Act, permits the Minister of Transport to grant waivers for matters in the prohibited list. Foreign owned vessels are required to obtain a licence from the Minister of Transport in order to qualify for registration in the Cabotage Register. In certain prescribed circumstances, vessels both foreign and Nigerian may be granted a waiver by the Minister of Transport in respect of the prohibitions contained in the Cabotage Act.

Waiver:

The Minister of Transport is empowered to grant the following waivers:

- Waiver on the requirement for the vessel to be wholly owned by Nigerian citizens; on being satisfied that there is no wholly owned Nigerian vessel that is suitable or available to perform the activity(ies) specified in the application.
- Waiver on the requirement for the vessel to be fully manned by Nigerian citizens; on being satisfied that there is no qualified and available Nigerian officer and crew for the position(s) specified in the application.
- Waiver on the requirement for the vessel to be built in Nigeria; on being satisfied that there is no Nigerian ship-building company that has the capacity to construct the particular vessel or that there is no available Nigerian built vessel of the particular type specified. [Foreign built vessels that were entirely rebuilt in Nigeria are eligible for participation in cabotage services without a waiver. Section 7(1) Cabotage Act.]

The Cabotage Act establishes a priority system for the grant of waivers as follows:

- First, to wholly owned Nigerian vessels;

- Second, to Joint Venture Owned Vessels; and
- Third, to any vessel registered in Nigeria and owned by a shipping company registered in Nigeria (foreign owned vessels).

The validity of waivers granted by the Minister is one year, subject to annual renewal. On renewal, applicants among other things are required to show evidence of improved level of compliance with the requirements of the Cabotage Act on manning, ownership and ship-building requirements.

Licence:

Foreign owned vessels are required to obtain a licence from the Federal Ministry of Transport prior to registration in the Cabotage Register.

The duly completed application form (FMOT Cabotage Trade Form 3) is required to be submitted to the Ministry of Transport with the applicant's corporate documents, certificate of waiver and vessel documents as specified in the guidelines.

The licence is valid for one year subject to annual renewal. On renewal, applicants are among other things required to show evidence of improved level of compliance with the provisions of the Cabotage Act on manning, ownership and ship-building requirements.

Exemptions:

Vessels (both foreign and Nigerian owned) engaged in the following activities are exempted from the provisions of the Act.

These activities are:

- Commercial Salvage Operations;
- Activities related to Marine Pollution Emergency;
- Ocean Research Activity;
- Marine Scientific Research; and
- Humanitarian Salvage Operations.

Vessel Operators that intend to engage in the above activities, except humanitarian salvage operations are however required to apply for exemption from the Minister of Transport.

Vessel Financing:

The Cabotage Act permits the entry of mortgages and other security documents in the Cabotage Register on payment of the prescribed fee. Vessel financing may also be structured by way of a Bareboat Charter.

Application of Cabotage Act to Employers of Vessels:

Employers of vessels for cabotage trade are required to specify and publish all the requirements to be satisfied under the Cabotage Act in invitations for pre-qualification to tender in major Nigerian Newspapers not less than 3 months before the close of submission of bidding documents. Also, all invitations for pre-qualification to tender advertisements are required to expressly state compliance with the Cabotage Act as a pre-requisite for pre-qualification.

Enforcement:

The Minister of Transport is empowered to create an Enforcement Unit (“Cabotage Enforcement Unit”) within the NMA with responsibility to enforce compliance with the provisions of the Cabotage Act.

Enforcement Officers have wide powers under the law including the power to: stop and board any vessel reasonably suspected of contravening the Cabotage Act; search a vessel and seize anything found that may be used as evidence of contravention of the Cabotage Act; request the Master of the vessel or any other responsible person to produce for inspection the log book of the vessel or other documents that may provide evidence of contravention; enlist the

assistance of Nigerian Customs Service, Nigerian Navy or Nigerian Police or any other law enforcement agency as deemed necessary and in exigent circumstances, issue a detention order in respect of a vessel without first obtaining a Court Order.

Fees and Tariffs:

The guidelines specify the fees and tariffs for the various processes and application. For instance the fee for waiver on the ownership requirement in respect of foreign owned vessels is USD 50,000.00 per vessel. The fees for waiver on the manning requirement are specified per man, while the fee for waiver on shipbuilding requirement is a flat rate of USD 1,000.00 per vessel. The registration fee is calculated with reference to the gross tonnage of the vessel.

Offences and Penalties:

The Cabotage Act specifies penalties for the breach of its provisions with fines ranging from N100,000.00 to N15,000,000.00 or higher as determined by the Court and/or forfeiture of the offending vessel.

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