

## **THE LAW AND OPERATION OF ‘NATIONAL CARRIER’: WHY AMAECHI MUST WATCH IT**

By Emeka Akabogu, Esq.

Minister of Transportation Rotimi Amaechi was recently reported to have stated that government was in the process of establishing a new national carrier, to be financed by money from the Cabotage Vessel Financing Fund CVFF and private investors. He was further reported to have indicated that the ownership model for the national carrier will be sixty percent Nigerian and forty percent foreign, and while urging President Buhari to enforce cabotage. The widely published reports have not been denied by the Honorable Minister, so I will proceed on the assumption that he indeed made those remarks. The idea of establishing a national carrier is great, but I am concerned about the process towards achieving it and the apparent non-existence of a strategically developed supporting framework. I will set out the key areas of my concern and the reasons thereof, which condescend on legal and operational factors.

### **The Idea of ‘Establishing’ a National Carrier**

The concept of a national carrier is provided for under sections 35-38 of the NIMASA Act, and had been predated by similar provisions in the now repealed National Shipping Policy Act of 1987. Section 35 of the NIMASA Act provides that the Minister may grant national carrier status to a shipping company if it satisfies the conditions set out in the Act. The status confers on the national carrier ‘exclusive right to carriage of export and import cargo belonging to the Federal, State and local governments, including Federal and State owned companies and agencies’, by virtue of section 36(1).

The foregoing provisions obviously suggest that national carrier status could be routinely conferred on deserving vessel owning companies as a means of promoting national interest in shipping and developing a national fleet for the country. The first evident implication is that national carrier status is conferrable on *any* shipping company, and not necessarily for government ‘established’ organisations. I would go further to venture that government should be very circumspect with the idea of establishing a national carrier. Government failed woefully at running the now liquidated NNSL, and nothing in the administrative impulses of government has so changed as to rule out the same fate befalling a new government ‘establishment’.

However, if government must have an interest, I suggest it must only be on the condition that the carrier must be under the framework of an incorporated joint venture between government and predominantly Nigerian private sector partners, in which decision-making is legally removed from government and the shareholding structure ensures nominal majority stake in favour of the private sector partners. This model has worked excellently with the NLNG and could be easily replicated.

### **It is Illegal To Invest CVFF in National Carrier**

The Cabotage Vessel Financing Fund which government is proposing to utilise in establishing the national carrier is meant to provide financial assistance to Nigerian operators in domestic coastal shipping. It has accrued over the last twelve years exclusively from the contributions of private Nigerian and non-Nigerian ship owning firms. Not a dollar from it is

from government. Government's proposal to use this money sounds like robbing Peter to pay Paul. It does not sound fair.

Crucially, deployment of the Cabotage Vessel Financing Fund towards the national carrier will be illegal and ultra vires the Coastal and Inland Shipping (Cabotage) Act. The CVFF is expressly meant to assist Nigerian operators in the domestic coastal trade, while the national carrier status is exclusively for companies operating on international routes, 'not in Nigerian coastal or inland waterways.' This position is borne out by a combined reading of section 42(2) of the Coastal and Inland Shipping (Cabotage) Act and section 35(b) of the Nigerian Maritime Administration and Safety Agency Act.

Section 42(2) of the Cabotage Act states in respect of the CVFF as follows:

*(2) The purposes of the Fund shall be to promote the development of indigenous ship acquisition capacity by providing financial assistance to Nigerian operators **in the domestic coastal shipping.***

Section 35(b) of the NIMASA Act on its part states:

*35. The Minister, on the recommendation of the Agency, may grant national carrier status to a shipping company if –*  
*(b) the vessel owned by the company operates on international route, the deep sea and **not in Nigerian coastal or inland waterways.***

Of course I think this provision of the NIMASA Act is unreasonable to the extent it limits promotion of fleet development to international routes to the detriment of coastal and inland operations. But it is the law. Any attempt by the Honorable Minister of Transport to deploy the CVFF to the establishment of a national carrier, however altruistic the intentions, will be illegal.

### **Maximising Value From the National Carrier Status**

A national carrier is only as useful and effective as the framework under which it operates allows. I think it will be very useful to enable this framework by ensuring the process guarantees cargo for national carriers under terms set out in the Act. It seems to me that it would be more impactful on the economy if government could simply ensure that the existing policy under the law is implemented in favour of deserving private shipping companies as opposed to pursuing direct investment as proposed.

Back in 2006 Mr. Femi Otedola, through his Seaforce Shipping Limited bought the Nigeria Unity Line (with no assets) for 20million USD for the sole purpose of utilising the company's national carrier status. His money reportedly went up in smoke as the framework for translating that national carrier status was not existent. Today the story has not changed.

I suggest that in synergy with Dr. Ibe Kachikwu at the Petroleum Resources Ministry, Mr. Amaechi works on entrenching procedures that ensure that 50% government cargo in the petroleum industry is shipped on national carriers as already provided for in our laws. NIMASA, which is under Mr. Amaechi's remit, can and should complement the effort by enforcing regulatory standards which ensure the national carrier seamlessly complies with

IMO requirements and is therefore not in a position to be rejected by charterers. One can get giddy with excitement at the sheer thought of industry impact this framework will deliver. In today's environment where NNPC is importing 100% of Nigeria's petroleum products, term deals with the swap partners should include carriage of swap crude and refined products by compliant national carriers, obviously under commercial terms. The industry will never be the same, neither will the Nigerian economy.

### **'Looking for Private Investors'?**

I have earlier argued that existing shipping companies that meet national carrier status criteria should be conferred with same. Unfortunately, the government has not even set out guidelines or regulations for conferment of national carrier status as required under section 36(2) of the NIMASA Act. This is an immediate imperative and I advise the Honorable Minister not to put the cart before the horse. Mr. Amaechi indicated in his remarks that he has already empaneled a committee to look for private investors who will work with government in establishing the national carrier. This sounds more like private placement as opposed to a public offer with clearly set out criteria. It will be useful for government to clearly set out its required criteria for national carriers and confer same on companies that qualify. In the absence of such companies, it may then open a transparent process to facilitate investment in an incorporated joint venture if it insists the government must have a stake. The idea of looking for private investors under opaque circumstances for the national carrier is not advisable.

### **60-40 Ownership Structure Between Nigerians and Foreigners**

I hope and advise that the 40% foreign interest will be 40% of the private sector shareholding and not of the entire shareholding. An incorporated joint venture should see government with minority shareholding and private owners with majority. If government decides (albeit illegally) to use the CVFF to take up to 49% as in the NLNG model, the private sector will be left with 51%, of which Nigerians should control 60% and foreigners 40%. It is instructive that the decision-making for the IJV is going to be determined by the private sector shareholders so this should be considered.

### **President Buhari to Implement Cabotage?**

I am minded to believe that the Honorable Minister was misquoted on this one. The Minister of Transport is the be all and say all as far as cabotage implementation is concerned under the Cabotage Act. He is all powerful and needs no further directives from the President. Indeed it is the Minister that is expected to propose initiatives to the President. There are so many outstanding things awaiting the Minister's action for cabotage implementation. A starting point is issuing regulations or guidelines for the grant of Ministerial Waivers, in addition to those relating to national carrier as stated earlier and a raft of others under both the NIMASA Act and the Cabotage Act. Implementation simply requires effective monitoring and documentation of ships coming in and working within Nigerian waters, which NIMASA is charged with. Adequate intelligence options already exist under extant tools cheaply available in today's maritime market. The Minister's work is clearly cut out in cabotage implementation. Amaechi's call is simple - just do it.

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