# ENFORCEMENT FRAMEWORK FOR MARITIME REGULATIONS: PENALTIES AND COMPLIANCE IN NIGERIA*[1]

**Abstract**
*The Nigerian government is desirous of developing its maritime sector. The promotion and development of indigenous tonnage is at the core of the cabotage policy of restriction of the use of foreign vessels, construction of foreign vessels and man power involvement in cabotage trade in Nigeria. Maritime regulations and a penalty regime are therefore structured towards the attainment of the cabotage policy goals. However, the enforcement mechanism and in particular, the instrumentality of the judicial system has not contributed in actualising the much-anticipated policy objectives. This paper therefore calls on the legal enforcement parameters to act in synergy and apply policy realisation symmetry. Without the necessary collaboration, legislative stipulations may suffer setback on the altar of legal technicalities. There is now a move from technical justice to the realisation of substantive justice in Nigeria, the paper however, recommends the training and retraining of enforcement stakeholders, especially judicial officers entrusted with cabotage/maritime justice dispensation responsibilities amongst other things.*

**Keywords:** Cabotage, Penalty, Compliance, Enforcement, Court System, Nigeria.

## 1. Introduction

Cabotage law is a law empowering navigation and trading within a country's coast or from port to port within a nation (domestic shipping) to be reserved exclusively for and carried on by its national flagships and nationals. It underscores protectionist ideology; this phenomenon represents the core policy objective of Coastal and Inland Shipping (Cabotage) Act, 2003. The Cabotage Act, 2003 was designed to restrict the use of foreign vessels in domestic coastal trade, to promote development of indigenous tonnage and establish cabotage vessel financing fund. It is the intention of the law makers to strategically allow a relaxed cabotage regime with the provision for ministerial power to grant waiver to non-Nigerian vessels which in turn ought to, through the Cabotage Vessel Financing Fund expand national tonnage, propelled by administrative dexterity and the courts system realise its core aim. Historically, the English Admiralty Act of 1890 empowered the courts in Nigeria to exercise the full extent of the admiralty jurisdiction of the High Court in England. English law both substantive and procedural was applied in the adjudication of admiralty cases. The provisions of the Brussels Convention of 1952 on the Arrest of Ships were incorporated into the British Administration of Justice Act 1956 and that Act was applied by Nigerian courts in the exercise of their *in rem* jurisdiction. Though the 1956 Act was superseded by the Supreme Court Act of 1981 in England, the 1956 Act continued to be applied in Nigeria due to legislation made at the time of independence authorizing courts in Nigeria to apply the then existing English rules of practice and procedure. However, in 1991 the government finally promulgated a new admiralty jurisdiction decree. This decree sets out in detail the circumstances in which the action *in rem* (that is an action in which the plaintiff is entitled to an arrest of a ship or cargo) can be validly maintained. The decree also defines the circumstances where any admiralty action whether *in rem* or *in personam* can be validly brought in this country.

## 2. The Penalty Regime

The penalty regime is intended to propel and usher in a robust indigenous maritime capacity. The courts are at the center of determining the legality, appropriateness or otherwise of any given fine or forfeiture made by the cabotage administrators in Nigeria. Thus, the point must be emphasised that the system of court and dispensation of cabotage justice must be in tune with the intentions of the legislature. The courts in Nigeria are known to adjudicate appropriately when cabotage administrators acts outside of its scope of responsibilities. However, they must also not play to the gallery. The Cabotage Act provides in section 35 (1) thus:

> A vessel commits an offence if the vessel contravenes;
> (a) sections 3-6 and is liable on conviction to a fine of not less than N10.000.000.00 and or forfeiture of the vessel involved in the offence or such higher sum as the Court may deem fit.
> (b) section 21 and is liable on conviction to a fine of not less than N15.000.000.00 and or forfeiture of the vessel involved in the offence or such higher sum as the Court may deem fit and.
> (c) section 22 and is liable on conviction to a fine of not less than N5.000.000.00.

Section 3-6 prohibits the unlawful engagement in coastal trade. It stipulates the exclusion of vessels not wholly owned and manned, built and registered in Nigeria from participating in domestic carriage of both cargo and passengers. A tug boat or barge may be excluded from engaging in towage services from points or ports within Nigerian waters. It also places a restriction on carriage, supply services and dredge materials whether or not it's of commercial value. The intention of the law maker is to ensure the full fledge indigenous domestication of coastal trade and inland waterway transport services. A foreign vessel is liable to pay fine where it operates without licence under section 21. Section 22 also prohibits a vessel from operating without registration requirements. See generally Part VII (Ss. 35-40) of the Act.

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In view of its objective of bolstering economic activities, ensuring national security and protection of economic interests of citizens, firstly it provides for an only fines regime. That is, no provision for imprisonment of human offenders. Secondly, the provisions are prohibitive; the least fine payable is N500, 000. Thirdly, the value of fine is adjustable depending on the inflationary or deflationary economic circumstances prevailing at the time. Fourthly, the Act endorses corporate criminal responsibility whereby the veil of incorporation is lifted in order to mete out punishment on the humans behind the veil of incorporation. Their prosecution is independent of the culpability of the company. Where it is a partnership, every partner or officer of the partnership will also be indicted. Fifthly, the Act brings to bear offence multiplication. That is, every offence under the Act is not one off, each day the act constituting offence continues the offender is liable for a separate count. See s38 of Cabotage Act. Lastly, there is vessel forfeiture as well as payment of fines. However, this is made subject to the discretion of the court. This brings to bear the need for proper adjudication by the court systems in Nigeria. Moreover, the principal administrative body, the Nigerian Maritime Security and Administration Agency (hereinafter referred to as NIMASA) plays a crucial role in giving impetus to the realisation of the cabotage policy.

There have been calls for review of the Act to strengthen the enforcement regime. According to Attah[2] the cry is predicated on inefficient and ineffective implementation by NIMASA, including abuses of the provisions of the Act. This view is shared by stakeholders in the industry such as the Secretary General of Nigeria Shipowners Association, Tunji Brown[3] who decried the current situation with indigenous ship owners as they find it difficult to remain in business. According to him, some with three to four vessels without patronage will need to maintain vessels, the insurance on the vessels, the need to pay crew members and currently most importers probably own their own ships or use foreign vessels. The inability to have jobs has impacted on their credit worthiness as well. He further stated that there is currently no special advantage given to local firms lifting wet cargo offshore Lome to Nigeria or offshore Lagos into storage tanks and that there is now need for the abolition of waiver for temporary registration and allow Nigerian ship owners carry the available cargo. It is submitted that the provision which allows for temporary registration of foreign owned vessels by the minister is no longer in tune with national economic interests. The said section 27 which permits foreign owned vessels engaged in the domestic trade, a temporary registration status in the Nigerian Registry, which registration ought to cover only a determinate contract duration for which any given vessels are/were employed. After years of operation of the extant law, the continued grant of waiver therefore undermines the economic interests of the nation and jeopardises indigenous going concerns.

**3. The Maritime Jurisdiction of Federal High Court**

By section 1 of the Federal High Court Act, it provides for power to entertain any matter arising from shipping and navigation on any inland waters declared as national waters and any cause or matter arising from the constitution and powers of all ports' authorities, National Maritime Authority now NIMASA. Etc. It also extends to criminal matters in respect of which jurisdiction has been conferred by section 1. Section 41 of the Cabotage Act 2003 confers exclusive jurisdiction on the Federal High Court over cabotage matters and offences. This can simply be said to be implementation of section 251 (g) of the 1999 Constitution of the Federal Republic of Nigeria. By Order 3 rule 1 of AJPR 2011 admiralty claims are commenced by writ of summons. See *The Incorporated Trustees of Indigenous Ship Owners of Nigeria and Ors v The MT Makhambet*,[4] here the action was brought by originating summons and was unchallenged. However, in both *The Union Grace*[5] and *The MT Torrent*[6] the Federal High Court struck out the action for being incompetently commenced. In both cases the claim of plaintiffs revolved on unlawful participation of foreign vessels in cabotage trade. It is submitted that these cases ought not to have been sacrificed on the altar of technicalities. It is further submitted that the attitude of the court in the above cases detracted from local content promotion goals of Cabotage Act and has contributed to in no small measure to the woes of indigenous ship owners in Nigeria. However, where any action not specifically required to be commenced by writ shall be commenced by originating summons. *See* Order 3 rule 7 AJPR 2011. Section 2 (1) categorised maritime claims into proprietary and general claims. Admiralty actions may also be *in rem* that is against a thing such as the ship or cargo or *in personam* that is against a person such as a ship owner or captain. The law also provides for statutory lien, section 5(4) of AJA[7] entitles a person who would have been entitled to bring an action *in personam* under section 2 of the Act against the owner, charterer, or person in possession of or holder of the shares in a ship to bring an action *in rem* against the ship.

**4. The Wide Discretionary Powers of the Minister**

It must be noted that with the new administration, there exist now Ministry of Marine and Blue Economy and all reference to the Minister of Transport means the Minister of Marine and Blue Economy. The Minister wields superintendent powers under the Cabotage Act. He has far-reaching and wide discretionary administrative powers. He may refuse the grant of a waiver under part III and may refuse to grant a license under part IV. He also can suspend or cancel or vary the conditions

[2] Attah M, Jurisdiction, 'Enforcement of Provisions, Offences and Punishment Under the Cabotage Act' In Epiphany Azinge and Osatohanmwen O. Eruaga (eds), *Cabotage Law in Nigeria*, (Nigerian Institute of Advanced Legal Studies, 2012), p.204.

[3]Tunji Brown, 'Nigerian shipowners are going through difficult times' ships & ports April 4, 2016, http://shipsandports.com.ng/nigerian-ship-owners-are-going-through-difficult-times-tunji-brown/ accessed on 30/11/2017.

[4] Suit No. FHC/L/CS/703/2009 delivered by Okeke J.

[5] *Supra.*

[6] *Supra.*

[7] Cap. A5 LFN 2004.

and terms of such license. The Minister also has power to issue and review guidelines for the operation of CVFF and accept all applications for loans considered by NIMASA and grants approval in the disbursement of the Cabotage Vessel Finance Fund established under the Act. The powers of the Minister can make or mar the core intention of the legislature in respect to realising the objectives of the cabotage regime. It must be pointed out that the exercise of ministerial power in relation to issuance of waiver has no clear provision in requiring the minister to satisfy himself of the unavailability of Nigerian ships to undertake any such service as may be needed. The enforcement powers under the Act, besides the administrative roles of a positive nature, the minister of transport also has some overreaching administrative disciplinary powers. It is quite easy for an enforcement officer under the notion to be seen to be performing to be carried away by the need to detect and punish infractions of the Act with the effect of stiffening economic activities.

**5. Nigerian Maritime Administration and Safety Agency (NIMASA)**

NIMASA was established by section 3 of NIMASA Act 2007 to carry out among other things the development and implementation of policies and programmes which will facilitate the growth of local capacity in ownership, manning and construction of ships and other maritime infrastructure; enforce and administer the Cabotage Act; carry out inspection and make enquiries.[8] Section 30 of Cabotage Act provides for an Enforcement Unit which shall have power to conduct search onboard a ship, carry out arrest of ship and officers, obtain information etc. Failure to comply with directives of Enforcement officers attracts fines ranging from N100.000.00 and above. See Part VII. However, enforcement officers must be guided by cabotage enforcement form[9] in order to avoid arbitrariness in their conduct. Wrongful arrest of ships would be discountenanced by the courts.[10]

**6. Other Sister Agencies**

In the performance of the duty to enforce compliance with the Cabotage Act, the law allows collaboration with sister agencies such as Nigeria Customs Service, Nigerian Navy, others are Nigerian National Petroleum Corporation Limited, Nigerian Immigration Service, Corporate Affairs Commission, Nigeria Investment Promotion Commission, Nigerian Content Development Board, NIWA, NESREA, NOSDRA etc their collaboration is necessary for the due implementation of the Act. The wrangling amongst sister agencies led Igbokwe[11] to remark that;

> The failure or neglect or delay by NNPC/NAPIMS and NMA/JOMALIC to work together for the full implementation of the Act in order to actualise the enormous benefits in the Act for the development of indigenous shipping capacity and the economy, leaves a sour taste in the mouth. It has to change immediately if we do not want to continue to be a laughing stock among the comity of nations and disturb the growth of the local shipping industry. Cabotage works well in Malaysia, USA and Brazil according to the laws of those lands, and the case of Nigeria should not be different. Selah! The different relevant government agencies in the implementation of the Act especially NMA, JOMALIC, NIWA, NNPC/PPMC/Navy should freely have access to each other's information and documents on their activities and on vessels' ownership, seamen's nationality, qualification, employment and shipyards capability etc.

It is submitted that, the continual absence of cooperation especially with respect to NNPCL bidding and allocation of contracts to indigenous companies remains a critical threat to achieving objectives of our cabotage policy. The enforcement of cabotage provisions in our laws appears to have been overshadowed by conflict of interests, the root cause of several unethical practices in maritime regulatory bodies, where personal interest negatively impacts on decision making and procedural justice. It appears Nigeria is not alone in this, in Australia where cabotage is based on the Navigation Act of 1973 customs requirements and immigration laws, 90% of its coastal trade is by Australian crewed ships and all foreign vessels operating along its coast are licensed or permitted under certain conditions. It allows foreign participation in domestic trade only where there are no Australian ships available, through the issuance of single voyage permit. The maritime union of Australia made complaint of some shippers who manipulate the system by waiting until an Australian manned vessel sail out and then rush to contract a foreign flagged vessel with third world low paid crew and substandard ships to participate in its domestic trade thereby rendering Australian seafarers and vessels unable to participate in their coastal trade.[12] It is submitted that conflicts of interest in the face of whistle blowing, transparency, and anti-corruption war, must be conquered by our quest for objectivity and due process.

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[8] See NIMASA Act 2007 S. 1, 22.

[9] See Guideline 7.1 of 2007.

[10] See *Anchor Ltd v the Owner of the Ship Eleni,* (1966) vol. NSC, 22. See also *Supermaritime Nigeria Ltd v International Chartering, Operating Shipping MV Abtwerp & Anor* (Vol.4 NSC at 54).

[11]Igbokwe M, '*Advocacy Paper for the Promulgation of a Nigerian Maritime Cabotage Law',* www.mikeigbokwe.com accessed on 12/12/2017.

[12] Igbokwe M, *op cit,* '*Advocacy Paper for the Promulgation of a Nigerian Maritime Cabotage Law',* www.mikeigbokwe.com accessed on 12/12/2017; In addition, Malaysia also permits foreign registered companies to engage in coastal trade by obtaining temporal licence from Domestic Licensing Board (DSLB) where there are no Malaysian vessels. Malaysian ship owners' association raised complaints of manipulation and circumvention by Malaysian shippers fronting for foreigners who mislead the DSLB in respect of oil tankers. See ss 65B of Malaysian Merchant Shipping Ordinance 1952 as amended by Merchant Shipping Act (amendment) 1994.

**7. Impact of Weak Enforcement of Maritime Regulations in Nigeria**

The lackadaisical enforcement regime inevitably creates a multiplier effects. From economic angles to national security and several other areas are being affected. Ship repair facilities are presently poor despite the huge potential, as the country currently lacks adequate capacity to cater for both human and facility development in both operations and repair. About 80% of both minor and major dock repairs are carried our outside Nigeria and consequently, Nigeria loses an average of N26bn annually to foreign dry-docking companies due to absence of standard shipyards.

Beyond dockyard business opportunities, failure in enforcing compliance with the cabotage policy have impacted local operators negatively. Local operators and Nigerian seafarers have complained of unfair treatment meted out on them by foreign competitors in active collaboration with few Nigerian stakeholders. Poor implementation has in fact deprived more than 20,000 Nigerians sea training annually and the country loses over $1.5 billion yearly in wages paid to foreign seafarers working in the country.[13] The abuse of the waiver policy in the continuous temporary registration of foreign vessels and over politicisation of cabotage regime. In fact, the regime has become a mere revenue generating system without more. The waiver system has gradually become the rule rather than the exception as thousands of waivers have been issued to foreign owned ships.[14]

Insecurity within maritime domain where lack of equipment and technology required to address the situation; lack of political will to tackle the problem head-on; arrested criminals are not properly prosecuted but, in most cases, released to continue with their criminal activities; insurance companies and the Kidnap and Ransom (K and R) factor whereby insurance companies are now making money from kidnapping incidents. Others include gangster activities and the private security organizations that threaten ship captains to make use of their services portend serious threats to cabotage trade in Nigeria. Official corruption, conflict of interest and political involvement in the administration of the maritime industry particularly in appointments of top management cadre and in most cases political interest impacts negatively on the efficient and robust development of the sector. Lack of cooperation among sister agencies and reign of official corruption which pervades management echelons. The failure of the cabotage regime in developing indigenous shipping has been credited to a tradition of corruption among few Nigerian officials and foreign shipping companies.[15]

Also, litigations in economic regimes such as cabotage portend threat to commerce and business engagement. Emphasis should be placed on arbitration and other non-litigious alternative means of dispute resolution. The pollution of marine environment and failure to effect clean up exercises and non-use of energy efficient practices. High operational cost of enforcement or lack of platforms to access offshore platforms and other vessels that are far in the seas. The Agency had disengaged from a Public Private Partnership arrangement with an indigenous operator and went into talks with an Israeli firm with a view to outsourcing platforms for enforcement.

Finally, the twin issues of lack of collaboration and government refusal to set in motion the operation of the Cabotage Vessel Finance Fund. Indigenous ship owners have exhibited lack of collaboration and refusal to come together and form unified front during bidding processes for contracts and in making demands from the government. The Minister of Marine and Blue Economy (formerly Minister of Transportation) has impressed on various ship owners' associations to form a single forum as an umbrella body in this regard.[16] Also, the inability to commence the Cabotage Vessel Finance Fund and render other support schemes. The US from whom the cabotage regime was derived from has various subsidies and guarantee to their shipping companies that help facilitate their capacity to thrive in the industry one of such is the Operating Differential Subsidy whereby subsidy is provided based on difference between the fair and reasonable cost of insurance, maintenance and repairs and difference if the vessel was operated under foreign registry. Ordinarily local operators find it difficult accessing loans in the international finance market because perception of lack of stability in government over the years, inconsistencies in government policies, inability of indigenous ship owners to structure and unify themselves in the industry, inadequate insurance cover and collateral. In Singapore maritime related service are also given support by government.[17]

[13]Moses Amadi, 'Promoting Indigenous Capacity Through Cabotage' The Economy (2009) available at http://theeconomyng.com/news47.html. cited by Suzzie Onyeka Ofuani, 'Foreign Vessel Financing Under The Nigerian Coastal And Inland Shipping Act' In Epiphany Azinge and Osatohanmwen O. Eruaga (eds), *Cabotage Law in Nigeria*, (Nigerian Institute of Advanced Legal Studies, 2012), p237 ; http://naijakini.wordpress.com/page/2/ accessed 22 may 2012, cited by Anwuli Irene Ofuani, 'Waivers And The Grant Of Waivers Under The Cabotage Act: An Overview Of The Procedure, Practice And Challenges' In Epiphany Azinge and Osatohanmwen O. Eruaga (eds), *Cabotage Law in Nigeria,* (Nigerian Institute of Advanced Legal Studies, 2012), p 139.

[14] Article: Q1 How the Maritime Sector Fared, Thisdaylive.com cited by Moneke E U, *op cit*, p 303.

[15]Francis Ugwoke, Nigeria: Indigenous Shipowners and Coastal Shipping Policy this day 19 July, 2015 http://allafrica.com/stories/201507202324.html accessed on 30/11/2017.

[16]https://www.thisdaylive.com/index.php/2016/03/14/nigerian-ship-owners-join-forces-to-form-one-body/accessed on 15/12/2017.

[17]Singapore Country Report, 'Promoting Efficient and Competitive Intra-Asean Shipping Services,' Final Report March 2005.p.3 www.aseansec.org. Accessed on 12/12/2017.

## 8. Conclusion

Maritime cabotage trade has traditionally been an exclusive preserve of national flag vessels, indigenous vessel owners and indeed citizen crewmen. In other words, cabotage law essentially is restriction of coastal and inland waterways trade to vessels of the nation. Cabotage law is a law empowering navigation and trading within a country's coast or from port to port within a nation (domestic shipping) to be reserved exclusively for and carried on by its national flagships and nationals. It underscores protectionist ideology; this phenomenon represents the core policy objective of Coastal and Inland Shipping (Cabotage) Act, 2003. The Cabotage Act, 2003 was designed to restrict the use of foreign vessels in domestic coastal trade, to promote development of indigenous tonnage and establish cabotage vessel financing fund. It is the intention of the law makers to strategically allow a relaxed cabotage regime with the provision for ministerial power to grant waiver to non-Nigerian vessels which in turn ought to, through the Cabotage Vessel Financing Fund expand national tonnage, propelled by administrative dexterity. This paper queried the impact of the enforcement of indigenization policy envisaged in the Cabotage Act of 2003, as a result of the presence of foreign vessels in Nigerian waters by grant of ministerial waivers have continued unabated. The extent of promotion and the development of indigenous capacities in Nigeria is not in sight, therefore the call for a review of the law and in the alternative or in the meantime the courts as bastion of the nation's conscience should uphold the economic interest of the cabotage policy in Nigeria. Government should prioritise the training and retraining of judicial officers and other enforcement stakeholders entrusted with cabotage justice dispensation responsibilities. Judges should also de-emphasise technical justice and seek substantive justice to help achieve the goals of the maritime policy in Nigeria.