



Ports Congestion and Transfer of Cargoes to Off-Dock Terminals: Who Bears the Cost?

BACKGROUND

It has become the practice for Terminal Operators or Shipping Companies as the case may be to transfer cargoes by barges from the ports' terminals to off-dock terminals either on the request of consignees or as a way of decongesting the Ports or facilitating delivery of Containers by the Consignees. This practice has been strongly supported by the Nigerian Ports Authority (NPA) due to traffic congestion and poor state of the Ports' Access Roads within and around the Apapa and Tincan areas of Lagos State. The NPA has however on several occasions warned Terminal Operators and/or Shipping Companies against the imposition of charges on barging services not requested to by the consignees and threatened to sanction any defaulters.



This Article therefore seeks to articulate the legal framework for rendering barging or other services to Consignees' cargoes and to analyse whether circumstances exist that could allow Terminal Operators and/or the Shipping Companies to impose charges on Consignees in the absence of any request for Cargo transfer to Off-Dock Terminals. This would be done within the context of the Contractual Frameworks in the Ports Sector – The Ports' Lease Agreements and the Contract of Affreightment (Bill of Lading) as well as other compelling considerations such as the peculiarities of the Nigerian maritime operating environment, the utility of the barging services in facilitating delivery of containers and Ports' decongestion.

a) The Ports' Lease Agreements

Following the concession exercise in the Nigerian Ports Sector in 2006 which led to the transfer of the management and operation of the Nigerian Ports from the Nigerian Ports Authority to the Private Sector known as Terminal Operators, Nigerian Government entered into various Lease Agreements to evidence the transfers. The operative terms and conditions of the Lease Agreements are similar to each other save that there may be variations in the numbering of the Articles, Clauses, Paragraphs and Schedules/Appendixes. To this end, any reference to any Article or Clause or Paragraph or Schedule/Appendix of the Lease Agreement is peculiar to the particular Lease Agreement being used as a guide herein and does not imply uniformity in all the Lease Agreements due to the above stated variations. . A typical Lease Agreement being used in the Ports Sector has the provisions considered below.

The Permitted Operations under the Lease Agreement

1. By virtue of **Article 6.1 of the Lease Agreement**, Terminal Operators accept to perform the operations and activities described in Part A of

Appendix E to the Lease Agreement, namely:

- i. The handling and delivery services for the Cargoes/Containers, including without limitation stevedoring (loading and offloading) of vessels, transporting, sorting, storage and the procurement, operation and maintenance of equipment for the foregoing;
 - ii. The repair and maintenance of the Fixed Assets and Movable Assets.
2. **Article 6.3 of the same Lease Agreement** on its part gives Terminal Operators the right to perform other services in accordance with the Terms of the Agreement and where this is the case, *to ensure that any charges made for other services shall be in accordance with Applicable Law and competitive within the Port and within competing Ports of Nigeria. Part B of Appendix E to the Lease Agreement* listed Other Services to be the following:
- i. Warehousing, stuffing and stripping/unstuffing, cleaning and fumigating and consolidation, and the procurement, operation and maintenance of equipment for the foregoing;
 - ii. Ship shore handling of supplies for vessels;
 - iii. Project and oversized cargo handling services;
 - iv. Terminal handling;
 - v. **Inland depot transfers**; and
 - vi. All other activities necessary to conduct operations;

The Permitted Operations Rates under the Lease Agreement

3. The relevant part of the Lease Agreement which relates to tariff is Clause 6.9 headed "Operations Rates" and Appendix H. For ease of reference, Clause 6.9 (a, b & c) provide as follows: "Clause 6.9(a) – **General Parameters.** The Lessee shall ensure that the Operations Rates shall be in accordance with Applicable Laws and competitive within the Port and with other competing ports of Nigeria having facilities similar to the Lease Property.
4. Clause 6.9(b) – **Specific Parameters.** The Lessee shall charge cargo dues and delivery charges for the Operations which are not greater than the rates set forth in Section A of Appendix H (the "Operations Rates") in accordance with the terms and conditions included therein. **The Lessee shall not make any increases in the Operations Rates, unless agreed to in writing by the Parties and any required consents of Governmental Authorities have been obtained.** Value added taxes and other taxes shall be added as required to the accounts rendered to the Lessee without any collection, deduction or set-off by the Lessor or the Regulator. **The Lessee shall also be allowed to charge for other services rendered but not specified in Appendix H,** including but not limited to: terminal handling, **inland container depot transfers,** storage and for penalties for violation of applicable rules and regulations set down by the Lessee. **The level of terminal handling charges and inland container depot transfer charges shall not exceed the market rates charged by the shipping agents and the Lessor respectively prior to this agreement, and any future increases shall require the**

consent of the relevant Government Authorities.

5. 6.9(c) Publication of Operations Rates. The Lessee shall at all times publish its rates, charges and conditions of the Operations as directed by the Lessor or the Regulator and shall make such information immediately available upon request by any Person."

Analysis of the Above Cited Provisions of the Lease Agreement

Having regard to the provisions of the Lease Agreement highlighted herein, Terminal Operators are not only entitled to render container/cargo transfer services to Inland Depots or Off-Dock Terminals by any means including the use of barges but to also charge for the services so rendered. The only limitation under the Lease Agreement is that Terminal Operators cannot charge more than what Shipping Agents and NPA charged prior to the Lease Agreement. Where Terminal Operators intend to exceed what Shipping Agents and NPA charged immediately before the Lease Agreement, then the consent of the relevant Government Authorities would be required for any such increase.

b) Contract of Affreightment (Bill of Lading)

Bill of Lading is a contractual instrument that documents the terms and conditions of carriage by sea between the Carrier, Shipper and the Consignee. Bill of Lading serves three main functions – it serves as a conclusive evidence of receipt of the cargo; it evidences the terms of the contract of carriage and it serves as a document of title to the cargo. Bill of Lading contains amongst other information, the Port of Loading/Departure and the Port of Delivery/Destination.

Where a Consignee chooses for his cargo to be discharged at an Off-Dock Terminal, depending on the type and nature of

carriage rendered by the Carrier, and same is reflected in the Bill of Lading, it is the duty of the Carrier to convey the cargo to the named Terminal without any additional charges to the Consignee as the freight paid on the cargo by the Consignee would have covered transfer of same to the named Terminal. In circumstances of this nature, the Shipping Company representing the Carrier in Nigeria bears the cost of transfer of the cargo to Off-Dock Terminals on behalf of its Principal and where the actual transfer is effected by any Terminal Operator, it shall be the obligation of the Shipping Company to defray the Terminal Operator charges for the barging services.

Where however, the Consignee specifies that his Cargo shall be discharged at the Seaport Terminal and same is reflected in the Bill of Lading but on or before the arrival of the Cargo, he notifies the Carrier or its Agent in Nigeria of his intention to transfer the Cargo to Off-Dock Terminal, the Consignee in such circumstances naturally bears the cost of effecting his instructions whether the transfer is done by the Shipping Company or through a Terminal Operator.

There may however be a situation where the Consignee contracted for his Cargo to be discharged at the Seaport Terminal without any request to transfer the said Cargo to Off-Dock Terminal but he may still be bound to bear the cost of such transfer owing to compelling and extenuating circumstances such as the need to decongest the Ports and allow more cargoes to be discharged and also to facilitate quick delivery of cargoes to consignees due to poor access road infrastructure as is being witnessed within the Ports for some years now.

Under the regime above, the provision of the Lease Agreement empowering Terminal Operators to transfer and charge

for the barging services readily comes to mind and serves as a justification for any charge by Terminal Operators. On the other hand, standard Bills of Lading have similar provisions that empower Carriers to discharge Consignee's Cargo to any convenient place other than the named place of destination in the Bill of Lading and in certain circumstances may charge additional cost for services rendered as a result of Port, Terminal, Yard, Rail Ramp, Road or other congestion; extraordinary gate queues and wait times, labour related disruption of service etc pursuant to various Carriers' Bills of Lading and/or Freight Rules which are incorporated by reference as forming part of Bills of Lading Contract.

Conclusion

In the light of the foregoing, it is apposite to state that the Terminal Operators or the Shipping Companies may render barging, Trucking or other services to the consignees' cargoes and levy charges on same even in the absence of any request for such services and for latter mainly in situations of Port Congestion, extraordinary gate queues and wait times, etc as is currently the case in Apapa and Tincan Ports. It is therefore imperative for Terminal Operators and/or the Shipping Companies to bring these contractual facts to the attention of the Nigerian Ports Authority (NPA) or any other governmental authority as the case may be in the event of any opposition to such charges. It may also be prudent, in circumstances where the cost of rendering barging services are disputed, for Terminal Operators or the Shipping Companies to furnish such governmental authority with adequate information on the cost implications of rendering barging or other services to the Consignees' Cargo and the need to levy consignees a cost reflective charge for such services.

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