

ADVOCACY PAPER FOR A NEW CARGO INSURANCE POLICY FOR NIGERIA: *By Olisa Agbakoba SAN*

Introduction

Cargo insurance is one leg of the tripod on which marine insurance stands. Marine insurance refers to that branch of insurance concerned with the insurance of ships as well as their freight and cargo against maritime risks or perils. "Maritime Perils" are the perils consequent on, or incidental to the navigation of the sea, that is to say, the perils of the seas; fire, war perils, pirates, rovers, thieves, captures, seizures, restrains and detainments of princes and people, jettison, Barratry and any other perils, either of the like kind or which may be designated by the policy. (Section 5 (3) Marine Insurance Act of 1990)

Marine insurance is the earliest form of commercial insurance but its origin is said to be "veiled in antiquity and lost in obscurity" because no one is certain about its exact origin. Despite its age, marine insurance is still relevant today in the economic and social structure of the society, providing relief from financial losses arising from the ever - present element of risk and uncertainty in man's daily living. Insurance principles have over the years been perfected and utilized to protect individuals and corporate bodies against financial losses arising from loss or damage to their properties and business assets. No modern economy can function, efficiently without services provided by an organized insurance industry. Modern international trade would also be virtually impossible without marine insurance.

Since Edward Lloyd's Coffee House opened in London in 1689, modern maritime insurance practice has been dynamic responding to the economic and social moods of the time. Insurance practice has come a long way since the time when Lloyd's sent runners to the waterfront to pick up news of ship movements and later would send policy around London for subscription by anyone with sufficient means.

INTRODUCTION OF INSURANCE TO NIGERIA

The concept of insurance in its modern form was introduced into Nigeria by the British in the closing years of the 19th century with the establishment of trading posts in what is now known as Nigeria towards the end of the 19th century by European trading companies, mostly British. These companies started effecting their insurance with established insurers in the London insurance market. As time went on, some British insurers appointed Nigerian agents to represent their interest in the country. These agents later metamorphosed into full branch offices of their parent companies in Britain. The first branch office in Nigeria was the Royal Exchange Assurance in 1921, later followed by other British companies. Indigenous Nigerian insurers and re-insurers later followed such as NICON established in 1969 and Nigeria Reinsurance Corporation established in 1977. There are well over 200 direct insurance companies and over five professional reinsurance companies operating in Nigeria today.

Most of the country's major or large marine risks are placed in the London market and at Lloyd's. The influence of these foreign markets and their marine insurance practices are quite substantial in Nigeria such that the Institute of London Underwriters' (ILU) clauses are extensively used in both hull and cargo insurance business in Nigeria. The Institute clauses are drafted by the ILU and are generally revised from time to time in response to the needs of the insurance world. The clauses contain the terms of the insurance contract, the risks covered or excluded, the duration of the policy, the duties of the parties, the measure of indemnity, assignment of the policy, the choice of law clause and other relevant information. The common clauses in use are Institute Cargo Clause A,B and C (ICC A,B,C), Institute Time Clauses (Hulls) (ITC (Hulls)), Institute Voyage Clauses (Hulls) (IVC (Hulls)), Institute Time Clauses (Freight) (ITC (Freight)), Institute Voyage Clause (Freight) (IVC (Freight)), Institute Time Clause Hulls (Port Risk) (ITC Hulls (Port Risk)). These clauses together with the relevant policies to which they are attached forms the basis of marine insurance contracts in Nigeria.

THE NIGERIAN FRAME WORK FOR CARGO INSURANCE

The Nigerian economy is going through a transition. We are moving from a centrally state controlled economy to a liberal economy driven principally by the private sector. The GON is deregulating the vital sectors of the economy including the maritime sub-sector and its parent sector - the transport sector. To this end, much effort is being exerted towards formulating an appropriate transport policy as well as maritime policy for Nigeria. It would be incomplete to talk about a comprehensive maritime policy in the absence of an appropriate cargo insurance policy. Appropriate cargo insurance policy refers to a policy that is reflective of the Nigeria's present socio-economic realities. In other words Nigeria needs a cargo insurance policy suitable for a deregulated economy and a free and liberalized market. The cargo insurance policy will operate at two levels:-

- i. **The international level.** That deals with regulation of cargo insurance business as between Nigerian insurers and their foreign counterpart.
- ii. **The Local Level.** This deals with regulation of cargo insurance business between Nigerian insurers.

The Function and Role of Policy in Industry

Black's Law Dictionary (6th edition @ page 1157) defines the word "policy" as "the general principles by which a government is guided in its management of public affairs, or the legislature in its measures. Put differently, a policy is a selected, planned or agreed course of conduct or action usually based on principles. Take shipping policy for instance. Shipping policies may be classified into two major categories:

- a. commercial; and
- b. operational.

Commercial policies relate to trade activities. They cover matters such as tonnage, ownership and registration of ships, employment of seafarers, taxation, marine insurance, cargo, passenger transportation, employment of vessels in contracts of affreightment and the incorporation of relevant national laws and international conventions into the rights and obligations of parties to these contracts, etc. Operational policies on the other hand cover matters like safety of life at sea, protection of marine environment, pilotage, etc. The implementation of these policies by the government is usually approached at two levels:

i. Promotional/Regulatory Strategy

Here the government tries to encourage the industry by taking measures that will ensure the growth of the local industry in the face of external competition. For instance the government could grant subsidies to the particular sector or enact protective legislation.

ii. Regional and Inter Governmental Co-operation.

This approach involves influencing the market through clamour for changes at the international level.

National Shipping Policy and the International Angle

Shipping being an international concern naturally captures the interest and intention of the United Nations. The UN through her specialised agencies on trade and maritime (eg. International Maritime Organisation (IMO) and United Nations Conference Trade and Development (UNCTAD) have provided a veritable platform for effective fundamental changes in shipping policies worldwide.

The IMO (formerly International Maritime Consultative Organisation (IMCO) until 1982) has as part of its objectives, encouraging the removal of discriminatory and restrictive actions by governments and thereby promote the free availability of shipping services for the benefit of world trade.

UNCTAD's work covers such matters as Liner Conferences, Multi-modal Transport, Ports (their developments and adequacy), protection of shippers interest, bulk (cargo) trade (wet and dry), development of merchant shipping in developing nations and correcting the imbalance between supply and demand of shipping services, etc. The UN Liner Code of 1974 (generally referred to as UNCTAD Liner Code) has as its primary objectives the desire to shift some of the perceived economic benefits accruable through commercial aspects of shipping to developing third world countries known as the Group of 77 Code prescribes that 40% of the total volume of cargo traffic and revenue shall be reserved for indigenous national carriers, another 49% for carriers of cargo originating and destination countries and the remaining 20% for all recognised third-flag carriers. Nigeria adopted the UNCTAD Code on September 10, 1975

On December 29, 1981 the civilian administration of Alh. Shehu Shagari, launched what was called a new National Shipping Policy. The policy re-emphasized the spirit and letter of the UNCTAD Code and stated its desire that Nigeria's merchant marine should be sufficient to carry our domestic and international cargo. On April 30, 1987 the National Shipping Policy Act (NSPA) was passed into law signifying the formal domestication of the UNCTAD Liner Code.

NIGERIA's CARGO INSURANCE POLICY

As earlier mentioned, cargo insurance policy in Nigeria operates at two levels-international and local levels. We should consider these in details.

Cargo Insurance Policy at the international level.

This concerns regulation of cargo insurance business as between Nigerian insurers and their foreign counterpart. The policy of the government of Nigeria on this can be found in the NSPA and the Insurance Decree.

Cargo Insurance Policy under the NSPA

It is significant to note that before the introduction of the National Shipping Policy Act (NSPA) in 1987 there was a Marine Insurance Act (MIA) enacted in 1961 that governed marine and by extension, cargo insurance in Nigeria. The MIA reproduced in extenso the English Marine Insurance Act of 1906 which codified case law and common law principles relating to marine insurance.

It was not surprising, then that the MIA did not stipulate any cargo insurance policy for Nigeria. It was not until 1987 that a national cargo insurance policy was formulated for Nigeria under section 14(3) of the NSPA.

Section 14(3) stipulates that all public sector contracts for the importation and exportation of goods shall be on F.O.B. and C and F contracts respectively. This means that cargoes belonging to the government or for use in the execution of government contracts shall be imported into the country on FOB basis. If on the other hand, the cargoes are meant for export is should be on C and F terms. The clear policy intent is that such imports or exports are to be insured by a Nigerian registered insurance company.

Laudable as this idea may have been, it still gave rise to grave problems. First it is restricted to public sector contracts alone. Which implies that all private sector contracts are excluded from the benefit of this policy. The Nigerian insurer is thus faced with the herculean task of competing against their favourably positioned foreign counter parts with regard to private contracts.

Cargo Insurance Policy under the Insurance Decree 1997

The hardship caused by the rather lop-sided policy in the NSPA would seem to have been ameliorated by the Insurance Decree No. 2 of 1997. Section 76 of the Decree deal with insurance of imports, and it provides that an insurance of goods to be imported into Nigeria shall be made with an insurer registered under the Decree. This provision covers both public and private sector contracts. An insurer cannot be registered under the Decree unless it is duly incorporated as a company or co-operative insurance society under Nigerian Law (See section 3(1), 4(1) and 6(1) of the Decree).

Subsection (3) of Section 76 further stipulates that every L/C or such similar document issued by any bank or other financial institution in Nigeria in respect of goods to be imported shall be on Carriage and Freight basis only. It is not quite clear whether the Decree intended to say FOB when it stipulated C and F. The manifest intention remains that the goods are to be insured by a Nigerian insurer.

The whole ideal of inserting this provision in the Insurance Decree is without doubt, to give the Nigerian insurer unrestricted access to insure all imported goods coming into Nigeria. But the Decree would appear to have created an opening for Nigerian insurers with the right hand and in the same breath blocked the opening with the left hand.

This is because Subsection (4) of Section 76 provides that where in any particular case an insurance broker satisfies the National Insurance Commission (NAICOM) that by reason of the exceptional nature of the risk in, or emanating from, Nigeria or other exceptional circumstances, it is impracticable to effect the insurance with an insurer registered under the Decree (i.e. a Nigerian insurer) the commission may in writing permit such broker to effect such insurance with insurers outside Nigeria.

It is regrettable to note that while this provision was meant to grant exceptions in certain deserved cases, it has been used as a general rule of insurance practice in Nigeria. The Nigerian insurer for reasons that may become evident shortly, are content acting as brokers/agents for foreign insurers.

Cargo Insurance Policy at the Local Level

This again concerns the regulation of cargo insurance business among the players in the Nigerian insurance market. Since attaining independence the GON has run and managed the vital sectors of the economy through state owned enterprises (SOE's). The Insurance Industry was no exception. The GON established NICON to pursue its insurance business and Nigerian Reinsurance Corporation for reinsurance business. Appropriate Laws were passed to protect these concerns and curtail competition thus making them monopolies.

Nigeria now moves from a public sector oriented economy towards a private sector driven economy that is more competitive and market based. The insurance industry is being deregulated. The Public Enterprises (Privatisation and Commercialisation) Decree No. 28 of 1999 which is the Federal Government's legal blue print for deregulation/Privatisation, has listed NICON and Nigerian Reinsurance Plc. for partial Privatisation. 40% of the shares in these enterprises would be sold to strategic investors, 20% to Nigerian individuals and the remaining 40% will be retained by the GON.

It is posited that deregulating the insurance industry should extend beyond divesting of government's shares in these enterprises to include adopting legal measures in the form of abolition of regulatory controls and adopting less interventionist laws.

To give proper effect and meaning to the deregulated insurance sector the GON must as a priority change its cargo insurance policy and carry out legal and regulatory reforms. The existing legal and regulatory structures need to be relaxed to reduce government regulation of insurance business, break the monopoly of NICON and Nigeria-Re and create a level playing field for all competitors. The market should be made competitive. The legal and regulatory reforms will provide the framework to support the new policy regime.

Legal and Regulatory Framework for deregulating the Insurance sector.

The new legal framework should take the following form:-

- i. Amending/reviewing and updating existing laws
- ii. Setting up independent regulators and if deemed unnecessary, redefining the role and powers of NAICOM to reposition it as an independent regulator.
- iii. Drawing up new laws and regulations. The new laws will be in two categories.
 - (a) those establishing the independent regulatory body
 - (b) those enacting new sets of laws that will complement the deregulation process e.g. Competition Act, Restrictive Practices and Fair Trading Act, etc

The following provisions of the Insurance Decree will have to be struck down or amended to remove their regulatory features.

- i. Section 69(1) forbidding any insurer or re-insurer other than Nigerian Reinsurance Corporation from entering into a contract of reinsurance with a foreign reinsurer with respect to foreign reinsurance business without first offering the business to Nigerian Reinsurance Plc. as stipulated by Section 7(3) of the Nigerian Reinsurance Corporation Act. Section 7 of the Reinsurance Act actually gives Nigerian Reinsurance Plc the right of first refusal of any insurance

business from Nigeria before such business is placed in the international reinsurance market. Nigerian Reinsurance should source for its own foreign reinsurance business as other private reinsurance companies are doing.

- ii. Section 93(1) and (2) making NICON the sole insurer of all properties of the Federal and State Governments as well as any statutory corporation. Any other insurer can only insure such properties if the President of Nigeria gives his approval in writing. Neither the Insurance Act nor the NICON Act Cap. 263 LFN 1990 defines the expression “government property”. By the combined effect of Section 4(1) and (2)(b) of NICON Act which empowers NICON to carry on any class of insurance business and in that respect insure any property in which the government has any interest it would be safe to surmise that property includes every thing that is the subject of ownership, corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal. Every thing that has exchangeable value or which goes to make up wealth or estate. This will include cargoes belonging to the government.

Conclusion

I wish to conclude this paper with the following recommendations which if implemented will take the insurance industry to a higher level of performance in the 21st Century.

1. Nigeria needs a comprehensive and up to date cargo insurance policy. The cargo policy should be complemented with a transport policy and maritime policy for Nigeria.
2. The current policy that all imports of goods are to be underwritten by Nigerian importers has not been given bite by the Federal Government due to lack of political will to enforce the policy. The government can boost the fortunes of the insurance sector and conserve scarce foreign currency if this policy is strictly enforced.
3. The Nigerian insurance sector is still over regulated though the sector is supposed to have been deregulated. The role and powers of NAICOM need to be redefined. NAICOM should be restructured to make it more independent so it can play the role of an umpire.
4. The exclusive rights of NICON and Nigeria Re to certain insurance businesses should be removed with the privatization of these enterprises to allow for competition and create a level playing field in the industry.
5. There is need for a review of the relevant insurance statutes and regulations. These laws came into force at a time when the sector was heavily regulated. These laws should be reviewed to make them suitable for a deregulated insurance sector.