COMMENTARY ON THE PAPER ENTITLED "LEGAL RESPONSIBILITIES OF OPERATORS IN THE NIGERIAN PORTS (NPA, TERMINAL OPERATORS, SHIPPING AGENCIES AND FREIGHT FORWARDERS)" BY CHIEF (SIR) OSUALA EMMANUEL NWAGBARA (KSM)

COMMENTARY BY:
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I feel elated and highly privileged to be invited to comment on the paper entitled, "***Legal Responsibilities of Operators in the Nigerian Ports (NPA, Terminal Operators, Shipping Agencies and Freight Forwarders)***" just delivered by Chief (Sir) Osuala Emmanuel Nwagbara (KSM).

In the paper it will be seen that the learned presenter takes us through a brief history of the Nigerian sea ports and their development stages, legal responsibilities of the Nigerian Ports Authority (NPA), port terminal operators, shipping agencies, freight forwarders and customs brokers/clearing agents.

The learned presenter should be commended for a well-researched work. However, having had a preview of the paper, there are a few remarks (by way of a critique) I would like to make, and those are in relation to:

(i) The ceding of cargo handling responsibilities hitherto undertaken by the NPA to terminal operators;

(ii) The legal responsibilities of shipping agency/agents;

(iii) The definition of a freight forwarder; and

(iv) The inclusion of the legal roles of Customs Brokers or Customs Clearing Agents in the discourse.

The ceding of cargo handling responsibilities hitherto undertaken by the NPA to terminal operators:

Section 7(e) (ii) of the Nigerian Ports Authority Act Cap. N126, Laws of the Federation of Nigeria, 2004 empowers the NPA to provide facilities for the loading and unloading of goods or embarking or disembarking of passengers in or from a ship. Similarly, Section 40(1) (b) of the same Act also empowers the NPA to make bye-laws for regulating the manner in which and the conditions under which the loading and discharging of ships shall be carried out.

The learned presenter stated on page 12 of the paper that under the hybrid concession arrangement (Clause 9. 1(f) of one of the sample hybrid concession agreements) that the "*Concessionaires' responsibility covers such important issues as stevedoring, loading and unloading of vessels, shore work, storage, customs inspection delivery and reception of containers to and from the customer.*"

A critical question of whether the NPA can, by contract, confer on another person/entity a duty imposed upon it by statute arises here.

I am of the view that it may be validly argued that unless and until the aforementioned sections of the NPA Act have been amended or abrogated, a party aggrieved by the acts or omissions of a stevedore or stevedoring company can hold the NPA liable for any act, default or omissions of a stevedore/stevedoring company (the stevedore/stevedoring company being presumed to be an employee/agent of the NPA) for which he has sustained damages.

In a case at the Lagos Division of the Federal High Court of Nigeria (SUIT NO. FHC/L/ CS/391/2002 – MV "NORDICA & ORS. V. THE NIGERIAN PORTS AUTHORITY [NPA] & ANOR.) in which my firm represented the Owners, Charterers, Operators and Managers of the MV "Nordica" and the MV "Jolly Zaffiro", there was damage to a consignee's cargo of machinery for natural gas glass furnace, which occurred during discharge operations by a stevedoring company. The consignee sued the vessel interests, who in turn, by a third party proceeding, sued the Nigerian Ports Authority and the stevedoring company claiming indemnity and/or contribution against any damages that may be awarded against them in favour of the consignee in the said suit on the grounds that the damage to the consignee's cargo was as a result of the negligence/recklessness of the

stevedoring company, who operated the crane that was used in unloading the cargo from the vessel.

It was the contention of the vessel interests that the said stevedoring company was at all times material to the case agent and/or servant of the NPA, the owners and/or managers of Roro Port, Apapa, Lagos.

The third parties did join issues with the vessel interests on the allegation that the damage to the consignee's cargo was caused by the negligence of the stevedoring company, and on the contrary stated that it was a crew member of the vessel that operated the crane during discharge operation when the container of machinery for natural gas glass furnace fell down and got damaged.

In the course of trial, the question turned on who, as between the crane driver of the stevedoring company and a crew member of the vessel, operated the crane when the cargo was damaged. The Learned Trial Judge gave judgement in favour of the NPA on the basis that the Plaintiffs in the Third Party Proceedings (vessel interests) "*failed to prove on the balance of probabilities that it was the crane driver of the 2nd Third Party (i.e. the stevedoring company) that drove the crane at the time the cargo fell on the deck of the vessel.*"

The opportunity of having a judicial pronouncement on whether or not a stevedore/ stevedoring company is an agent of the NPA was lost when, having dismissed the case of the Plaintiffs in the Third Party Proceedings on the ground aforesaid, the Learned Trial Judge took the position, and rightly so in our view, that:

> "*It is therefore irrelevant to consider the point whether the 2nd Third Party was an Agent of the 1st Third Party.*"

The question may be asked: "If the incident had happened today, would a Plaintiff who is unaware of the terms of the concession agreements, relying on Section 7(e)(ii) of the Nigerian Ports Authority Act, be right or wrong in suing the NPA for the acts, defaults or omissions of a stevedoring company?"

Now, considering that the NPA Act by Section 8(l) also enables the NPA to enter into agreement with any person for the operation or the provision of any of the port facilities which may be operated or provided by the Authority, then, to that extent, it can on the other hand, be validly argued also that the cession of stevedoring responsibility to the port concessionaires pursuant to the concession agreement is in order, hence, the NPA can escape legal liability for any act, default or omission of a stevedore/stevedoring company that has occasioned damages to a third party.

The legal responsibilities of shipping agency/agents:

I note that on page on pages 20 to 21 of the paper, the learned presenter enumerated the "legal" responsibilities of a shipping agency or shipping agent. Respectfully, I consider it something of a misnomer to describe the responsibilities of a shipping agent as "legal responsibilities". The impression one gets when that term is used is that there is a body of laws where the responsibilities of a shipping agent are codified. In the paper, there is no statutory provision or decided case to which reference was made where the "legal responsibilities" of a shipping agent are enunciated.

In my humble view, I think that "the responsibilities" of a shipping agent is one of contract to be agreed upon by an individual ship owner, manager or charterer of a vessel and his shipping agent. The learned presenter can be presumed to understand this viewpoint when in paragraph 2, page 20 of the paper he stated thus: "*However, the 'legal' responsibility of an agent or agency will be dependent on the principal's* ***specific instruction*** *to the agent…*"

Having said this, it will be apposite at this juncture to note that there is an implicit legal responsibility on the part of a shipping agent to carry out his/its duties with utmost care and diligence.

The law has created an exception to the general principle that an agent of a disclosed principal is not vicariously liable for the default of his principal. Section 16(3) of the Admiralty Jurisdiction Act 1991 provides that a person who acts as an agent of the owner, charterer, manager or operator of a ship may be personally liable *irrespective of the liability of his principal* for the act, default, omissions or commission of the ship in respect of anything done in Nigeria.

It is worthy of mention, however, that before the provisions of Section 16[3] of the Admiralty Jurisdiction Act 1991 can be applicable to an agent it must be shown or proved that the act, default, omissions or commissions were in respect of anything done in Nigeria. Please, refer to the decision of the Supreme Court of Nigeria in **MV "CAROLINE MAERSK" .V. NOKOY INVESTMENT LTD [2002] 12 NWLR [PART 782] P. 472 at Pp. 506-507, paras. F-C.**

In the MV "Caroline Maersk" case, since there was no evidence that the act, default, omissions or commissions for which the ship was sued happened in Nigeria, the Supreme Court of Nigeria held that there was really no basis for making the 3rd appellant, who was sued as an agent liable.

In another case that I was involved as Counsel to the vessel interests (SUIT NO. FHC/L/CS/742/2007 – FRIGOGLASS INDUSTRIES (NIG) LTD & ANOR. V. OWNERS/ CHARTERERS OF MV KANAL MAS & 7 ORS.) the liability of an agent for alleged damage to a consignee's cargo came to the fore. In the aforementioned case, it was pleaded and evidence given that the damage to the cargo occurred due to explosion on the high seas, which led to the containers being "deconsolodated at or before transshipment" of the cargo at Port Klang onto the vessel, MV "Great Blossom".

During cross-examination, in the course of trial, the witness for the cargo interests also testified that the explosion that led to the damage to the cargo happened during voyage and that the incident did not occur in Lagos, Nigeria.

Despite the aforesaid evidence, in delivering judgement in the matter, the trial court (which understandably might have been empathetic to the plight of the consignee whose cargo had been damaged), held amongst others as follows:

> "*The provisions of section 16(3) of the Act is hereunder reproduced.*
>
> > *'A person who acts as an agent of the owner, charterer, manager or operator of a ship may be personally liable, irrespective of the liability of his principal, for the act, default, omission or commission of the ship in respect of anything done or failed to be done in Nigeria.'*

The Act clearly makes the agent liable in such a situation. That is the essence of section 16 (3). The Defendant did not bring any witness who testified to where the damage occurred or what actually happened to the goods. But what has been established is that the five containers were damaged and bore different numbers. This is evidence of negligence on the part of the Defendants. This Court believes that the 7th and 8th Defendants are caught within the provisions of section 16 of the Act. To hold that they are not liable will cause great injustice to the Plaintiff. The 8th Defendant never denied the fact that they are agents to the carriers of the goods. ***Somebody has to be liable for the serious damage done to the Plaintiff's consignment of goods and that somebody is the 7th and 8th Defendants.***"

The decision of the Federal High Court aforesaid has been appealed against and parties are waiting for the judgement of the Court of Appeal in the matter, which has been reserved.

In the SUIT NO. FHC/L/CS/143/2012 – OLEEVE NIGERIA LTD .V. PACIFIC INTERNATIONAL LINES (PTE) LTD & ANOR in which I also acted for the ship owners and their agents, despite the fact that the Plaintiff itself pleaded that the damage to the Consignee's cargo occurred in Ghana even before the agents to the carriers had anything to do with the cargo, the Court, relying on Section 16(3) of the Admiralty Jurisdiction Act 1991 went ahead to hold the liable for the damage to the cargo.

In view of the decisions of the Federal High Court in the **Frigoglass** and **Oleeve** cases aforementioned, one is minded to ask what is the effect, if any, of the decision of the Supreme Court in the MV "Caroline Maersk" case?

It should also be emphasized that even in a situation where the damage to a cargo or any incident had occurred in Nigeria, the law further requires the Plaintiff/Claimant to prove the culpability of the Agent. In the case of **HILARY FARMS LTD .V. MV "MAHTRA" [SISTER VESSEL TO M/V "KADRINA"] & 2 OTHERS [2007] 14 NWLR [PART 1054] P. 210 at P. 232, paras. A-C,** the Supreme Court of Nigeria held, per Onu, J.S.C as follows:

"*Even if the 3rd respondent's principal were liable, the use of the word 'may' in section 16(3) of the Admiralty Jurisdiction Act, 1991 suggests that*

> ***a principal's liability does not automatically attach to an agent****. Rather, I agree with the respondents that the appellants had to lead evidence to show reason why the agent should be held liable irrespective of the liability of its principal. In the case in hand the appellants did not lead any such evidence. For this reason I agree with the respondents that the 3rd respondent is not liable either jointly or severally to the appellants.*"

The point being made here is that there is a legal responsibility on the part of a shipping agent, as a key stakeholder in the maritime industry, to discharge his or its duties with due care and diligence, otherwise the shipping agent will be held culpable for any damages occasioned to a third party, irrespective of the liability of its principal.

The definition of a freight forwarder:

It will also be seen that on page 22 of the paper the learned presenter gave the definition of a freight forwarder when he stated thus:

> "*A freight forwarder* ***within the Nigerian law*** *means 'any person or company who arranges the carriage or movement of goods and associated formalities on behalf of an importer or exporter along the international boundaries of sea ports, cargo airport or land border stations.*"

It should be expected that the particular Nigerian law in which "a freight forwarder" is defined ought to have been referred to in the paper. This was not done, and I am of the view that it detracts from industry put into the work.

The inclusion of the legal roles of Customs Brokers or Customs Clearing Agents in the discourse:

It will be seen that the learned presenter having given a definition of a "freight forwarder", he proceeded to state that there is "*the need to look also at persons who facilitate clearance and delivery of cargo within the country's sea port terminals, airport terminals and within the Nigerian land territories. These are Customs Brokers or Customs Clearing Agents as they are known colloquially.*"

The paper under reference is clearly headed: "***Legal Responsibilities of Operators in the Nigerian Ports (NPA, Terminal Operators, Shipping Agencies and Freight Forwarders***)".

One would have thought that the discourse ought to have been limited to the legal roles of the named operators, i.e. the Nigerian Ports Authority (NPA), terminal operators, shipping agencies and freight forwarders. The Latin expression, "*expressio unius est exclusion alterius*", meaning what is not stated is deemed excluded, comes to mind here. Please, refer to **BAGWAI .V. GODA (2011) 7 NWLR (PART 1245**) P. 28 at P. 57, para. A.

I am of the respectful view, therefore, that the amount of time and space devoted to discussing the role of a Customs Broker is a deviation from the topic in hand. This is even more so as the learned presenter clearly understands that there is a distinction between a Customs Broker and a Freight Forwarder. Please, refer to page 23 where the learned presenter stated as follows: "*… in a way the functions of the Freight Forwarder and the Customs Broker differ…*"; "*This provision (i.e. section 19(2) of the Council for the Regulation of Freight Forwarding in Nigeria [CRFFN] Act 2007) presumes that the CRFFN Act has merged the professions of Freight Forwarding with that of Customs Broker in Nigeria.* ***This presumption is erroneous with due respect.*** "

Thank you, for your kind attention.