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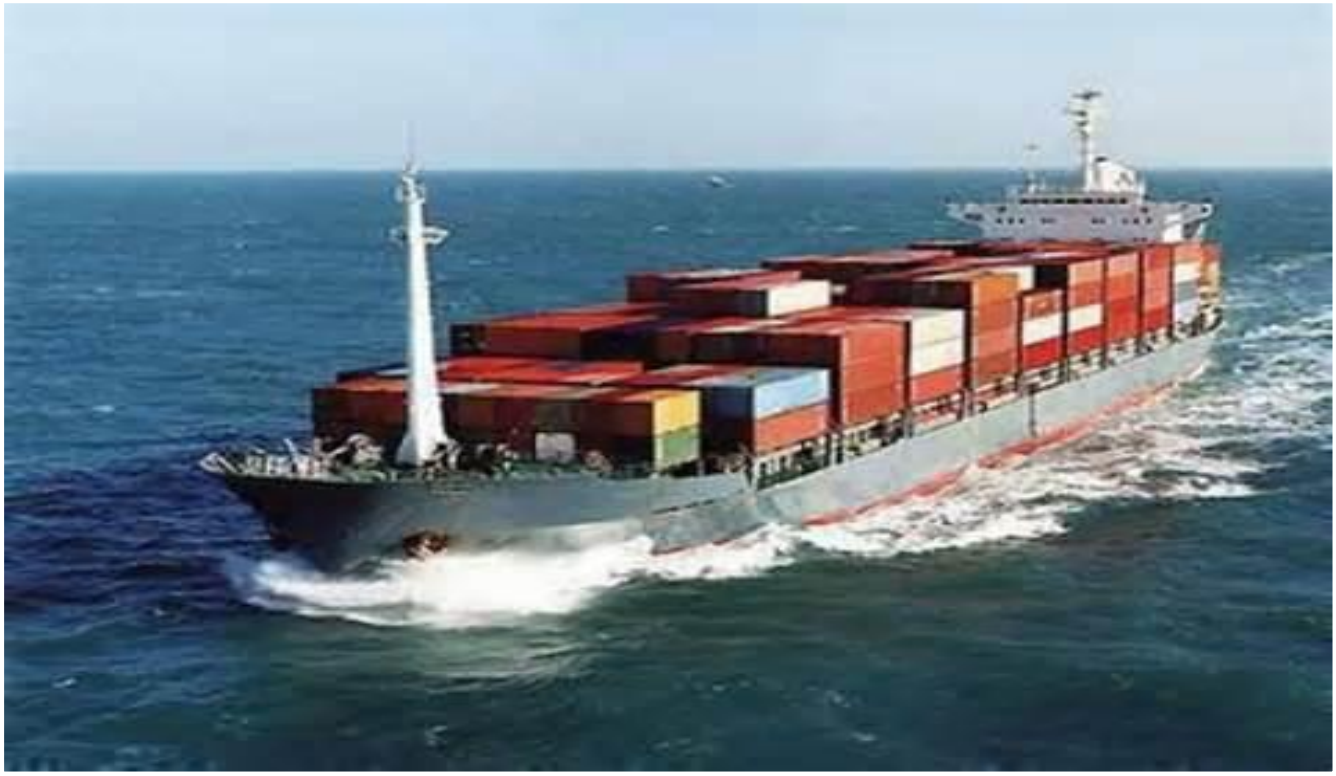

EDITOR'S NOTE

Welcome to the E-news publication of the first quarter of the year 2014. The focus of this edition is on cargo arrest, balancing the interests between our prospective National oil companies and International oil companies and of course the raging debate on whether the Nigerian Shippers Council can legitimately wear the hat of a Port Economic Regulator!

We welcome comments or enquiries regarding the contents of this E-news. Kindly address these to the Editor at k.tsumba@foundationchambers.com

Kashimana Tsumba
Editor

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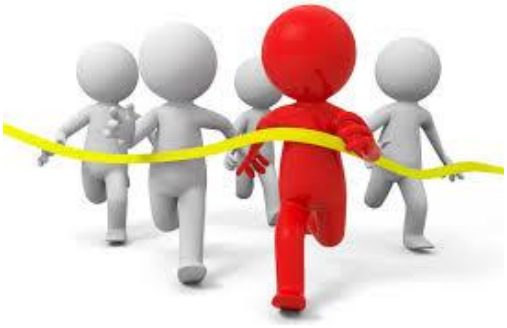
CARGO ARREST: AN ALL-COMERS AFFAIR?

By Adedoyin Adeloye*

BACKGROUND

The arrest procedure is one of the unique features of Admiralty Practice. An action *in rem* is one which **subjects the ship or *res* to arrest** when a **maritime claim** is brought against it, pending the deposit of security to cover the Plaintiff's claim or pending the eventual sale of the ship or property by the court. The fact that not only ships may be the subject of an in rem action is clearly suggested in the Admiralty Jurisdiction Act 1991, by the phrase "***or other property***".



The AJA divides maritime claims into Proprietary maritime claims and General maritime claims. Proprietary maritime claims are concerned with questions of title to or possession of ships, while general maritime claims have their origin in Statute. It defines maritime liens as claims in respect of which an action *in rem* is available, irrespective of who owns the property at the time the action is commenced or of who may be liable *in personam.*

ACTION IN REM AGAINST CARGO

Is an action in rem against cargo available with regard to all maritime claims and maritime liens? The Act suggests by the use of the phrase "*other property*" that Proprietary maritime claims may be the subject of an *in rem* action. Consequently, a claim for mortgage of a ship's freight seems like one for which cargo may be arrested, considering the connection between cargo and freight - as only cargo may be subject of arrest in respect of a claim for freight. However, such logic is not supported by judicial authority and the widely held view is that an action *in rem* may only be maintained against freight, in respect of a maritime lien.

General maritime claims are a major segment of claims to which Plaintiffs attempt and often "successfully" bring actions *in rem* against cargo in Nigeria. Any general maritime claim in respect of which an action *in rem* may be brought must conform to the conditions stipulated under Section 5 (4) (a) and (b), AJA 1991. That Section provides that an action *in rem* in respect of a statutory maritime claim may be maintained when it arises in connection with a ship and the person who would be liable in an *in personam* action in respect of the claim was at the time the claim arose the owner, or charterer, or in possession or control of the ship. It states further that the relevant person is at the time the claim is brought the beneficial owner of all the shares in the ship or its demise charterer; or alternatively the relevant person is at the time the claim is brought, the beneficial owner of all the shares in another ship. The absence of the use of the phrase "*other property*" (or similar wording) and the need to identify the "beneficial owner of all the shares" in a second *ship* makes it very doubtful that an arrest of cargo is possible in respect of general maritime claims.

Modern Admiralty law by Mandaraka-Sheppard, states that cargo on board a ship may be subject to arrest only if there is a maritime lien attached to such cargo, such as salvage services offered to save a ship and the cargo. Another learned author, Meeson, relying on the old English decision in the "Victor" maintained that an action *in rem* may be brought against cargo only where cargo is subject to a maritime lien, but reasoned that a claim for damage done by a ship would not qualify a claimant for an arrest of cargo.

In **The Nikos A**, before the Federal High Court, the Plaintiffs, Master and Crew men on board the vessel "Nikos A" brought an action *in rem* against the ship and its cargo for unpaid wages ranging from 8 -24 months. The Court granted them an arrest of both the ship and cargo, but on the application of the cargo owners/ interveners, varied the said Order of arrest to exclude cargo while retaining the arrest of the ship. While there were no independent Court pronouncements with regard to the variation of the arrest order which released the cargo from arrest, it would appear that the court had done the right thing as the Master and Crewmen were unlikely to qualify as having any right to proceed in rem against the cargo on the ship.

It is worth pondering what would have been the outcome if several cases of cargo arrest had been challenged in Court for lack of *in rem* jurisdiction e.g Arrest of liquid cargo suspected to have been stolen off a ship by its owner or carrier; of cargo which was expected to be carried by a time or voyage charterer, for a claim for detention, demurrage or deadweight. Would the court have upheld such arrests or would they have been struck out?

CONCLUSION

Arrest of cargo and "*other property*" against which an in rem jurisdiction may be exercised is certainly more limited in scope than in respect of a ship arrest. The limits of the exercise of an in rem jurisdiction in this regard however will be better grasped with Lawyers not hesitating to challenge the exercise of the Court's in rem jurisdiction in circumstances where the propriety of such arrest are doubtful and with Judges being more prepared to consider the propriety of ex-parte applications for cargo arrest before granting same.

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BALANCING NOC, LOCAL AND FOREIGN INVESTOR INTERESTS IN THE OIL AND GAS INDUSTRY

By Donald Ibebuike*

BACKGROUND

The recent prominence of National Oil Companies in the world oil and gas business has altered the control structure of most of the world's oil and gas reserves. The NOCs controlled less than 10% of the world's oil and gas reserve in the 1970s but today it is estimated that they control more than 90% of proven oil and gas reserves. This has enabled the NOCs to raise capital and source human and technical resources especially from oilfield services companies (OSCs). The reliance on OSCs by NOCs for specific capabilities has forced International Oil Companies and independents to contract-operator service. This has created enormous challenges for the IOCs and the sustainability of their resource-ownership business model. A major challenge confronting the IOCs is the issue of falling production levels and difficulty in replacing reserves in countries where resource-rich nations have restricted access to their reserves.

The successful and well run NOCS have developed global reach and influence and now compete with major private IOCs in the acquisition of exploration, development and production assets. Thailand's NOC, PTT recently outbid Shell for Cove Energy's East African assets and the Chinese NOCs have made inroads into North American and African assets.

Nonetheless it appears IOCs will continue to be partners in developing resources of the host countries and competitors on the world oil and gas stage. The competition with NOCs has made IOCs to engage in countries with political instability, and sometimes inadequate legal framework such as Iraq. However NOCs now tend to make laws asserting more rights and participation in the industry and thus forcing IOCs to observe the local content policy, research and development or education programmes of the host state, for instance, the Nigerian Oil and Gas Industry Content Development Act, 2010. The availability of low-cost local service providers from the host states, supported by NOCs and their governments, who supply technology and services have introduced another dimension in competition with OSCs. Leading NOCs emerged by insisting on awarding contracts to domestic companies not only to build indigenous capacity, but also to develop suppliers that can compete globally. They recognize that unless the scale of oil reserves is large enough to sustain business for local companies in the very long term, benefits such as preferential contracts have limited impact.

The emphasis in Nigeria now is directed towards development of the Oil and Gas Industry to increase the government's take through fiscal regime, NOC and active participation of local companies not only in exploration and production activities but also in the service and supply chain sub-sectors. Nigerian government has promulgated the Nigerian Oil and Gas Industry Content Act, 2010 which mandates IOCs and OSCs to support local content initiative of the government by contract awards, technology transfer and manpower development. Similarly, the Petroleum Industry Bill currently before the National Assembly makes provisions relating to fiscal policy and unbundling of Nigerian National Petroleum Corporation and Nigerian Gas Company. The essence is to shift from the traditional NOC represented by NNPC to a hybrid NOC that is commercially driven.

Statistics show active participation of local companies in the oil & gas industry is far from being robust. Nigeria has 173 oil blocs, of which local companies own 52% representing 90 oil blocs while foreign oil companies own 48% representing 83 oil blocs. Regrettably, indigenous players account for only six per cent of the country's total crude oil production, representing about 150,000 barrels of crude oil per day, while foreign oil companies account for 94 per cent of the total output representing 2.35 million barrels of crude oil per day. Government has sought to encourage local participation by introducing Marginal Fields Policy and awarded 24 fields in 2003. Second Marginal Field Licensing Round was flagged off in November, 28 2008. The low performance of indigenous companies is attributed to the lackadaisical attitude of the owners towards development of their fields, funding constraints, technical competence, non-bankable proposals and litigation. There is therefore every need for more synergy and proactive engagement by indigenous companies.

CONCLUSION

While it is acknowledged that NOCs are in control of world petroleum reserves, IOCs are in control of the markets. The IOCs can through cooperation provide the nationally owned companies with access to the main energy markets and can help to develop markets for new products. Likewise host governments should set clear and stable energy policy frameworks as relates to fiscal policy, since unpredictable and frequently changed policies contribute to business uncertainty and have an adverse effect on the viability of hydrocarbon projects. Importantly NOC and IOCs should favour dialogue and re-negotiations or mediation when their views differ on what 'changing circumstances' mean for contracts. The IOC that

genuinely integrates itself to maximize its use of a local workforce and supply chain can make a substantial impact on the economy, while at the same time benefiting from a simplified sourcing model and economic savings on import premiums.

**Donald Ibebuike is Senior Counsel in Foundation Chambers*

NIGERIAN SHIPPERS COUNCIL: A REGULATOR, A STAKEHOLDER OR BOTH?

By Kashimana Tsumba*

The Nigerian Shippers Council (NSC) was established pursuant to the Nigerian Shippers Council Act Cap N133 LFN 2004. The NSC has various functions which include but are not limited to protecting the interests of Shippers on matters affecting imports and exports to and from Nigeria. In recent times it has played an alternative dispute resolution role between Shippers, Terminal Operators and Shipping lines.

Recently the Federal Government announced that the NSC is to serve as the Economic Regulator for the Nigerian Maritime sector. The NSC as the new economic regulator is expected to approve all charges and fees that accrue to service providers such as Shipping Companies and Port Terminal concessionaires. It is envisaged that ultimately the NSC may be "transmuted" or "converted" into the proposed National Transport Commission resulting in a name change under a new law to be known as the "National Transport Commission Act". This proposed law is presently making slow progress through the National Assembly.

Furthermore it is expected that the Commission will superintend and coordinate the economic aspects of all non aviation agencies namely the Nigerian Ports Authority as the technical administrator of the Ports, and its infrastructures and the Nigerian Maritime Safety and Administration (NIMASA) as the maritime safety administrator , the Nigerian Inland Waterways Authority (NIWA), and the Nigerian Railway Corporation(NRC) .

There have been various reactions by stakeholders regarding the appointment of the NSC as economic regulator. It appears that as a result of some of its erstwhile statutory functions, the NSC is perceived to be potentially more likely to protect the interest of the Shipper than that of the Terminal operators or Shipping companies. This perception flows from the fact that from inception the NSC was tailored towards finding solutions that are beneficial to the Shipper. Suffice it to observe that the conflict between cargo interests and port operators is only one aspect of the expanded role of the NSC.

Its new role however seeks to move the NSC further away from its traditional advisory role to a Regulatory role. At the core of the new directive lies the question whether carrying out a Regulatory role lies within the purview of the provisions of the Nigerian Shippers Council Act Cap N133 LFN 2004.

The functions of the Council stated in the Act include a duty to liaise with government in assessing the stability and adequacy of existing services and advising on matters relating to the structure of freight rates, availability and adequacy of shipping space, frequency of sailings, terms of shipment, class and quality of vessels, port charges and facilities and other related matters.

The word "regulate" as opposed to "advise" is at the heart of the new directive. It is contended that there needs to be an enabling law which gives the NSC the legislative backing to carry out the envisaged activities. By way of analogy the Nigerian Communications Act 2003 which regulates the Communications sector contains specific stipulations as to the powers, procedures and penalties exercisable by the Commission. It also contains authority to make and publish regulations and guidelines regarding specific issues like permits, assignments, licences, fees and fines. On the other hand the NSC Act generally provides that the Minister may make regulations for carrying into effect the provisions of the Act. The difficulty here is that the provisions of the present Act are not all encompassing enough to cover the field envisaged by the directives made and it would appear that the wording of the Act would need to be extensively amended to enable it meet up with its new portfolio.

Another viewpoint is that the delegation of the regulatory functions to the NSC should await the passage of the National Transport Commission Bill so as not to put the cart before the horse. The present development may have far reaching economic and legal implications. Surely the recent Federal Government announcement is only a first step in a chain of events that are gradually unfolding. We wait to see!!!!

**Kashimana Tsumba is Counsel in Foundation Chambers.*

IN MEMORIAM

It is with heavy hearts we announce the passing away of a much loved member of Foundation Chambers, Mrs. Oluchi Azubuike Elue. Oluchi was our Practice Accounts officer and had worked with us since 2008. She was an asset to the firm and at this time, our sincere condolences go to her family and loved ones. She will be greatly missed.

TIT-BITS

What's the difference between a lawyer and a boxing referee? A: A boxing referee doesn't get paid more for a longer fight.

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Two small boys, not yet old enough to be in school, were overheard talking at the zoo one day. "My name is Billy. What's yours?" asked the first boy. "Tommy," replied the second. "My Daddy's an accountant. What does your Daddy do for a living?" asked Billy. Tommy replied, "My Daddy's a lawyer." "Honest?" asked Billy. "No, just the regular kind", replied Tommy.

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A lawyer defending a man accused of burglary tried this creative defense: "My client merely inserted his arm into the window and removed a few trifling articles. His arm is not himself, and I fail to see how you can punish the whole individual for an offence committed by his limb."

"Well put," the judge replied. "Using your logic, I sentence the defendant's arm to one year's imprisonment. He can accompany it or not, as he chooses." The defendant smiled. With his lawyer's assistance he detached his artificial limb, laid it on the bench, and walked out.

Two schoolgirls were having an argument. "My dad's better than your dad. He's a carpenter and makes buildings." The other girl replied, "My dad does better than that. He's a lawyer, and makes loopholes."

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Billy, Bobby and Joe had a spree in the fruit orchard. They tore all the fruit from the trees, gorged themselves, then threw fruit and generally vandalized the place. When the farmer caught them, he called the sheriff and had them taken into custody. When the boys appeared before the judge after spending a night in jail, he asked them if they had learned their lesson. The first boy replied, "Yes, sir. All that fruit made me sick. My dad's a doctor, and he told me never to do that again!" The second boy was from a military family, "My dad told me that if I ever get in trouble with the law again, I can kiss West Point goodbye!" The third boy told the judge, "You bet I won't do it. My dad's a lawyer, and I'm gonna sue that farmer for damages to my pants that got tore jumping his fence.

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