ARREST OF VESSELS IN NIGERIA[1]

1. INTRODUCTION

Maritime trade and maritime transportation are dominant features in world trade and international transportation given that they represent well-over seventy percent (70%) of such services in volume terms annually. Ocean-going vessels of varying sizes and configurations constitute essential means of transportation of goods and services from one jurisdiction to another. These vessels, in the course of the ocean voyages sometimes encounter legal or contractual challenges which result in their arrest and/or detention in one jurisdiction or another.

Vessel arrest is an age-long custom of shipping trade and admiralty practice. It's primary objective or purpose is to secure some indemnity or security for a maritime claim initiated by an aggrieved party (the arrestor) in a commercial transaction involving that vessel.

It is important from the onset in this presentation to distinguish **vessel arrest** from **vessel detention.** Whilst vessel arrest occurs where there is an alleged breach of a commercial or contractual obligation arising from the use or hire of a vessel, vessel detention often stems from the violation of a statutory or administrative obligation (e.g. unseaworthiness). Such detention and ultimately sanction are usually at the instance of a Government Agency carrying out **Flag or Port State Control duties** e.g. the Ports Authority, the Maritime Safety Agency, the Customs Service or even the Immigration Service.[2] Similar rights of detention apply to crew on board a vessel when they have committed a criminal or other offence within that jurisdiction.

2. BACKGROUND TO VESSEL ARREST

Historically, an aggrieved person was entitled to arrest a shipowner, his ship or the goods on board his ship. The action against the shipowner was regarded as an action "**in personam**" whilst the other two actions were actions "**in rem**" against "**the res**". The purpose of either type of action was to force or compel the "defendant" to furnish bail as **security pending any judgment** ("pre-judgment security"), which the Court may give against the said defendant in

[1] Being text of paper presented by Mr. L. Chidi Ilogu (SAN).

[2] - See Section 15 Admiralty Jurisdiction Act 1991, AJA.
- See also Nigerian General Superintendence Co Ltd v Nigerian Ports Authority (1989) 3 NSC 519.

favour of the complainant usually referred to as the Plaintiff. This experience often happens in a jurisdiction (foreign) other than that of the owner of the vessel where such owner has no known assets other than the said vessel. Invariably, the vessel is bound to sail away in continuation of its trading obligations if not restrained by an Order of the Court at the instance of the complainant. The practice of arresting the shipowner has since become obsolete and was not allowed under Common Law.[3]

The Nigerian Court of Appeal has observed that:

> *"An action in rem affords the Plaintiff opportunity to obtain adequate pre-trial and pre-judgment security by bond, guarantee, bail or letter of indemnity for the satisfaction of any claims the Plaintiff has against the offending ship or res in the event that the Plaintiff obtains judgment against the owner of the res.*[4] *"*

The arrest process resulting in the issue of a **warrant of arrest** remains distinct from the issuance of a **writ in rem** but in practice they are taken out and served at the same time on the "res" – usually the vessel.[5] Nigeria inherited this admiralty practice along with the Common Law from the British colonial administration and the adoption of the then UK Administration of Justice Act 1956 as the procedure for prosecuting maritime claims in Nigeria. The provisions of the Administration of Justice Act 1956 were made applicable in respect of Admiralty jurisdiction which was vested in the High Courts by virtue of Section 1(i) of the Admiralty Jurisdiction Act 1962.

Nigeria acceded to the 1952 International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-Going Ships (otherwise known as "the Arrest Convention") in November 1963. However, it was not until the Admiralty Jurisdiction Act 1991 was passed into law that the said Arrest Convention became effectively a part of Nigerian law. The Admiralty Jurisdiction Act (AJA) 1991 and the Admiralty Jurisdiction Procedure Rules (AJPR) 2011 made pursuant to Section 26 of the AJA now govern the substantive and procedural requirements for the arrest of vessels in Nigeria.

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[3] See: "Practical aspects of arrest of a Ship" – Maritime Law by Christopher Hill (4th Edition), Chapter 4, page 137-138.
[4] A. W. Ltd vs Supermaritime (2005) 6 NWLR (Part 922) at p. 587.
[5] See Order 7 Rule (4) 2 of the Admiralty Jurisdiction Procedure Rules (AJPR).

Consequently, since the coming into force of the Admiralty Jurisdiction Act 1991 and as enshrined subsequently in the provision of Section 251 (g) of the 1999 Constitution, admiralty jurisdiction in Nigeria now vests **exclusively** in the Federal High Court as the Court of first instance. Appeals lie from the Federal High Court to the Court of Appeal and finally to the Nigerian Supreme Court.

3. THE MEANING OF ARREST

The word "Arrest" of a vessel or ship is not defined in the **Admiralty Jurisdiction Act 1991 (AJA)** but Order 1 Rule 5 (1) of the **Admiralty Jurisdiction Procedure Rules 2011 (AJPR)** defines ''Arrest'' as ''*the detention of ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment''.* It is apparent that **AJPR** adopted the definition of ''arrest'' under **Article 1 Rule 2 of the Arrest Convention. AJPR** goes further to define *"Arrest Warrant"* as *"a warrant for the arrest of a ship or other property"*.

It is evident from this definition in the **AJPR** and **Arrest Convention** that "arrest" in admiralty practice relates to a **pre-judgment** arrest of a vessel and the arrest process contemplated cannot be used to detain a vessel after judgment has been obtained with a view to enforcing that judgment. Such a post-judgment arrest is provided for separately in **Order 7 Rule 4(3) AJPR** which states that "***A ship or other property may be arrested in a proceeding after judgment has been given in the proceeding."***

The English Court of Appeal has held that the definition of arrest in the **1952 Convention** deals more with the nature of legal process involved in effecting a pre-judgment arrest and not necessarily the motivation of the arresting party and that the essence of the Convention was to harmonize the laws of the contracting states as to the types of claims which could ground an arrest and that arrest should not be used to secure claims other than maritime claims[6].

[6] Anna H (1995) 1 Lloyd's Report 11

4. PRE-CONDITIONS FOR ARREST

A warrant of arrest of a vessel cannot be issued in isolation. It must be premised on some fundamental procedural prerequisites which must be satisfied. Such prerequisites include:

(i) **Jurisdiction** - The issue of jurisdiction is fundamental to commencement of any action in Court. It is now settled law that the Federal High Court has **exclusive** jurisdiction in Nigeria in respect of admiralty causes – whether civil or criminal as expressed in Section 19 of the Admiralty Jurisdiction Act (AJA). It is therefore important to note that the admiralty jurisdiction of the Federal High Court covers matters enumerated in Sections 1 and 2 of the AJA. The provisions cover a wide range of subject matters from proprietory interests in ships to oil pollution, Federal Ports and their precincts, banking and letters of credit transactions involving transportation and importation of goods into Nigeria. Where such matters are commenced at the State High Court, they can be effectively challenged for want of jurisdiction. Similarly, an action commenced at the Federal High Court must be one which falls into the enumerated matters in Sections 1 & 2 AJA.

What is critical in subject matter jurisdiction is the cause of action as set out in the Writ and expatiated upon concisely in the Statement of Claim. A cause of action is valid irrespective of the strength or weakness of the Plaintiff's case. The Court is required to confine itself only to the averments in the Statement of Claim in determining whether the Court has jurisdiction or not and should not delve into the strength or weakness of the claim which remains a matter for determination at trial. Regrettably quite often the Courts inadvertently delve into the "merits" of the case at the pre-trial stage.

The Nigerian Court of Appeal has held that:

> *"For an admiralty action to be maintained as an action in rem, it has to be* ***established*** *that the* ***Claim*** *falls within the admiralty jurisdiction and under the maritime claims of Section 2 of the Admiralty Jurisdiction Act 1991. The fact that a claim* ***relates*** *to a vessel* ***no matter how connected the circumstances giving rise to it's coming about does not conclusively bring it within an admiralty action''.***[7]

[7] Cemar Shipping Inc. v. M/T "Cindy Gaia" & 4 Ors NSC Vol 10 p. 456.

It is therefore quite difficult to draw a clear line between the jurisdiction of the State High Court and that of the Federal High Court. It has been stressed by the Supreme Court of Nigeria that where the claim is purely in contract and has nothing to do with admiralty the State High Court has jurisdiction to entertain it[8].

It is equally important to note that the jurisdiction of the Federal High Court in cargo claims extends or persists until delivery to the Consignee (e.g. at his warehouse). Jurisdiction remains the only catalyst upon which a Court can adjudicate a claim, absence of the Court's jurisdiction is therefore fatal to a case. This point was stressed by the Supreme Court when it held *"that jurisdiction is the very basis on which any tribunal tries a case; it is the life line of all trials, a trial without jurisdiction is a nullity*[9]*."* Every action commenced with a view to arresting a vessel must therefore be properly grounded within the **admiralty jurisdiction** of the Federal High Court.

(ii) **Commencement of Action In Rem -** A party seeking to arrest a vessel in order to ensure pre-judgment security must first commence an **action in rem**. ***Order 3 Rule 3 of the AJPR*** requires that an Admiralty action *in rem* should be commenced by a *Writ in rem* issued by the Registry accompanied by a Statement of Claim and copies of every document to be relied upon at the trial. This is known as Front-Loading.

Front-Loading: It is worthy of note that the revised Federal High Court (Civil Procedure) Rules 2009 has introduced the practice of "**front-loading**" in actions commenced at the Federal High Court. This has now been extended formally into the 2011 AJPR by virtue of its Order 14. It is observed that this practice is quite demanding and may sometimes work hardship (especially when acting for overseas clients) in commencing maritime claims and arrest proceedings which are usually commenced in rem as a **matter of urgency** with a view to securing pre-judgment security.

An action *in rem* which usually leads to arrest of a vessel could arise under one of two major situations, namely: where there is a maritime lien or a statutory right in rem.

[8] Chevron Nigeria V Lonestar Drilling, Nigerian Shipping Cases, Vol. 10 p.587.
[9] Petrojessica Ent. Ltd v. Leventis Technical (1992) 5 NWLR Part 244 at p.675

Maritime Lien

A Maritime lien is defined as a privileged right or claim against a vessel or *res* which remains inherent and attached to it "*like a leech"* for services rendered to, or injury caused by that vessel or *res*. A maritime lien is founded on the general maritime practice which recognizes a vessel as having a personal *legal entity* distinct from that of its owners and so the *res* is held accountable for the consequences of "its" acts or omission notwithstanding that these may have been done by its "human" owners, operators, managers, agents or servants. The vessel is recognized as the "offender" and not its owner and becomes liable for the act or omission.

Maritime liens have been recognized under Nigerian law by **S.5 (3) AJA 1991** which provides:

"…and for the purposes of this section, "maritime lien" means a lien for:

(a) Salvage or

(b) damage done by a ship; or

(c) wages of the master or a member of the crew of a ship; or

(d) master's disbursements (on account of the ship)

The right of action in any of these circumstances can be set in motion against the vessel at anytime subject to any contractual or statutory limitation period and otherwise within **three (3) years** of the cause of action arising as allowed by Section 18 (b) of AJA where there is no express provision to the contrary. Such cause of action can be maintained, notwithstanding that ownership of the vessel has changed hands.

However it is important to note that by virtue of Section 73 of the Nigerian Merchant Shipping Act, maritime liens *''shall be extinguished after a period of* ***one year*** *from the time when the claims secured by the lien arose, unless prior to the expiry of the period the ship was arrested and the arrest led to proceedings for a forced sale''*. In effect therefore the one year limitation period would be applicable in practical terms for enforcement of maritime liens in Nigeria.

Statutory Rights In Rem

These are maritime claims which are now sometimes enforceable against the vessel or *res*, only because they are so provided for statutorily by the AJA. They become enforceable *in rem* only when the Plaintiff issues a Writ *in rem* against the vessel[10].

Statutory rights *in rem* as enumerated in AJA derive their origin from the domestic efforts to harmonize the process and procedure for prosecuting maritime claims, pursuant to the aforesaid 1952 Arrest Convention.

In Nigeria, these statutory rights are set out in **S. 2** of the Act and include all the other claims in that Section which are not "maritime liens" - whether classified as "**proprietary**" or "**general**" maritime claims. The "proprietary" claims are claims related to *ownership, possession and mortgage* of ships, whilst the "general" claims cover other shipping claims.

In these cases, an action *in rem* can only be instituted and a ship arrested where the conditions listed in **Section 5(4) AJA** are satisfied, namely:-

(i) Where a claim maintainable in personam (e.g. for breach of contract) arises in connection with the vessel;

(ii) The person who would be liable on the claim in an action in personam ("**the relevant person**") was, when the cause of action arose, **the owner** or **charterer** of or **in possession** or control of the ship;

(iii) Provided the relevant person is either the **beneficial owner** of that ship as respects all the shares in it OR the charter of the **ship under a demise charter**; OR against

(iv) Any other ship (alternative "sister" ship) of which at the time the action is brought, the **relevant person** is the **beneficial owner** as respects all the shares in the ship.

It is important therefore to ensure that where the claim is not for enforcement of a maritime lien, that these conditions are satisfied before an arrest is initiated.

[10] The ''Monica S'' (1967) 2 Lloyd's Report, p. 113.

(iii) **Beneficial Ownership –** This is the litmus test required for most arrest proceedings. The principle of beneficial ownership arises in relation to the mode of exercise of admiralty jurisdiction as stipulated in Section 5 of AJA. It tries to impose a stringent test which entitles a Claimant to proceed in an **action in rem** against a person who ordinarily would have been liable in an action **in personam** (called "**the relevant person**") in respect of claims enumerated in Section 2(3) where the claim arises **in connection with a ship.** Section 5 (4)(a)&(b) entitles the Claimant to commence the action **in rem against that ship or any other ship PROVIDED** that relevant person is the **beneficial owner** of that ship or the **alternative** ship (often called "**sister**" ship) as respects **all the shares in it.**

What constitutes beneficial ownership continues to be controversial internationally. It has been held severally (both in Nigeria and the UK) that what constitutes a beneficial owner in relation to the shares in a vessel could be any of the following:

(a) the legal owner
(b) the equitable owner
(c) the person who has full possession and control of all the benefit and use of the vessel which a legal or equitable owner would normally have.[11]

The Nigerian Court of Appeal has held that entries in the Port of Registry, executed Bills of Sale or Certificate of Registry, can be used as prima facie evidence of **ownership** only. They will be displaced by an entry in the relevant volume of Lloyds Registry of Ships which is normally the ground for believing that a ship is owned by a particular party. The Court also held that a beneficial owner of a ship is the person who is the legal owner, the equitable owner or the person who has full possession and control and has all the benefits and use of her which the legal or equitable owner would normally have[12].

[11] See generally:
- 1 Congresso del Partido (1971) 1 Lloyd's Report
- The Andrea Ursula (1971) 1 All E.R 821
- C.M.I Trading Services Ltd v. Owners of MV "Chaika" & Anor (The Chaika) Nigerian Shipping Cases (NSC) Vol 6 P.367

[12] The M.V. S Araz No. 1 (1996) 6 NSC. 116

(iv) **Sister Ship -** The principle of beneficial ownership applies closely to the issue of sister ship/alternative ship arrest as clearly stipulated in Section 5 (4) (b) of the AJA and as such the challenges identified as to beneficial ownership are equally applicable in the arrest of such vessels.

In a concerted effort to forestall sister ship arrest and circumvent the law ship-owners are now known to have resorted to setting up one vessel owning companies or entities thereby disguising the real ownership with the distinct legal personalities of the different companies.

(v) **Right of Suit** - The right to sue in a maritime claim is as fundamental as founding subject matter jurisdiction as without it a Court may be acting in vain. Where the right of suit does not exist, the right to arrest a vessel cannot be maintained by any stretch of imagination.

It is a well-established principle of contract that only a party thereto can sue. This principle applies with equal force in admiralty matters especially in relation to carriage by sea contracts (contracts of affreightment). However, it should be noted that in Bill of Lading transactions which are often facilitated by Banks, the usual practice is to have the name of the Bank inserted in the Bill as the receiver of the goods often termed **"the consignee"** while the supplier/shipper of the goods is termed **"the consignor".** The name of the Bank's customer is usually left out or at best inserted as "Notify Party" only and as such, the Bank steps into the shoes of its customer as the contracting party.

The right to maintain an action in respect of that transaction is often restricted to both the **consignor** and **consignee except** where the Bill of Lading is "endorsed" to another party **on the face of that Bill of Lading.** Such a party is called "the Endorsee" of the Bill and acquires and sometimes takes over the consignee's right to sue on the Bill of Lading[13].

However, a party named in a Bill of Lading as **"Notify Party"** only cannot sue or assert any rights in respect of that Bill. In a case involving consignment of sugar the Appellant commenced an action against the vessel at the Federal High Court for short delivery and

[13] See the cases of Nigerbrass Shipping Line v Aluminium Extrusion Industries (1994) 4 NWLR (part 341) p. 733 and "K" Line v. K.R. Industries (Nig) (1993) 5 NWLR part 292 p. 159

damage to the cargo of sugar. The Lower Court and the Court of Appeal held that the Claimant was not an Endorsee of the Bill even though the goods were imported by him. The Court of Appeal went further to explain.

> "*By virtue of Section 375 of the Merchant Shipping Act 2004, only a Consignee of goods named in a Bill of Lading or an Endorsee whom the property in the goods have passed and by virtue of those facts will be able to sue on a Bill of Lading Contract. A notify party or addressee may not sue. A notify party or addressee cannot therefore possibly be a party to the contract evidenced in a Bill of Lading*[14]."

The Merchant Shipping Act 2007 repealed the Merchant Shipping Act 2004 and by necessary implication the said S.375 became repealed. The omission of equivalent provision of S. 375 in the 2007 Act created a set back to the right of suit of the Endorsee or Holder of a Bill of Lading in Nigeria to maintain maritime claim. Consequently, the only recourse of the Endorsee or Holder of a Bill of Lading to maintain a maritime claim in Nigeria is Section 172 of the Evidence Act 2011 which is in pari material with the repealed S. 375 as to proof of shipment by such an endorsee or holder against the Master of a vessel. Efforts are being made to introduce a new legislation directly dealing with rights of suit under Bills of Lading and other shipping documents.

(vi) **Time/Statute Bar** - Maritime contracts are usually made subject to a stipulated time frame within which an action to litigate any claim must be commenced. Where the action is not commenced within the stipulated time, it is said to be **time-barred**. Where the limitation period is embodied in a statutory provision, the action is said to be **statute barred**.

Most contracts of carriage in and out of Nigeria are governed by the Hague and Hague-Visby Rules which have a time limit of **one (1) year** from when the cause of action arose to be enforced. A claim would usually be defeated on the technical point that the suit was not commenced within the required one year period. Where negotiations are on-going towards settlement, it is advisable to commence the action and keep it in view or obtain a written commitment or waiver from the other party extending the time within which an action may be maintained.

[14] Pacer Multi-Dynamic Ltd v. MV Dancing Sisters & Anor (2000) 3 NWLR Part 648 p.241

Where no time limit is expressly stated in the contract of carriage document the Admiralty Jurisdiction Act (AJA) now stipulates that a maritime claim should be commenced within **three (3) years** of the cause of action or become statute-barred.

It goes to the root of the matter therefore that when an action on the face of it, is seen to be time-bared, no right of arrest can be exercised. Counsel seeking to represent a Client in taking out an arrest application must satisfy himself that these pre-conditions are met. A claim in damages for wrongful arrest would be maintainable by the owner of the vessel where these pre-conditions are absent.

5. APPLICATION FOR ARREST ORDER

A party intending to arrest a vessel is required to satisfy some procedural pre-conditions in order to move the Court to issue the warrant of arrest.

(i) **In rem action** – As earlier discussed, it is a prerequisite that the Plaintiff (or arresting party) must have commenced an in rem action by issuing Writ in rem accompanied with a Statement of Claim and copies of every document to be relied on at the trial before he can apply for a warrant of arrest of a vessel. Usually, the Writ in rem together with the accompanying documents and the application for arrest are taken out/filed simultaneously or contemporaneously as required by **Order 3 Rule 1** and **Order 7, Rule 1 (1)** of the AJPR. **Order 3 Rule 2** requires the Plaintiff to file within 7 days of filing his Writ and other processes, written statements of his witnesses which shall be adopted on oath at the trial.

By **Order 7 Rule 1 (1)**, an arrest application can only be brought if the res is within Nigerian territorial waters or is expected to arrive there within three days. **Order 6 Rule 1** provides that the Writ in an action *in rem* must be served on the relevant *res*. Accordingly, the vessel or other property must be **within jurisdiction** of the Court ie within Nigerian territorial waters, for the service to be effected. The territorial waters of Nigeria extend to **twelve nautical miles** of the coast of Nigeria measured from low water mark or of the seaward limits of inland waters.[15]

[15] S. 7(1) and (2) AJA and S.1 Territorial Waters Act; Benzenne Nigeria Ltd v Nigerbras Shipping Line Ltd – The Gongola Hope (1992) 4 NSC 247.

Where the action *in rem* is commenced against a sister ship, the relationship must be identified as required by **Order 5 Rule 4(1) AJPR** which states that "*where the action is commenced against a sister ship, the ship in relation to which it is a sister ship shall also be* ***identified in the initiating process****."* More than one ship may be identified as a sister ship – **Order 5 Rule 4(2).** However, **only one vessel can be arrested** in a maritime claim as clearly stipulated in **Sections 5 (8)** and **(9) AJA**.

It should be noted that the right to proceed *in rem* against a res is lost once the res is destroyed, for example, after a vessel has been sold as scrap. However, **Section 8** of the AJA provides that where a proceeding *in rem* would have been commenced but for a sale of ship or other property by the order of a court, the proceeding may be commenced *in rem* against the proceeds of sale that has been paid into the Court. In effect such proceeds can be arrested as security for the said claim. This remedy is beneficial to Plaintiffs who ordinarily would have lost the right to an action where a judicial sale has been ordered.

(ii) **Ex Parte Application** – A party who has commenced a properly grounded **action in rem may** by **motion ex parte** apply to the Federal High Court for the issuance of arrest warrant in respect of the vessel against which the action in rem has been commenced – **Order 7 Rule 1**.

(iii) **Affidavit** – By **Order 7, Rule 6** the arrest application must be supported by an Affidavit stating the nature of the claim or counter-claim and the fact that it has not been satisfied, the nature of the property to be arrested and if the property is a ship, the name of the ship and her port of registry if known. For a claim against a ship by virtue of S. 5(4) of the AJA, the name of the person who would be liable on the claim in an action in personam (the relevant person) and that the relevant person was when the cause of action arose the owner or charterer of the ship or in possession or control of same; that at the time of the issuance of the writ, the relevant person was either the beneficial owner of all the shares in the ship or the charterer of it under a charter by demise. Where the warrant is sought against a ship that is not the subject of the action (sister ship), that the deponent has reasonable grounds to believe that the ship against which the warrant is sought is beneficially owned by the person who is the owner of the ship that is the subject of the action. The Affidavit shall, in a case of claim

for possession of a ship or for wages, state the nationality of the ship and in a case for a claim in respect of a liability incurred under the Merchant Shipping Act, the Affidavit shall state the facts relied upon as establishing that the Court is not prevented from entertaining the action.

As earlier identified, the Court is not expected to consider the merits of the case at this stage but to satisfy itself that the pre-conditions have been satisfied to justify grant of the Arrest Order.

(iv) **Caveats against Arrest -** Order 8 Rule 1 AJPR 2011 allows a party who does not want a vessel to be arrested by any potential Claimant to file a caveat **against such an arrest.** The caveat consists of a written undertaking for a specified amount and type of claim given by the Caveator or his Solicitor to the effect that the Caveator will be prepared to appear within 3 days to answer any claim of the kind specified in the caveat **and** to put up security for such claim up to a specified amount on the Caveat. Rule 2 provides that such undertaking may be given by a Protection and Indemnity Club, a Bank or a reputable Insurance Company.

Caveat Search - The applicant seeking to arrest a vessel is obliged under Order 7 Rule 1 (2) AJPR 2011 to conduct a search into the Caveat Book to ascertain that no caveat against arrest is in force against the vessel before applying to arrest the vessel.

This provision in the new Rules is similar to the practice in UK is an improvement and indeed brings to an end the practice under the old Rules wherein a claimant can obtain an arrest order and proceed with an arrest where there is a caveat in force in favour of the vessel sought to be arrested as the old Rules did not require a search of the caveat register before an application for an order of arrest is made.

(i) **Pre-judgment security** - Pre-judgment security is of paramount interest to the maritime Claimant, who always faces the threat of being unable to recover his claim from a shipowner who often times resides in another jurisdiction and has no known assets within the Claimant's reach. Obtaining an Order of Arrest, which prevents the vessel from sailing away, is therefore a veritable tool towards ensuring that the Claimant's claim is protected by the shipowner coming forward to post security and thereby ensuring that it is ultimately settled if successful.

Similarly, the possibility of post-judgment execution, by way of judicial sale of the arrested ship where security is not posted, is a key consideration for maritime claimants/creditors concerned about the solvency of their debtors and their willingness to settle claims.

(ii) **Appearance of Defendant/Shipowner** - It is significant also that the commencement of the action in rem against the vessel and its subsequent arrest usually secures the **appearance** to the action of the defendant ship-owner and it **establishes the jurisdiction** of the Court. Where the Court subsequently allows the claim, the judgment is then enforceable against the arrested *res* by judicial sale or against the security or guarantee given to secure the release of the vessel from arrest.

Generally, arrest of vessel remains an effective tool in admiralty practice in most jurisdictions. On the purpose and essence of arrest of vessel, the Court of Appeal has held that the purpose of obtaining an order for the arrest of a vessel or res is to make the defendant put up bail or provide, in advance of the judgment, adequate funds to secure compliance with any judgment that may be eventually awarded against it, or its owners[16].

(iii) **Security for Cost/Counter Security** - There is now a requirement under the new AJPR 2011 for party seeking to arrest a vessel to provide security for costs which is in some measure a counter-security. The arresting party, apart from being required in filing the application to give an undertaking to meet the Admiralty Marshal's costs, expenses or damages caused by the application, may also be required to meet some other conditions imposed by the Court. Pursuant to Order 13 Rules 1&2, the Court may subsequently, on the application of an interested party e.g. *where the Plaintiff's claim is for an amount in excess of* ***Five Million Naira*** *or the Plaintiff has no assets within jurisdiction,* order the Plaintiff to put up security for costs. The security is required to be in the form of a Bank Guarantee, Insurance Bond or Protection and Indemnity (P&I) Club Letter of Undertaking in a manner similar to the security usually provided by the vessel owner to meet the arrestor's claim to secure release of the vessel.

[16] The Owners of the M Angara v Chrismatel Shipping Co. Ltd (2001) 8 NWLR pt 716 p. 685 @ p. 693

It is mandatory that the arrested vessel shall be released where the Plaintiff fails to provide the required security within the specified time (Order 13 Rule 4). It is equally noteworthy that this new principle has been extended by Order 13 Rule 7(c) AJPR 2011 to circumstances where the Defendant to the action has a cross-action or counter-claim.

(iv) **Damages for Wrongful Arrest** - There is an established principle that for there to be a valid claim for a wrongful arrest, the Claimant must show that the arrest was obtained either *mala fides (bad faith)* or through *crassa neglentia (crass negligence)*[17]. This principle is still operative in England where it has been observed that shipowners encounter much difficulty in proving mala *fides* and *crassa negligentia*.

However, **S.13** of the AJA has introduced less stringent criteria for establishing wrongful arrest in Nigeria. The Section requires the vessel owner to show that the conduct of the arrestor was **"unreasonable"** and **"without good cause."** The Section also extends liability for wrongful arrest to parties who demand or try to exact outrageous and disproportionate security or withhold consent for the release of the vessel.

(v) **Cost of Maintaining an Arrest/Admiralty Marshal's Expenses -** It is common knowledge that when ships are arrested the Admiralty Marshal will incur costs. These costs are recouped by the Admiralty Marshal from the arresting party and/or their solicitors. As such addition to the filing fee that is payable in relation to a Writ in Rem, an arresting party is generally required to pay an initial upfront deposit in lieu of the Marshal's costs and expenses for maintaining the vessel while under arrest in keeping with his undertaking pursuant to Order 9 AJPR.

The new AJPR 2011 now provide that the Admiralty Marshal may accept an amount of money not less than **=N=100,000.00** and not more than **=N=500,000.00** as deposit towards discharging the liability and may make more demands fortnightly for payment on account of those expenses. The Admiralty Marshal is also required to file a return or receipts and expenditures to the Court within **7 working days** of the release of the ship – **Order 9 Rule 2 (2 a, b, c & d) AJPR 2011.**

[17] *The Evangelismos* [1858] Vol. 4 ER

However, as a result of the 1999 amendment of the Nigerian Ports Act, the Defendant or owner of the vessel is now liable for payment of berthing and other Port dues while the vessel is under arrest. It is usual, for the Port Authorities to move arrested vessels to lay berths and away from service areas within the Ports, thereby reducing drastically any charges due and payable to the Authority.

Where the claim is eventually successfully determined, the Plaintiff would be entitled to recover the cost of the arrest and custody from the Defendant. On the other hand, where the arrest is declared to be needless or unwarranted, the Defendant would be entitled under the Act and the Rules to damages for the needless or wrongful arrest and any losses arising therefrom.

(vi) **Priorities** - Orders 16 and 17 of the Nigerian Admiralty Jurisdiction Procedure Rules 2011 deal with valuation and sale of vessels and determination of priorities respectively. However, the Rules are silent on ranking of claims and there are no instructive Nigerian decided authorities on the issue. However reliance can now be placed on the provisions of Sections 67 – 76 of the Merchant Shipping Act 2007 which has set out some order of priority as follows:

- Statutory, court and other charges and costs;
- Cost of arrest and sale of the res;
- Possessory lien (if any) created prior to maritime lien;
- Maritime liens which rank in the following order – salvage, wreck removal and general average;
- Seamen and master's wages
- Master's disbursements
- Loss of life or personal injury
- Claims for port, canal and other waterway dues and pilotage dues;
- Registered Mortgages and charges;
- Other trade creditors.

It should be noted that the arrestor's claim must be placed appropriately and ranked among other claims according to the order of priorities highlighted above irrespective of the fact that the judicial sale was made pursuant to his maritime claim.

CONCLUSION

It is quite evident from this discourse that arrest of vessels is a well recognized international maritime practice. The practice has evolved in Nigeria as in most jurisdictions into legislation derived from International Conventions such as the Arrest and Maritime Liens & Mortgages Conventions, among others.

The practice in Nigeria has sought to maintain a high measure of uniformity in the administration of justice leading up to the arrest of vessels. It is expected that Nigerian Courts especially the Federal High Court which is the Court of first instance in maritime and arrest proceedings will maintain the integrity and urgency envisaged in the adjudication of such cases in the best interest of international commerce.

Thank you for your attention.

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